THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER I
PRELIMINARY

S. 1
Short title, extent and commencement

(1) This Act may be called the *Code of Criminal Procedure, 1973*[2].

(2) It extends to the whole of India except the State of Jammu and Kashmir :

Provided **that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply—**

(a) to the State of Nagaland,

(b) to the tribal areas,

but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications, as may be specified in the notification.

Explanation.— **In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the *Constitution*, other than those within the local limits of the municipality of Shillong.**

(3) It shall come into force on the 1st day of April, 1974. [49]

1. A short history of the Criminal Procedure Code.—

The existing law relating to criminal procedure (referred to in the book as 'the *old* Code') was contained in the *Code of Criminal Procedure* , 1898. That Code had been amended from time to time by various Acts, the more important of which were the amendments brought about by Central legislation in 1923 and 1955.

The first Law Commission (hereinafter referred to as 'The Commission') presented its Report (the Fourteenth Report [3]) on the Reform of Judicial Administration, both civil and criminal, in 1958; it was not concerned with a detailed scrutiny of the provisions of the *Code of Criminal Procedure* , but it did make some recommendations in regard to the law of criminal procedure, some of which required amendments of the Code. A systematic examination of the Code was subsequently undertaken by the reconstituted Law Commission (since 1961) not only for giving concrete form to the recommendations made in the Fourteenth Report but also with the object of attempting a general revision. A comprehensive report for the revision of the Code, namely, the Forty-first Report, was presented by the Law Commission in September, 1969.

The recommendations of the Commission (41st Rep.) were examined carefully by the Government, keeping in view, among others, the following basic considerations:

(i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.

The *Code of Criminal Procedure* Bill, 1970, was drafted on these lines. It was referred to a Joint Select Committee of Parliament, whose report was presented to Parliament on 4-12-1972. The Bill, however, lapsed on the dissolution of Parliament.

After a fresh election, the Bill was again introduced as the *Code of Criminal Procedure* Bill, 1972, embodying the recommendations of the Joint Committee, and was passed by the Rajya Sabha on 13.12.1972. The Lok Sabha, in its sitting on December 12, 1973, passed the Bill with 125 Amendments, and the Rajya Sabha adopted all these amendments on December 18, 1973. This *new* Code came into force on April 1, 1974. [4]

2. Amending Act 45 of 1978. —

Within five years of the coming into force of the Code of 1973, it was extensively amended by the *CrPC* (Amendment) Act, No. 45 of 1978.[5] The text of this book gives the Code as amended by that Act, and subsequent Amendment Acts 32 of 1988, 10 of 1990, Act 43 of 1991, Act 25 of 2005, Act 2 of 2006 and Act 5 of 2009.

3. Major changes effected by the Code of 1973 :

A. Some of the more important changes made by the *new* Code with a view to speeding up the disposal of criminal cases are :

(a) the preliminary inquiry which precedes the trial by a Court of Session, otherwise known as committal proceedings, [6] is abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences;

(b) trial by jury has been abolished; [7]

(c) provision is made to enable adoption of the summons procedure for the trial of offences punishable with imprisonment up to two years [8] instead of up to one year as at present; this would enable a larger number of cases being disposed of expeditiously;

(d) the scope of summary trials is widened by including offences punishable with imprisonment up to two years [9] instead of six months as at present; summons procedure will be adopted for all summary trials; [10]

(e) the powers of revision against interlocutory orders are taken away, [11] as it has been found to be one of the main contributing factors in the delay of disposal of criminal cases;

(f) the provision for compulsory stoppage of proceedings by a subordinate Court on the mere intimation from a party of his intention to move a higher Court for transfer of the case is omitted [12] and power is given to the High Court to stay such proceedings in proper cases;

(g) when adjournments are granted at the instance of either party, the Court is empowered to order costs to be paid by the party obtaining the adjournment to the other party; [13]

(h) provision is made for the service of summons by registered post in certain cases; [14]

(i) in petty cases, the accused is enabled to plead guilty by post and to remit the fine specified in the summons; [15]

(j) if a Court of appeal or revision discovers that any error, omission or irregularity in respect of a charge has occasioned failure of justice it need not necessarily order retrial; [16]

(k) the facility of part-heard cases being continued by successors in office available in respect of Courts of Magistrates is now extended to Courts of Session. [17]

B. Some of the more important changes intended to provide relief to the poorer sections of the community are :

(a) provisions have been made for giving legal aid to an indigent accused in cases triable by a Court of Session; the State Governments may extend this facility to other categories of cases; [18]

(b) the Court has been empowered to order payment of compensation by the accused to the victims of crimes, to a larger extent than is now permissible under the Code; [19]

(c) when a commission is issued for the examination of a witness for the prosecution, the cost incurred by the defence including pleader's fees may be ordered to be paid by the prosecution; [20]

(d) the accused will be given an opportunity to make representation against the punishment before it is imposed in sessions and warrant trials. [21]

C. Some other important changes :

(i) Separation of the Criminal Judiciary from the Executive, by incorporating necessary provisions in the Code itself. [22]

(ii) Ordinary Original Criminal jurisdiction of the High Court has been abolished. [23]

(iii) The category of 'Presidency-towns' has been replaced by 'metropolitan areas' and, the Judicial Magistrates in these areas have been named 'Metropolitan Magistrates', while on the executive side, there will be Executive Magistrates, as well as a District Magistrate. [24]

(iv) The institution of Justice of the Peace has been abolished. [25]

(v) Provision has been made for 'anticipatory bail' (s. 438,*post*).

4. Scope and Object of the Code .—

The object of the *Criminal Procedure Code* (hereinafter referred to as the Code) is to provide a machinery for the punishment of offences against the substantive criminal law and to ensure to the accused a fair trial, for the ascertainment of his guilt or innocence.[26]

While the substantive law as to punishment for offences is laid down in the *Indian Penal Code* and other enactments for the time being in force [s. 2(n)] the *Criminal Procedure Code* provides the *machinery* for imposing such punishment, except in so far as otherwise provided in any special Act (*i.e.* , an Act other than the *Penal Code*) [s s. 4(2); 26(b)].

Different Chapters of the *Criminal Procedure Code* lay down detailed provisions relating to the mode in which it is to be ascertained by whom an alleged offence has been committed and the mode in which it should be tried and punished by a competent Court. These provisions may, broadly speaking, be divided into the following heads:

1. Pre-trial proceedings include information to the Police or to a Magistrate, investigation or inquiry into the alleged offence [Chaps. XII-XVII] and procedure for bringing the person accused before Court [Chaps. IV-VII];

2. The Courts in which particular classes of cases are to be tried, the respective powers of such Courts and the classification of offences necessary for the purpose [Chaps. II-III, XIII];

3. Initiation of proceedings in Court [Chaps. XIV-XVII];

4. Different kinds of trial and the procedure relating to each [Chaps. XVIII-XXI];

5. General provisions relating to bail, recording of evidence, granting of pardon, judgment and the like [Chaps. XXIV, XXVIII, XXXIII];

6. Appeal, reference and revision to superior tribunals [Chaps. XXIX-XXX];

7. Execution of the sentences passed by the Criminal Courts [Chap. XXXII]; and

8. The prevention of offences and the powers of the Police and the public in this respect [Chaps. X-XII].

But though the *CrPC* is concerned with the *adjective* or procedural law, some of its provisions are *substantive* in nature, *e.g.* , the provision relating to the prevention of offences [Chap. VIII]; maintenance of wives and children [Chap. IX]. [27]

5. The new Code is an amending and consolidating Act .—

The *new* Code of 1973 is an Act to amend and consolidate the law relating to criminal procedure, just as the *old* Code of 1898 was.

The *new* Code of 1973 replaces the Code of 1898, with vital changes which have already been indicated. Nevertheless, its nature remains the same, namely, that it is an amending and consolidating Act. Since there are certain special rules for the interpretation of a consolidating enactment, it would be useful to recount them here:

The object of a *codifying* Act is not to declare the law relating to any particular point, but to embody in the form of a code the whole of the *existing* law contained in judicial decisions [28] as well as statutes relating to a subject, so that the law may be ascertained 'by interpreting the language used, instead of roaming over a number of authorities'. [29] The object is systematisation. The object of a *consolidatings* Act is to consolidate in one Act the provisions contained in a number of statutes, with 'corrections and minor improvements' as may be necessary to remove ambiguities and anomalies. The distinction between a codifying and a consolidating statute is that in construing a consolidating statute, there is a presumption (which is, of course, rebuttable) that there was no intention to alter the law, but there is no such presumption in the case of codifying statutes. [30] In the result, cases decided before a code are usually no authority for its interpretation, though they may be referred to for the purpose of ascertaining the previous state of the law; on the other hand, in interpreting the provisions of consolidating statute, the previous decisions are *prima facie* relied upon, [31] but the presumption is rebuttable and it may be shown that while consolidating the law, the Legislature introduced material changes, and that the framework of the new statute was different. [32]

However, Code is not only a consolidating Act but is also an *amending Act* . For the purpose of construing a statute, which is a

consolidating as well as an *amending Act* , the proper course is to have reasonable interpretation of its provisions [33] and to apply the normal rule of construction so as to give each word the meaning proper to the context. [34]

Since the new Code is consolidating and amending Code, the main features of the old Code of 1898 have been retained in the new Code, except when otherwise stated. The reference in this book will, therefore, be to the provisions of the new Code, with a reference to corresponding provisions of the old Code whenever necessary.

6. The basic principle underlying the Code.—

The Code, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural Justice. If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, and he is afforded a full and fair opportunity of defending himself, then, provided there is "substantial" compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based. [35]

7. Code exhaustive.—

The Code is an exhaustive Code providing a complete machinery to investigate and try cases, appeals against judgments. It has provisions at each stage to correct errors, failure of justice and abuse of the process under the supervision of the High Court. This is made clear in popular *Muthiah v. State.* [36]

It is indicated in above judgment of the Supreme Court that when the matter is not specifically dealt with in the Code, the High Court can invoke inherent power to correct errors of the Courts below and pass such orders as may be necessary and/or to prevent the abuse of the process of the Court. But when there is a specific provision to correct the errors, the High Court cannot invoke inherent power and it cannot also go against the specific provision of the Code by which exercising inherent power.

1. Territorial Extent of the new Code.—

Material changes have been effected in this extent clause. The *new* Code applies to the whole of India excepting only—

(a) *The State of Jammu & Kashmir.* [37] The Code of 1898 did not extend to this State and the *new* Code cannot be extended to that State by Parliament because under the *Constitution* (Application to Jammu & Kashmir) Order, 1950, as it stands, Parliament has no legislative power over this State, with respect to ‘criminal procedure’.

It may be noted, however, that the provisions of the Kashmir *Criminal Procedure Code* are, on many points, substantially the same as the Indian Code of 1898.

(b) *The State of Nagaland.* As held by the Supreme Court, [38] the Code of 1898 did not apply to Nagaland, which was governed by certain Rules made under the Scheduled Districts Act, 1874. The *new* Code continues that position, *excepting* the preventive provisions in ss. 106-124; 129-153 (Chaps. X-XI), which apply of their own force. Outside the specified provisions, the spirit of the Code may be applied [39] if not inconsistent with the Rules for this Administration of justice and Appeals, *e.g.* , the provision in s. 438 of the Code. [40] [See also the Proviso, *below* , which gives power to the State Government to extend other provisions of the Code, with or without modifications.]

(c) *The tribal Areas in Assam.* [41] Under the Scheduled Districts Act, 1874, as modified by the Assam Autonomous Districts (Administration of Justice) Regulation, 1952, the autonomous districts of Assam were governed, in the matter of administration of criminal justice, by Rules made under those Acts and not by the *Criminal Procedure Code* . The new Code continues that Position, excepting Chaps. VIII, X and XI of the Code.

2. Proviso. —

Though the other Chapters [42] of the Code do not, by their own force, extend to Nagaland or the tribal areas, the Proviso to this Clause empowers the respective State-Governments to extend any provisions of the, Code to such areas or part thereof, as may be notified by that Government, with or without modifications of supplemental provisions. [43]

3. Explanation.—

The Expl. explains what are ‘tribal areas’ for the purposes of the Proviso; it refers to the areas mentioned in para. 20 of the 6th Sch. to the *Constitution* , [44] excluding the municipality of Shillong.

Manipur. The *new* Code extends to Manipur. [45]

Sikkim. The *old* Code of 1898 still applies to Sikkim. [46]

4. Special law and special jurisdiction.—

Under the *old* Code, Cls. (a)-(c) to s. 1(2) excepted certain persons from the scope of the Code, namely, (a) The Police in the towns of Calcutta and Bombay, and the Commissioners of Police in Calcutta, Madras and Bombay; (b) Heads of villages in the State of Madras; (c) Village police-officers in the State of Bombay.

The *new* Code has *omitted* all these exceptions, so that the Code will apply to all such persons. Under the *old*

Code, the Police in the Presidency towns were governed by the special provisions of the Police Acts or other Local Acts, but certain specific provisions of the Code extended to them and the State Government had the power to extend particular provisions of the Code to such excepted persons. Instead of depending on notifications, all the provisions of the *new* Code have been made applicable to the Commissioners of Police in the cities of Calcutta, Madras and Bombay. But, subject to the provision in s. 5, they may continue to possess any additional power they may have under such special laws, *e.g.* , the power of the Commissioner of Police, Calcutta, to prohibit processions or public assemblies. [47] Under s. 8(2),*post* , the Presidency-towns and the City of Ahmedabad have been declared to be 'metropolitan areas' under the Code.

'Criminal procedure', being a concurrent subject under the *Constitution* , it would also be competent for the states to enact special laws, in future, which are not inconsistent with the provisions of the Code. [48] As to such 'special law', see under ss. 4-5, *post* .

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2 Assented to by the President, on 25-1-1974, as Act No. 2 of 1974.

49 Coming into operation on 1.4.1974; Assented to by the President, on 25-1-1974, as Act No. 2 of 1974.

3 Ss. 206-220 of the *old* Code have, accordingly, been omitted from the *new* Code, in accordance with the 41st Rep., paras 3.5; 18.19; 23.1.

4 Assented to by the President, on 25-1-1974, as Act No. 2 of 1974.

5 Received the assent of the President on 18-12-1978; published in Gaz. of India, 19-12-1978, Part II— S. 1, Ext., p. 569.

6 Ss. 206-220 of the *old* Code have, accordingly, been omitted from the *new* Code, in accordance with the 41st Rep., paras 3.5; 18.19; 23.1.

7 Hence ss. 266-269, 274-283 of the *old* Code have been repealed [Commission's 14th Rep., Vol. 2, p. 873; 41st Rep., para 23.1].

8 See s. 2(w), (x), *post* , in place of S. 4(v), (w) of the *old* Code; the recommendation of the Commission that no change in this behalf was necessary (41st Rep., para 1.26) was not acceptable to Parliament.

9 The Commission recommended that the limit should be one year. Parliament made it two years [see s. 260(1)(i), read with s. 2(w), (x), *post*].

10 Accepting the recommendations of the Commission [14th Rep., Vol. II, para 45; 41st Rep., para 22.6; see s. 262(1),*post*].

11 See *new* sub-sec. (2) to s. 397,*post* , there was no corresponding provision in s. 435 of the *old* Code.

12 As recommended by the Commission [41st Rep., para 44.26]; see s. 407(6),*post* , in contrast to s. 526(8) of the *old* Code.

13 As recommended by the Commission [41st Rep., para 24.62]; see Expl. 2 to s. 309,*post* , in place of s. 344(1)(A) of the *old* Code.

14 As recommended by the Commission [41st Rep., para 6.6]; see *new* s. 69, *post* .

15 As recommended by the Commission [41st Rep., paras, 17.6 and 20.2]—see *new* s. 253.

16 As recommended by the Commission [41st Rep., para 45.9]—see s. 464(2)(b), *post* .

17 As recommended by the Commission [41st Rep., para 24.77]—see s. 35,*post* .

18 New s. 304,*post* , as recommended by the Commission (41st Rep., paras 24.34-24.39).

19 See s. 250 as amended and *new* sub-sec. (3) of s. 357 and s. 358 [41st Rep. of the Commn., paras 20.11 and 46.12].

20 See *new* sub-sec. (2) of s. 284,*post* .

21 See ss. 235(2); 8(2).

22 See 41st Rep. of the Commission, paras 2.1 *et seq* ., and s s. 6*et seq* ., *post* .

23 Commissions's 41st Rep., paras 3.5-6; ss. 266-267 of the *old* Code have been omitted and Chap. XVIII of the *new* Code is confined to a Court of Session only.

24 See s s. 2(k); 16-18; 20, *post* .

25 *Willie v. State of M.P.,* AIR 1956 SC 116 121 [*LNIND 1955 SC 90*].

26 *Willie v. State of M.P.,* AIR 1956 SC 116 121 [*LNIND 1955 SC 90*].

27 Chapter XXXVI of the *old* Code.

28 *I.R.C. v. Hinchy,* (1960) 1 All ER 505 (HL) .

29 *Robinson v. Canadian Pacific Ry.,* *(1892) AC 481* .

30 *Bank of England v. Vagliano,* *(1891) AC 107* (144).

31 *Smith v. Baker,* *(1891) AC 325* (349).

32 *Food Controller v. Cork,* *(1923) AC 647* (668).

33 *Ramdas v. Amerchand & Co.,* (1916) ILR 40 Bom 630 at p. 636 (PC).

34 *Grey v. IRC,* (1952) 3 All ER 603 at p. 607 (HC); *Thakur Amar Singhji v. State of Rajasthan,* AIR 1955 SC 504 [*LNIND 1955 SC 36*]at p. 526: (1954) 24 Com Cases 537 . (1954) 24 Com Cases 537 .

35 *Willie v. State of M.P.,* AIR 1956 SC 116 121 [*LNIND 1955 SC 90*].

36 *Popular Muthiah v. State,* (2006) 7 SCC 296 [*LNIND 2006 SC 458*] : (2006) 3 SCC 245 [*LNIND 2006 SC 458*](Cri) : (2006) 3 Crimes 23 .

37 Cf. *Mohan v. Commr. of Police,* (1983) Crlj 1182 (para 5) J&K; *Ram v. State,* (1983) Crlj (paras 16-17) J&K.

38 *State of Nagaland v. Rattan Singh,* AIR 1967 SC 212 [*LNIND 1966 SC 77*]; *Mowu v. Supdt.,* (1971) 3 SCC 936 [*LNIND 1970 SC 479*] : 1972 SCC (Cr) 184.

39 *State of Nagaland v. Rattan Singh,* AIR 1967 SC 212 [*LNIND 1966 SC 77*]; *Mowu v. Supdt.,* (1971) 3 SCC 936 [*LNIND 1970 SC 479*] : 1972 SCC (Cr) 184.

40 *Kulendra v. Union Territory,* (1983) Crlj 1122 (Gen.) —A debatable decision.

41 See 6th, Sch. to the *Constitution of India* ; Author's Constitutional Law of India (Prentice-Hall of India, (1977), p. 479;*Sankha v. Bura,* (1976) Crlj 1952 (para 10).

42 See 6th, Sch. to the *Constitution of India* ; Author's Constitutional Law of India (Prentice-Hall of India, (1977), p. 479;*Sankha v. Bura,* (1976) Crlj 1952 (para 10).

43 See 6th, Sch. to the *Constitution of India* ; Author's Constitutional Law of India (Prentice-Hall of India, (1977), p. 479;*Sankha v. Bura,* (1976) Crlj 1952 (para 10).

44 See 6th, Sch. to the *Constitution of India* ; Author's Constitutional Law of India, Latest Edition;*Sankha v. Bura,* (1976) Crlj 1952 (para 10).

45 *Saptawna v. State of Assam,* AIR 1971 SC 813 : 1971 Crlj 679, is no longer good law.

46 *Chabilal v. Krishna Bahadur,* (1984) Crlj 1433 (Sikkim) (para 6).

47 *Leakat v. Emp.,* (1913) 40 Cal 470 (472).

48 See 41st Rep. of the Commission, paras 1.14-1.20.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER I

PRELIMINARY

S. 2

Definitions.

In this Code, unless the context otherwise requires—

(a) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;

'Bail' means the release of the accused from the custody of the officers of law and entrusting him to the private custody of persons who become bound as sureties to produce the accused to answer the charge at the stipulated time or date. [In s. 438,*post* , the *new* Code has made a novel provision (for grant of 'anticipatory bail' by the High Court or a Court of Session, to a person who has not yet been arrested or taken into custody) but who *apprehends* arrest.]

A ' **bailable offence'** is an offence where bail can be claimed as of *right.* In the case of bailable offences, thus, the Court or the officer-in-charge of the Police-station is *bound* to release the accused on bail, provided he is prepared to give bail [s. 436].

Whether an offence is bailable or not is to be ascertained from Schedule I of the *new* Code (where all offences are enumerated) or any other law which makes an offence thereunder to be bailable. Thus, the offence of murder is non-bailable, but causing death by a negligent act is bailable.

Any offence which is not 'bailable' under the law, as above, is non-bailable. The term 'non-bailable' does not mean that in no case is release on bail available when a person is accused of such an offence. It only means that in such cases, the granting of bail is *discretionary* with the officer-in-charge of the Police-station or the Court before which he is produced, subject to the conditions and restrictions specified in s. 437 of the *new* Code.

(b) "charge" includes any head of charge when the charge contains more heads than one;

(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

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

(e) "High Court" means—

(i) in relation to any State, the High Court for that State;

(ii) in relation to a Union Territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court;

(iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India;

(f) "India" means the territories to which this Code extends;

(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;

(i) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath;

(j) "local jurisdiction", in relation to a Court or Magistrate means the local area within which the Court or Magistrate may exercise all or any of its or his powers under this Code [35] [and such local area may comprise the whole of the State, or any part of the State, as the State Government may, by notification, specify;]

(k) "metropolitan area" means the area declared, or deemed to be declared, under Section 8, to be a metropolitan area;

(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

(m) "notification" means a notification published in the *Official Gazette* ;

(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under *Sections 20 of the Cattle-trespass Act, 1871* (1 of 1871);

(o) "officer-in-charge of a police station" includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the State Government so directs, any other police officer so present;

(p) "place" includes a house, building, tent, vehicle and vessel;

(q) "pleader", when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding;

(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173;

(s) "police station" means any post or place declared generally or specially by the State Government, to be a police station, and includes any local area specified by the State Government in this behalf;

(t) "prescribed" means prescribed by rules made under this Code;

(u) "Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor;

(v) "sub-division" means a sub-division of a district;

(w) "summons-case" means a case relating to an offence, and not being a warrant-case;

[(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;] [90]

(x) "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(y) words and expressions used herein and not defined but defined in the *Indian Penal Code (45 of 1860)* have the meanings respectively assigned to them in that Code.

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1. Charge.—

See under s. 211,*post.*

The framing of a formal charge is necessary in Warrant and Sessions cases [ss. 240; 228], but not in Summons cases [s. 251].

2. Charge not defined.—

Code does not define what a charge is. However, it is the precise formulation of the specific accusation made against a person, who is entitled to know its nature at the earliest. A charge is not an accusation made or information given in the abstract, but an accusation made against a person in respect of an act committed or omitted in violation of the penal law forbidding or commanding it. In other words, it is an accusation made against a person in respect of an offence alleged to have been committed by him. [50]

1. Cognizable and non-cognizable cases.—

While from the standpoint of procedure at the trial, cases are divided as 'summons' and 'warrant' cases,—from the point of a police-officer's power to arrest with or without a warrant issued by a Magistrate, cases an offences are divided into cognizable and non-cognizable.

Col. 3 of Sch. I of the Code specifies certain offences for which the Police may arrest without warrant. Broadly speaking, they are offences which call for a speedy investigation, *e.g.* , murder, kidnapping. The power to arrest without warrant may also be conferred by other laws.

Thus, the last item of Sch. I of the *new* Code classifies 'offences against other laws', and the graver of them which are punishable with imprisonment for 3 years and upwards are cognizable', *e.g.* , s s. 3-4 of the *Delhi Public Gambling Act, 1955* . All offences under the *Essential Commodities Act, 1955* , have been made cognizable by s. 10A of that Act, inserted by Act 36 of 1967.

All such offences are ' *cognizable* ', while others are ' *non-cognizable* '. The circumstances under which *any* police officer may arrest without warrant are specified in Sections 41, *post* . Similarly, all offences under the *Companies Act, 1956* , are cognizable [s. 624].

If a special law, while creating an offence, does not specify whether the offence should be cognizable or non-cognizable, the question is to be determined with reference to the 1st Sch., Part II—'Classification of offences against other laws'. [51] If, however, the special Act specifies a particular officer in this behalf, only that Police officer would be competent to arrest without warrant. [52]

Another point of distinction is that a Police-officer cannot investigate a non-cognizable case without the order of a Magistrate having jurisdiction over such case [s. 155(2)]. If he does investigate, without such order, his report becomes a 'complaint', for the purposes of s. 190(1). This is made clear by the *new Explanation* to Cl. (d), *below* .

Where, however, the information discloses both a cognizable and a non-cognizable offence, the *new* sub-sec. (4) to s. 155,*post* , makes it clear that the Police officer may treat the entire case as a 'cognizable offence', and investigate the entire case without the order of any Magistrate. [53]

2. 'Case' and 'Offence'.—

1. The two terms are *not* synonymous, although an offence always leads to a case and a case relates to an occurrence or transaction which may involve the commission of one or several offences. [54]

2. When a Police officer receives information about the commission of a cognizable offence, and records the same, he is said to register a 'case'. It may involve the commission of more than one offences and the power of the Police under Chap. XII to investigate relates to the investigation of a 'case' which would mean all the offences involved therein. [55]

3. In the result, a final report or charge-sheet under s. 173 can be filed only after the completion of the investigation, *i.e.* , the investigation relating to all the offences arising in case. [56]

1. Charges made by the new Code.—

This definition corresponds to Cl. (h) of s. 4 of the *old* Code, with the addition of the *Explanation* , to make it clear that "the report made by the police on an unauthorised investigation of a non-cognizable case is complaint". [57]

2. Object of a complaint.—

The receipt of a 'complaint' is one of the modes according to which a Magistrate can take cognizance of an offence [s. 190(1)(a),*post*]. The definition in the present clause has been given a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which *prima facie* discloses the commission of an offence with the necessary facts for the Magistrate to take action. [58]

3. Ingredients of a complaint.—

The requisites of a 'complaint' according to the present definition, are—

(i) An oral [59] or a written allegation. It need not be in any particular form. [60] Thus, a letter or telegram addressed to the Magistrate may constitute a complaint within the meaning of the Code, if it contains the requirements of the definition. [61]

(ii) The allegation [62] must be of the fact that some person, whether known or unknown, *has committed an offence* [as defined in Cl. (*n*), *below*]. An omission to mention the section of the law under which the offence is punishable or the mention of a wrong section does not affect the validity of a complaint [63] so as to take away the jurisdiction of the Magistrate who takes cognizance of an offence under such complaint, provided it sets forth the facts, which, if proved, would warrant conviction.

If, however, the petition in question does not disclose the ingredients of an offence, or the allegations made, even if true, cannot amount to be an offence, it would constitute no 'complaint' as defined in s. 2(1)(d), and it would be liable to be dismissed under s. 203, upon its bare perusal. [64]

(iii) It must be made to a *Magistrate* . Hence, a report to the Police or some other authority, *e.g.* , the Panchayat [65] cannot be treated as a 'complaint'. [66]

Of course, under the deeming provision in the *Expl* . to s. 2(d), the report made by a Police officer is deemed to be a complaint; but the complainant in that case is the Police officer, say, for the purposes of s. 195(1)(iii), *post* . [67]

(iv) The allegation must be made with a view of the Magistrate's taking act ion [68] *under the Code* , as distinguished from, taking some administrative action. [69]

(v) Nothing is a complaint, which, if proved, would not lead to a conviction. Hence, allegations made to a Magistrate with a prayer to proceed under s. 107,[70] s. 110,[71] s. 133,[72] s. 145[73] or s. 125 (*old* s. 188) [74] do not constitute a complaint.

(vi) It is not imperative that the name of the accused should be mentioned. [75]

(vii) A complaint may be made against the person known or unknown. [76]

(viii) A complaint must disclose that an offence has been committed. [77] Mere mention of the name of the accused without making any allegation about the commission of an offence is not a complaint. [78]

(ix) It is not necessary that a complaint should verbatim reproduce in the body of the complaint all the ingredients of the offences he is alleging. [79]

(x) There is no particular format of a complaint. Nomenclature is also inconsequential. A petition addressed to the Magistrate containing an allegation that an offence has been committed and ending with a prayer that the culprit be suitably dealt with is a complaint. [80]

4. Reference to wrong statutory provision.—

It is the offence disclosed from the facts in the complaint that gives jurisdiction to the Magistrate. If, therefore, the complainant mentions a wrong Act or a wrong section to found the offence, it cannot be said that there is no 'complaint'. [81]

Where therefore the facts alleged in the complaint disclose an offence, the Magistrate should take 'Cognizance of the complaint and any error in the recital of the statutory provision or in the summons founded on such error in the complaint, may subsequently be rectified by the Magistrate, provided it is done in proper time to avoid prejudice to the accused. [82]

The fact that the complainant was a political opponent, the complaint filed by him, cannot be thrown out. Ultimate test is whether the allegations have substance or not. [83]

5. Some instances of complaint.—

In accordance with the foregoing principles, the following have been held to be complaints :

1. A 'protest petition' challenging the correctness of the Final Report [84] submitted by the Police under s. 173; or a similar petition filed before the submission of the Police Report, asking the Magistrate to proceed with the trial, [85] or to take some action as upon a complaint under ss. 200-204. [86]

2. But, in order to be taken as a 'complaint', a protest petition must contain the names of witnesses as well as the other ingredients of a complaint, as noted at pp. 11, 12, *ante* . [87] Even where the protest petition fulfills the requirements of a complaint, the Magistrate is *not bound* [88] to take cognizance of the case on. the basis of the protest petition as a complaint; he may take cognizance under s. 190(1)(b), on the basis of the 'case-diary' submitted with the police report, even

though he disagrees with the 'final report' submitted by the Police. [89] , [90] If the question subsequently arises whether the case should be treated as a complaint case or a police-case, it is to be seen whether the Magistrate resorted to the procedure under ss. 200 and 202, which must be followed where he has taken cognizance upon a 'complaint; if he has not resorted to that procedure and has applied his mind to the case Diary and other papers submitted with the Police report, his act ion cannot be challenged as without jurisdiction. [91]

6. Explanation: Police-Report in a non-cognizable case.—

Under the *old* Code, [92] there was a sharp conflict of judicial opinion on this point.

1. The draft of the *Explanation* added to the present Clause was altered by the Joint Committee [93] to make it clear that a report made by the Police as to the commission of a *non-cognizable offence* [94] shall rank, as a 'complaint' under s. 190(1)(a) and not as a 'police report' under s. 190(1)(b), even though such report may arise out of the investigation into an alleged cognizable offence, which, after investigation, turns out to be a non-cognizable offence.

Explanation to s. 2(d) covers only those cases where police initially investigates in a cognizable case but the offence turns out to be a non-cognizable one. [95]

In view of s. 155(4),*post* , the result would be different where a case relates to both cognizable and non-cognizable offences.

The difference in the effects of a 'police report' and a 'complaint made by a Police officer in a non-cognizable case' is as follows :

i. Where the Police-officer is a complainant within the purview of the *Expl* . to s. 2(d), his non-appearance may entail acquittal of the accused, under s. 256(1); but that provision cannot be invoked where the case was instituted on a 'police report'. [1]

ii. The limitation for special leave to appeal from an order of acquittal shall be *6 months* where the complainant is a Police officer or other public servant, while it is only *60 days* in the case of other complainants.

II. The *new* Code also resolves the controversy as to whether the report made by a Police-officer of other public-servant deemed to be a Police-officer, under special laws, would be a 'police report' for the purposes of s. 2(d) above or s. 190(1)(b), *post* , which now uses the technical expression 'police report' instead of a 'a report in writing ..... made by any police officer' which was interpreted in a wider sense in various cases. [2] This has been done by inserting a *new* definition of 'police report' in Cl. (r) of s. 2 (see *below*), as meaning a "report forwarded by a police-officer tinder sub-sec. (2) of s. 173" of this Code. By reason of these changes, it would be clear under the *new* Code that the following reports made by a Police-officer would be a 'Police-report' for the purposes of s. 190(1)(b) [3] of the Code—

(a) A report made by a Police-officer in a non-cognizable case, *only when* he is ordered to investigate it by a Magistrate having jurisdiction in that case, under s. 155(2),*post* ;

(b) A report made by a Police-officer in a cognizable case, under s. 156.

It is only in the above two cases that the investigation made by the Police officer may culminate in a report under s. 173(2) of the Code, *post* .

On the other hand, a report whether made by a Police-officer under the Code or by any other public servant under any other law empowered to investigate into an offence, shall not be treated as a 'police-report', but must be treated as a 'complaint' under Cl. (a) of s. 190(1), in the following cases, because in such cases, the investigation *cannot* lead to the submission of a report with a charge-sheet under s. 173(2) of the Code—

(i) An unauthorised report in a non-cognizable case, made by a Police-officer, without the order of a competent Magistrate, as required by s. 155(2); [4]

(ii) When a Police-officer starts investigation into a cognizable offence, but on investigation he finds that the evidence discloses the commission of a *non cognizable* case, his report under s. 157 shall be deemed to be a 'complaint'. [5] This is made clear by the *Explanation* . [6]

(iii) A report made by a public servant, such as the Excise Officer, under s. 21(2) of the Central Excises and Salt Act, 1944, which merely authorises an Excise Officer to make an inquiry, but not to submit a charge-sheet under s. 173 of the Code; [7] a report under *s. 14(3) of the Employees Provident Fund* Act, 1952. [8]

If, however, the special law, like the Bihar and Orissa *Excise Act* , 1915, provides that the Excise Officer " *for the purposes of s. 156 of the Crpc* , 1898 ... shall be deemed to be the officer-in-charge of such station (deemed to be a police-station)", it is clear that officer shall have the power to submit a charge-sheet under s. 173(2) of the Code, so that cognizance of the offence involved shall be under Cl. (b) of s. 190(1). [9]

Such Police-officer need not be examined as a 'complainant' under s. 200 [Proviso 1(a) to s. 200, corresponding to Proviso (aa) to *old* s. 200].

7. Police Report in cognizable cases.—

Barring the case relating to a non-cognizable case, [10] which comes under the *Explanation* , any 'police report' is excluded from the definition of 'complaint' in the present clause.

A. But under the *old* Code, notwithstanding such exclusion from the definition of 'complaint' in s. 4(1)(h), a sharp controversy arose as to whether the expression 'report of a police officer' in s. 190(1)(b) referred only to a "final report" under s. 173, or any report made by a Police-officer to a Magistrate, under any provision of the Code. As under the *old* Code, so under the *new* Code, a Police officer may make a report to the Magistrate at different stages:

(a) A preliminary report under s. 157, which the Police officer has to make at the time of taking up the investigation of a cognizable case.

(b) Report under s. 170, while forwarding the accused under custody of a Magistrate, when there appears sufficient evidence, after investigation, not to release the arrested person.

(c) Final report, under s. 173, on completion of the investigation, by which is submitted a 'charge-sheet'.

In the absence of a definition of the word 'police report' in the *old* Code, in some cases it was held that a Magistrate could take cognizance under s. 190(1)(b), on any report submitted by a Police Officer, *i.e.* , under s. 157, 170 or 173. [11]

B. This controversy has been avoided by the Code by inserting a definition of a 'police report' [12] in Cl. (r) of the present section, according to which only the 'final report' under s. 173(2) will be deemed to be a 'police report' for the purposes of s. 190(1)(b) as well as the other provisions of the Code where the expression is used. The Magistrate shall have no jurisdiction to treat such report as a 'complaint' [13] or even as an 'informations' under s. 190(1)(e), which also excludes information received from a Police-officer. See, further, under Cl. (r), *post* .

The result is that *any other report* submitted by a Police officer, say, under s. 157 or 170, can now be treated by a Magistrate only as a 'complaint' for the purposes of taking cognizance.

8. Order directing to file complaint under s. 340 Crpc.—

An order of the Court directing a complaint to be filed under *s. 340 Crpc* is not a complaint.[14]

9. Who may be a complainant. —

1. The present definition in the new Code makes it clear that a police officer cannot be a complainant except when he submits a report, as a result of his investigation in a case, as to the commission of a non-cognizable case. Barring this, anybody may be a complainant under the Code subject, of course, to statutory exceptions. [15]

2. Since the law of crimes is founded upon the theory that a crime is wrong done to the State, the criminal law can, as a general rule, be set in motion by any member of the public, unless, the law says otherwise (*e.g.* , in cases coming under s s. 195-198). [16] Hence, as a general rule, any person, having knowledge of an offence, may set the law in motion by a complaint even though he is not personally interested or affected by the offence, [17] *e.g.* , a private individual, with the requisite sanction, may be a complainant under *Sections 137 of the Customs Act* ; or Sections 97 of the Gold Control Act ; or the

Prevention of Corruption Act .[18] Even a public officer may be a complainant, *e.g.* , a Prohibition Officer, [19] a Food Inspector. [20]

3. An association being a 'person' is entitled to make a complaint. That it is not registered is immaterial for this purpose, though it may be relevant for the purposes of a civil suit. [21]

A registered partnership firm may file complaint. [22]

4. Section 195 offers instances of complaints made by 'Courts'. Though, s. 198 uses the words 'any person aggrieved', the two Provisos to that section contemplate persons other than the person aggrieved being the complainant. [23]
5. The exceptions to the above general rule that any person may be a complainant may be classified under several heads—

(A) *Where the complaint can be made only by the person aggrieved.*

Subject to exceptions where the aggrieved person is a purdanashin woman, minor, idiot, lunatic or an infirm or sick person (or a person serving in the Armed Forces in specified cases), a complaint for *breach of contract to attend a helpless person, defamation and offences against marriage* can be made only by some person aggrieved by the offence [s s. 198-199].

(B) *Where the complaint can be made only by specified person or authority* .

(i) Complaint for *contempt of lawful authority* of public servants can be made only by the public servant concerned or by his superior authority [s. 195(1)(a)].

(ii) Complaint for certain *offences against public justice* or offences relating to *documents given in evidence* can be made only by the Court in connection with whose proceedings the offence is alleged to have been committed or by its superior Court [s. 195(l)(b)].

(iii) Complaint for certain offences against the State or for certain classes of *criminal conspiracy* can be made only by or under authority from the State Government or some officer empowered in this behalf [s. 196].

(iv) Complaint for adultery with a married woman can be made only by the husband of the woman, or, in his absence, by some person in whose custody the woman was when the offence was committed (with the leave of the Court) [s. 198].

(v) A complaint under s. 199(2) [*old* s. 198B] can be made only by the Public Prosecutor.

(C) *Where no complaint can be made without the previous sanction of a specified Authority* .

(i) *Prosecution of Judges, Magistrates.* or certain classes of *public servants* , for offences committed while act ing or purporting to act in the discharge of their official duties, can be made only with the previous sanction of the State Government or the Central Government, as the case may be [s. 197].

(ii) A complaint in writing may be made by the Public Prosecutor, with the previous sanction of the 'authorised Secretary' of the Government concerned, for Prosecution for defamation committed against the President; the Vice-President, a Governor, a Minister or a public servant [s. 199(2)].

6. Apart from the foregoing provisions of the Code itself, a special statute (see further under s. 4(2),*post*) may lay down special qualifications for eligibility to file the complaint." [24] In that case, the law laid down in that special statute must prevail, *e.g.* ,

Sections 20, Prevention of Food Adulteration Act, 1954 .[25]

Sections 621, Companies Act, 1956 . [26]

Sections 89 of the Trade and Merchandise Marks Act, 1958 .[27]

Sections 13(3) of the Official Secrets Act, 1923 .[28]

7. But provisions which merely *enable* a particular authority to make a complaint, would not take away the right of any individual to complain, under the general law. [29]

8. There is no bar to a public servant from the filing of a complaint but he cannot represent the Government or some other person. [30]

10. Complaint and Information.—

1. A person who has knowledge of an offence may either (a) file a complaint before a Magistrate under s. 190(1)(b) read with s. 200, or (b) give information to the Police under s. 154 or 155 or to the Magistrate under s. 190(1)(c).
2. The following points of distinction as between the three modes should be noted:

A. When the *information* is lodged with the Police, the Police is to make investigation and then to submit a Report to a Magistrate empowered to take cognizance of the offence [s. 157].

While a Magistrate who receives a complaint proceeds to try the case [s. 204] if he is competent to 'take cognizance of it [s. 201], unless he considers an inquiry or investigation to be necessary before proceeding to try the accused [ss. 203-204], a police officer with whom information has been lodged can only make an investigation and report the result of such investigation to a Magistrate empowered to, take cognizance of the offence on such report [s. 173(2)]. Of course, instead of starting the investigation immediately on receipt of the information, the Police officer may make a preliminary report to the Magistrate for his orders [s. 157].

B. Giving information to the *police* is to be distinguished from the power of a *Magistrate* to take cognizance of an offence upon information received from any person [s. 190(1)(c)].

Under s. 190(1), a Magistrate may take cognizance of an offence, either—

(i) upon a complaint; or

(ii) upon a police report; or

(iii) upon information received from any person other than a Police officer, or upon his own knowledge or suspicion.

3. Though in the case of a complaint as well as of information, the Magistrate act s upon the statement of a private person, there are essential points of difference between the two:

(i) In the case of a complaint, the Magistrate acts on the motion of the complainant; in the case of information, the Magistrate act s on his own initiative.

(ii) In the case of a complaint, the Magistrate is asked to prosecute a person against whom allegations have been made and he has then to decide whether he will accede to the request or not. If he does not, he must record his reasons under s. 202(1); in such a case, he may then make an inquiry himself or direct an inquiry or investigation or dismiss the complaint (under s. 203), after stating the reasons. In the case of information, if the Magistrate chooses not to take any action, he need not pass any order or give any reasons.

(iii) Information is a genus of which *complaint* is a species. An information is not a complaint unless it satisfies the requirements of the definition in s. 2(d).

But an invalid complaint may be treated as an information, [31] except in cases, which the Code says, can be instituted only by a complaint or with the sanction of the prescribed authority [s s. 195-199]; and subject to the condition imposed by s. 191. [32]

(iv) On a complaint the *complainant* is first examined on oath [s. 200], unless it is covered by any of the exceptions in the Proviso to s. 200,*e.g.* , where it has been made by a public servant in the discharge of his duty. But there is no obligation to examine the *informant* , whether the Magistrate takes cognizance of the offence upon the information, or refuses to do so. [33]

(v) Where the Magistrate takes cognizance upon information, the accused has a right to get the case transferred to another Magistrate or committed to the Court of Session, for trial [s. 91]. There is no corresponding right when the Magistrate takes cognizance upon a complaint.

(vi) When information is given to the Police it is recorded in a particular form [ss. 154-155], which is technically known as the *First Information Report* (F.I.R.). Information may be given to a Magistrate in any form; in fact, any communication received by a Magistrate (from a person other than a Police Officer) which does not come under the definition of a ‘complaint’ [s. 2(d)], is an information.

(vii) When the Magistrate act s on a complaint, he acts on the statements made by the complainant, but when the Magistrate act s on information, he acts on his own initiative, and no one has asked him to issue process. Hence, if the Magistrate chooses not to act on information, he need not record any reasons or to pass any order. [34]

11. Complaint and Police-report.—

Under s. 190(1), a Magistrate can take cognizance of an offence either upon a complaint or upon a *police report* apart from *suo motu* order. s. 2(*d*), on the other hand, says that a complaint does not include a police-report. This distinction is important, for, though for the purposes of cognizance there is no difference between the two, there are important differences in the incidents of a complaint and a Police-report. Thus,—

(a) Under s. 250(1), where the accusation is frivolous, action may be taken against the ‘complainant’ or the ‘informant’.

(b) A case instituted upon a complaint may be dismissed under s. 203, or the accused acquitted, for non-appearance or death of the complaint under s. 256. But no such order can be made in a case instituted upon a police-report.

(c) When the Police refuses to prosecute by submitting a 'final report'; the Magistrate can still take cognizance on the complaint of the person aggrieved [s. 190(1)(a)] or *suo motu* [S. 190(1)(c)] [35] or under Art. 190(1)(b), after rejecting the conclusions of the Police officer but upon the materials collected by him. [36]

The definition of 'police report' in s. 2(r), read with the *Explanation* of s. 2(d), as inserted by the *new* Code, makes it clear that a report by the police on a non-cognizable case-without the order of a Magistrate under s. 155(2) or under any law other than the Code, which does not authorise the submission of a charge-sheet under s. 173(2), is to be treated as a complaint, [37] and *not* a 'police-report' for the purposes of s. 190(1) and consequential provision. [38]

1. High Court.—

Clause (i) of the definition refers to the High Court constituted for each State and Union Territory under *Art. 214 of the Constitution* . [See also *Art. 366(14) of the Constitution*].

1. India.—

This definition means that wherever the word 'India' is used in the Code, it shall refer to the territories mentioned in s. 1(2), which have been explained, *ante* .

1. Changes made by the new Code.—

Verbal changes have been made in order to make it clear that 'Inquiry' would not include a 'trial'.

2. Inquiry.—

1. The term 'inquiry' has been used in the widest sense to include every kind of judicial function or inquiry *other than a trial* [39] and has been held to include the following proceedings—

(i) An inquiry as to cause of death under s. 176. [40]

(ii) A preliminary inquiry under s. 159. [41]

(iii) A proceeding under s. 144,[42] so as to attract *old* s. 517 to which corresponds *new* s. 452(4).

(iv) A proceeding under S s. 145-147. [43]

(v) A proceeding under ss. 207-209; read with s. 309(2). [44]

(vi) A preliminary inquiry under s. 340(1) [*old* s. 476(1)]. [45]

(vii) Inquiry into unsoundness of the accused, under s. 329 (*old* s. 465). [46]

(viii) Proceedings under ss. 200-204. [47]

(ix) Any step taken by a Magistrate after taking note of the Police report under s. 170. [48]

2. It has, however, been held that a proceeding under s. 159, to ascertain whether a person should be put on trial, is not in 'inquiry' for the purposes of *old* s. 337, (tendering pardon), to which corresponds *new* s. 306. [49] [See, further, under 'investigation', *below*]. But s. 159 says that the Magistrate may make a 'preliminary inquiry' for the purpose of investigation under s. 159.

3. As to the distinction between 'Inquiry' and 'trial', see under Cl. (h), *below* .

1. Ingredients of an 'investigation'.—

In order to come under this definition, the following conditions must be satisfied:

(i) It must be a *proceeding* under *this* Code.

There are various special Act s, other than the *IPC* . which create offences.

(a) If such special Act also provides for the mode of investigation of such offences, the provisions of the Code relating thereto shall be excluded. [50] Such proceeding for investigation of that special offence will *not* then come under the present definition under s. 2(h).

(b) If, however, such special Act makes no provision for 'investigation', the provisions of the Code relating to 'investigation' shall apply s. 4(2),*post* , so that such proceeding shall come in under the present definition. [51]

(ii) The purpose of the proceeding must be the collection of *evidence* .

(iii) Such proceeding must be conducted either (a) by a Police officer; or (b) by any person authorised by a Magistrate in this behalf,— *not being a Magistrate* .

The definition in s. 2(h) is, however, not exhaustive, as the word 'includes' indicate. [52] Hence, where a special enactment (*e.g.* , Karnataka Forest Act, 1963) empowers an officer other than a Police officer to investigate into offences under that special Act, it cannot be argued that all subsequent proceedings under the Code shall be without jurisdiction as there was no investigation under s. 2(h). [53]

Thus, though the power to forward a report under Art. 173 of the Code does *not* belong to a Customs Officer

under the *Customs Act, 1962* , or an officer of enforcement under the *Foreign Exchange Regulation Act, 1973* [54] certain power of investigation have been conferred on those officers [55] so that it cannot be held that s. 167 of the Code is not applicable to an investigation made by the officers under these Special Act s. [56]

2. Investigation, Inquiry, Trial.—

The terms 'Inquiry', 'Investigation' and 'Trial' denote successive stages in a criminal proceeding in the order in which they are arranged:

A. ' **Investigation'** is a proceeding conducted by a Police officer or by any other person authorised in this behalf by a Magistrate, under *e.g.* , s. 202(1). The object of investigation is the *collection of evidence* . Investigation consists generally of the following steps. [57] (1) Proceeding to the spot; (2) Ascertainment of the facts and circumstances of the case; (3) Discovery and arrest of the suspected offender; (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) [58] and the reduction of their statements into writing, if the officer thinks fit; (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of a charge-sheet under s. 173. [59]

Investigation includes all proceedings under the Code for the collection of evidence conducted by the police officer or by any person other than a Magistrate and ends with the formation of the opinion as to whether with the materials collected there is case to go to trial against the accused. [60]

Investigation usually starts on information [61] relating to the commission of an offence given to an officer-in-charge of a police station and recorded under s. 154 of the Code. But he may hold investigation without information [s. 157]. [62] If, from information so received or otherwise, the officer-in-charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the *discovery and arrest* of the offender. [63] , [64]

If, upon the completion of the investigation it appears to the officer-in-charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond [s. 169]. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefor under s. 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under s. 173(2) in the prescribed form furnishing various details.

The hall-mark of an investigation under the *CrPC* is the 'police report under s. 173.[65]

However the Court cannot direct the investigation officer to seek the opinion of public prosecutor before filing charge-sheet. [66]

B.

(a) While 'investigation' refers to proceedings conducted by the *police or persons other than a Magistrate* [67] the word **'inquiry'** relates to *any* proceedings of a *Magistrate* or Court, prior to 'trial', not only where an accused has been placed before a Magistrate charged with an offence but also where the Magistrate wants to ascertain whether a person has committed an offence and whether he should be put on trial.

(b) Secondly, an inquiry may be either in respect of an offence or of a matter which is not an offence. [68] Under the former head falls—inquiry of warrant cases *prior to charge* (Chap. XIX). Instances of inquiry relating to matters other than offences are—inquiry for the purposes of security for keeping the peace (Chap. VIII); proceedings under ss. 114-148; proceedings for maintenance of wives and children (Chap. IX).

(c) While the object of investigation is to collect evidence, the object of inquiry is to determine the truth or falsity of certain facts with a view to taking further action thereon. An inquiry may be 'judicial' or 'non-judicial'; 'preliminary' or 'local'.

(d) Investigation in terms of s. 156(3) *Cr.P.C.* cannot be equated with enquiry as both are defined differently in s. 2(h) and *s. 2(i) Cr.P.C.* [69]

C. The word ' ***trial*** ' is not defined in the Code. The definition of 'inquiry' simply suggests that a trial is not an inquiry. A proceeding before a Magistrate, under the Code is, therefore, either an inquiry or a trial.

However trial is clearly distinguished from inquiry and inquiry must always be the forerunner to the trial. [70]

(i) A trial is a judicial proceeding which ends in *conviction* or *acquittal.* [71] All other proceedings, having different results, are inquiries. [72]

(ii) As has been already stated, the same proceeding before a Court may be 'inquiry' at an earlier stage [73] and 'trial' at a later stage. Thus,—

(a) In a sessions case, the trial commences only after the charge is framed [74] [s. 228].

(b) In a warrant-case, the proceeding is an inquiry up to the framing of the *charge* . Prior to that, the accused may be *discharged* [ss. 239, 245]. Trial begins when the accused is charged and then the question before the Court is whether the accused is to be *convicted* or *acquitted* on the charge so framed. [75]

(c) But in a summons-case, there being no formal charge, the trial begins as soon as the accused is brought before the Magistrate and the particulars of the offence are stated to him [s. 251]. There is no prior inquiry stage in this case.

In all these cases, thus, the trial commences "when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and the defence, if the accused be defended, present in Court for the hearing of the case" [76] , and ends with the sentence. Hence, arguments and judgment form part of the trial. [77]

The omission of any definition of the word 'trial' suggests that it should not bear the same meaning under all the provisions of the Code, but should be construed according to the context of each section. [78] Thus, for the purposes of withdrawal from prosecution s. 321 (*old* s. 494), the word 'tried' would include the stage of committal by Magistrate, under s. 209 (*old* Chap. XVIII). [79]

(iii) While, as stated earlier, an inquiry may relate to matters other than offences as well, [80] a trial may be only in respect of an offence. [81] Thus, a proceeding under s. 145 is not a trial, [82] and an inquiry held by the Police under the orders of a Magistrate under that section is not an investigation. [83]

(iv) The term 'inquiry' is wider than 'trial' because while trial presupposes the idea of an offence, inquiry relates not only to offences but also to matters which are not offences, such as security proceedings (p. 20, 21, *ante*). [84] , [85]

(v) As regards offences, inquiry stops when trial begins; hence, all proceedings before a Magistrate, prior to the framing of a charge or the statement of particulars of the offence alleged, which do not result in conviction or acquittal can be termed as inquiry'. [86]

(vi) Trial ends with pronouncement of the judgment. [87]

3. Power of investigating officer to examine witnesses.—

See under ss. 160-161, *post* . [1]

4. Evidentiary value of statement of such witness.—

See under s. 162,*post* . [2]

1. Judicial proceeding.—

A judicial proceeding is a proceeding if its object is to determine the jural relation between one person and another or the community in general, [3] and the judge act s judicially, in the exercise of his judicial power [4] and the power to take oath and it ends in a judgment, sentence or final order. [5] Hence, an investigation made by a Magistrate, as directed by the Magistrate who has taken cognizance of a complaint, under s. 202. [6]

A. The following *are* judicial proceedings:

(i) Inquiry under s. 144; [7] s. 176; [8] s. 202; [9] s. 84 [*old* s. 88(6C)]; [10] s. 340 [*old* s. 476]. [11]

(ii) Proceedings for issue of a search warrant under s. 97 [*old* s. 100]; [12] remanding accused under s. 167(2). [13]

(iii) Proceedings for maintenance (Chap. IX, *post*); [14] under s. 446[15] [*old* s. 514]; under s. 299 (*old* s. 512). [16]

(iv) Proceedings for grant or discharge of bail. [17]

(v) Summary proceeding under *s. 228, IPC* . [18]

B.

1. On the other hand, all powers conferred by the Code are not judicial powers and the proceedings cannot be said to be judicial unless the powers are to be exercised *judicially* . [19] Thus, the following have been held *not* to be judicial proceedings :

   (a) The function of the Magistrate in *agreeing* with a Police report under s. 169 has been held to be 'in the course of investigation by the Police'. [20]

   (b) Recording of statement by a Magistrate under s. 164,[21] in the course of police investigation.

2. Nor can a proceeding be said to be a judicial proceeding if it is without jurisdiction. [22]

3. As the word 'includes' suggests, the definition is not exhaustive. [23] The expression has, accordingly, been held to cover proceedings under laws other than the *CrPC* , under which evidence on oath may be lawfully taken,*e.g.* ,—

   (i) Proceedings in execution of a Civil Court decree. [24]

   (ii) An inquiry under the *Legal Practitioners Act* .[25]

   (iii) Proceedings under *Sections 8 of the Reformatory Schools Act* . [26]

   (iv) Proceedings before an Official Assignee under s. 332 of the Presidency Towns Insolvency Act, 1909. [27]

4. Again, the words 'or *may* be legally taken' suggest that in order to constitute a judicial proceeding, it is not necessary that the recording of evidence must actually take place. [28]

2. 'Under this Code'.—

A proceeding for the collection of evidence shall be an 'investigation' for the purposes of the Code only if the investigation is held under the provisions of the Code.

When an investigation under the Code is held by virtue of the provisions of some other law, the special requirements of such law must be complied with in order to constitute an 'investigation' within the meaning of the instant definition. [29] No investigation can be said to have started if the Police officer, on receiving a vague information, takes some informal steps to verify such information, before starting the investigation. [30]

3. 'Police officer'.—

The definition of 'investigation' and 'Police officer' [Cl. (r), *below*] are to be read as subject to s. 4(2),*post* , which makes special provision for offences under laws other than the *IPC* . When a special provision is made under such a law, a Police officer, who is not authorised by such special law, shall have no competence either to investigate or to send a police report, *e.g.* under Sections 5A of the Prevention of Corruption Act , 1955,[31] even though it may be a cognizable offence. [32]

4. Effect of investigation by an unauthorised officer. —

This will constitute an 'irregularity' which will not vitiate the trial or other proceeding in the absence of 'a failure of justice' [see s. 465(1),*post*]. [33] , [34]

S. 2(j) : The jurisdiction of Courts and Magistrates under ss. 7-19 are not uniform. Thus, the local jurisdiction of the High Court extends to the entire State, while that of a subordinate Court extends to particular specified areas, as notified by the State Government. The amended definition comprises all these cases.

As to the list of 'Courts' under the code, see under s. 6. *post* .

1. Changes made by the new Code.—

A *new* definition of 'local jurisdiction' has been added in order to explain this expression which has been used in ss. 177 *et seq* ., as to the 'place of trial'.

As to the local jurisdiction of Courts and judicial Magistrates, see Ss. 7-19, *post* .

1. Changes made by the new Code.—

This definition has been inserted, in order to explain the expression as used in the *new* sections relating to 'Metropolitan Magistrates' [ss. 16 *et seq*].

1. Non-cognizable offence.—

See under Cl. (c), pp. 9-10, *ante* .

1. "Offence".—

1. This definition is for the purpose of interpreting the word 'offence' as used in this Code. In s. 39(2) (*post*), there is an enlargement of the definition for the purposes of that section.

2. The definition is the same as that in *Sections 3(37) of the General Clauses Act, 1897* , but wider than that given in *s. 40, IPC* .

3. The test of 'offence' in the instant definition is whether the act or omission is 'punishable' by any law 'in force' in the territory of India, [36] thus including offences under laws other than the *IPC* .

4. There is an essential distinction between an 'offence' and the 'prosecution for an offence'. An offence forms part of the substantive law, meaning an aggregate of acts or omissions which are punishable by law, while prosecution for an offence signifies the procedure for obtaining an adjudication of Court in respect of such act s or omissions. Sanction to prosecute for an offence is not an ingredient of the offence; it is a condition precedent to prosecution for the offence. [37]

5. The word 'punishable' means punishable in a *Court of law* . Hence, the following are *not* punishable offences *within the meaning of this Code —*

   (i) Offences punishable under Sections 182 of the Sea *Customs Act* , 1878. [38]

   (ii) Want of ostensible means of livelihood [s. 109] [39]

   (iii) The act s complained of under s. 107; [40] 110; [41] s. 133; [42] s. 145; [43] old s. 488[44] (new s. 125; but breach of the order of the Magistrate under s. 125(3) would be an offence). [45]

   (iv) Offence under s. 21(8) of the West Bengal Premises Tenancy Act. [46]

   (v) Offences under s s. 21, 23 of the Punjab Gram Panchayat Act, 1953. [47]

6. The second ingredient of an offence is that it must be punishable under a law for the time being in force, *i.e.* , under the *Indian Penal Code* or under any special or local law (*e.g.* , Sections 36 of the Bombay Sales Tax Act, 1953), [48] which is for the time being in force in India.

There are two modifications of the above proposition:

   (a) Even though an act or omission be punishable under the law it will not constitute an 'offence' under the present definition if there is anything to the contrary in the subject or context of the law under which it is punishable. [49] Thus,—

   Travelling in a train without ticket is not an 'offence', under *Sections 113(4) of the Railways Act* , 1890.[50]

   (b) The second portion of the definition makes it clear that illegal seizure of cattle for which a complaint may be made under *s. 20 of the Cattle Trespass Act* is an offence,[51] and overrides some old decisions which held to the contrary.

7. An offence is constituted as soon as the act or omission which is punishable by law has been committed, even though it may not be triable by any Court unless certain formalities, such as sanction, complaint or the like, are complied with. [52] Hence, whether a Court has taken cognizance of an 'offence' under s. 195 will depend not on the sections referred to in the complaint of police-report, upon which such cognizance has been taken, but upon the facts alleged in it, which constitute a particular offence or offences. [53]

8. Where an offence consists of several ingredients, it is committed only when all the ingredients are satisfied. [54] No question of application of s. 188 of the Code arises until and unless an offence as defined in s. 2(n) has been *committed* . [55]

9. Where a single act is done which is punishable by law, it would constitute; *one* offence, even though it has affected more than one person or thing. [56] The question becomes relevant in connection with the joinder of charges, *e.g.* , where one shot kills two persons, there is only one offence and trial for killing the two persons by one charge cannot be challenged as bad for misjoiner of charges. [57]

1. Police officer and 'officer-in-charge of a police station'.—

The object of the present definition is to enable the discharge of the duties under the Code of an 'officer-in-charge of a police station' (*e.g.* under s. 58) by some other officer at that station, when the officer-in-charge is unable to attend to his duties for any reason. But if the officer-in-charge is present and able to attend to his duties, no other officer would be competent to discharge those duties by virtue of this definition. [58]

An officer-in-charge of a police-station is vested with certain special powers and duties which cannot be exercised by any other police-officer, *e.g.* , under ss. 154(1), 155(1), 156(1), 157(1), 169, 170(1), 173(2). Hence, the need for the present definition. Even though any other officer be vested with powers of investigation or the like belonging to a police-officer, he cannot exercise the foregoing powers belonging to an officer-in-charge of a police-station, unless the relevant special law provides that such officer "shall be deemed to be an officer-in-charge of a police-station. [59]

Thus the regular officer-in-charge of police-station is above the officer next below the rank even if he be an ASI of Police should be deemed to be the officer-in-charge of the police station. [60]

Under the *old* Code it was held that the definition did not apply to the Calcutta Police. [61] But, by the omission of Cl. 2(a) of s. 1 of the *old* Code, [62] the *new* Code extends to the Police in the Presidency Towns.

1. Changes made by the new Code.—

This clause replaces s. 4(1)(q), with the addition of the words 'vehicle and vessel' to make it clear that the provisions of the Code relating to search of a 'place' (ss. 93 *et seq* .) would extend to a vehicle or a vessel, thus superseding the view to the contrary taken by the Supreme Court, under the *old* code. [63] See 'Public place' under s. 133(1),*post* .

1. Changes made by the new Code.—

The instant definition corresponds to s. 4(1)(r) of the *old* Code, with the omission of words referring to different classes of lawyers, *e.g.* , pleader, mukhtera, advocate, vakil, attorney, in view of the provisions of the

Advocates Act, 1961 .

2. Pleader.—

This definition says that even any person other than an Advocate under the *Advocates Act, 1961* , [64] can act as a pleader for the accused, provided the Court's permission is obtained. [65] With such permission, therefore, even an outsider [66] or a co-accused [67] can appear and pled on behalf of the accused. But even a duly appointed attorney cannot so act without the permission of the Court. [68] , [69] The permission may be for a particular proceeding only, [70] and may be granted or withdrawn at the discretion of the Court. [71]

The Public Prosecutor is not a 'pleader' under this Claus, and in view of ss. 24-25, 301, 303, the P.P. or the A.P.P. can only conduct the prosecution and cannot be permitted to defend the accused. [72]

Power-of-attorney holder or the heirs of the deceased complainant cannot be treated as heirs of the complainant. [73]

A non-advocate can only plead for any party only on the permission of the Court. [74]

1. Changes made by the new code.—

1. This is a new definition, added on the recommendation of the Commission, [75] to do away with the controversy, under the *old* Code, as to whether an unauthorised report made by the Police in non-cognizable cases and whether a report other than the final report would constitute a 'police-report' within the meaning of s. 190(1)(c). The instant definition makes it clear that the expression 'police-report', throughout the Code, would refer to the 'final report' under s. 173(2)—(i) in cognizable cases; and (ii) in non-cognizable cases, where the investigation is undertaken under order of a Magistrate under s. 155(2). [see, further, under s. 173,*post*].

2. Under the *new* Code, in addition to a definition for investigation in s. 2(h), a separate definition for 'police report' is given by s. 2(r). This coupled with the newly introduced sub-section (5) of s. 167 brings out the distinction between investigation by the police report on which a Court is to take cognizance. The *report cannot now* be said to *be an integral part of investigation* . The introduction of s. 167(5) in the Code, cannot have the effect of invalidating the investigation done within the period of six months or enabling the Court to stopping the filing of police report under s. 173(2). If the investigation done during the period of six months discloses an offence, a police report may be founded on it and the Court can take cognizance of the same..... The investigation done within the period of six months is not rendered invalid merely because the investigation is *not completed* and further investigation is stopped. [76]

2. Ingredients of a 'police report.—

Read with s. 173(2),*post* , it would appear that a 'police report' in order to come within the present definition must, satisfy the following conditions:

i. It must be a final report submitted on the completion of the investigation.

ii. It must be submitted by the officer-in-charge of the Police station.

iii. It must be submitted to a Magistrate empowered to take cognizance of the offence on a police report.

iv. The report must be submitted in the form prescribed by the State Government and must contain all the particulars specified in sub-sec. (2) of s. 173.

Once the foregoing conditions are satisfied, the report would not cease to be a 'police report' simply because the documents mentioned in sub-sec. (5) of s. 173 have not been submitted along with the report. That sub-section lays down an independent obligation, apart from the definition. [77]

If the police report was not filed in complete form with all material papers contemplated by *s. 173(5),Cr.P.C.* , it cannot be held that the report was complete.[78]

3. Police report to be submitted before the Magistrate.—

When on the basis of the FIR lodged with the police station, the Officer-in-charge of the police station forwarded the report to the Commissioner of Police as provided in Sections 96 of the Bombay *Police Act* , 1951, the High Court directed the Officer-in-Charge of the Police station to submit the said report to the concerned Magistrate who alone can pass any judicial order on that basis which the Commissioner of Police cannot do. [79]

1. Police Station.—

In the absence of a declaration by the State Government, a beat house is not a police station, so that an information lodged there, does not amount to a First Information Report. [80] There is nothing in s. 156 or any other provision of the Code that there cannot be two police stations in respect of the same area.

When the State Government makes a declaration under this Clause, the limits of a police station shall be determined, by the limits as specified in such declaration. [81] The Jurisdiction of a police station will not vary with the fluctuation in the midstream of a river. [82]

When a State Government makes a declaration under this clause, the limits of police station shall be determined by the limits as specified in the notification. [83]

1. Changes made by the new Code.—

It is a *new* definition and follows the practice modern statutes.

1. Public Prosecutor.—

Under s. 24 of *new* Code, amended in 1978 (see *post*), there shall be the following categories of Public Prosecutors:

(a) A Public Prosecutor for the High Court, appointed by the Central Government or the State Government, after consultation with the High Court [s. 24(1)].

(b) A Public Prosecutor appointed by the Central Government for conducting any case or classes of cases in any district or local area [s. 24(2)].

(c) A Public Prosecutor for each District, appointed by the State Government [s. 24(3)].

(d) Additional Public Prosecutor or Prosecutors, for the district, appointed similarly [s. 24(3)].

(e) A special Public Prosecutor [s. 24(8)].

(f) A Public Prosecutor may engage any person to act under his direction and that person, so engaged, becomes a Public Prosecutor derivatively by the definition in the instant clause.

2. Assistant Public Prosecutor.—

Besides the above categories of Public Prosecutors, the State Government or the *Central Government* may appoint Assistant Public Prosecutors for conducting prosecutions in the Courts of *Magistrates* [s. 25]. But they would not be regarded as 'Public Prosecutors' for the purposes of the Code, because the definition in the instant clause refers only to those persons who are appointed under s. 24,*post.*

But he shall have the power to withdraw a case of which he is in charge [s. 321]. [See, further, under ss. 24-25, *post].*

3. 'Acting under the directions of a Public Prosecutor'. —

This means that when a person is validly appointed as a Public Prosecutor under s. 24, any person who is authorised by his to act on his behalf under his directions will also come to be a 'Public Prosecutor' within the instant definition and would be competent to discharge the functions of Public Prosecutor under the Code. [84] In other words, for a person to be Public Prosecutor it is necessary that he is either appointed as such under s. 24(1) or act s under the directions of a Public Prosecutor so appointed; or is appointed a Special Public Prosecutor under s. 24(6). [85]

4. Functions of a Public Prosecutor.—

Unless a person comes with the instant definition, he cannot discharge any of the following functions which are entrusted, *inter alia,* to a Public Prosecutor, by various provisions of the Code :

(i) S. 199(2),—complaint for the offence of defamation against President, Vice-President, Governor, Administrator or public servant [*old* s. 198B]. [86]

(ii) S. 225,—conduct of prosecution, in sessions cases [*old* s. 270].

(iii) S. 301(1),—power to appear and plead in any Court, without written authority [s. 493], and to conduct prosecution without permission of Court [s. 302(1)].

(iv) S. 308(1),—certificate of Public Prosecution necessary for trial of approver who has not complied with conditions of tender of pardon [*old* s. 494].

(v) S. 321,—withdrawal of prosecution [*old* s. 494]. [87]

(vi) S. 378(1),—appeal against acquittal [*old* s. 417(1)].

(vii) S. 407(5),—notice of application for transfer of case to be given to the Public Prosecutor [*old* s. 526(6)].

5. Duty in conducting prosecution.—

In conducting a prosecution, the Public Prosecutor represents not the Police but the State, for the purpose of determining the innocence or guilt of the accused and not to secure a conviction at any cost. He must, therefore, discharge his duty fairly and fearlessly and place the testimony of all available witnesses before the Court, which alone is competent to determine the innocence or guilt of the accused person. [88] In a larger sense, he is an officer of the Court and is bound to assist the Court with his fairly considered view. [89]

1. Sub-division.—

This definition explains the expression as used in s s. 6(3)-(4), 20(4), etc. [See, further, under s. 7(3),*post*].

1. Summons case.—

See under ‘Warrant case’, *below.*

1. Expression "victim" defined.—

By the *Code of Criminal Procedure* (Amendment) Act, 2008 (Act 5 of 2005), the expression "victim" has for the first time defined in Clause (wa). This has come into force with effect from 31-12-2009. This new clause introduces a definition of "victim" to confer certain rights on the guardians and legal heirs of the victims (vide notes on clause). For the first time, Criminal Procedure (Amendment) Act, 2008 (5 of 2009) confers certain rights to "victim" as defined in s. (wa), namely :

(1) By adding a proviso to sub-section (8) to s. 24 of the Code, the victim is enable to engage an advocate of his choice to assist the public prosecutor in a criminal case in which the victim is concerned;

(2) In s. 157, the second proviso has been inserted that in relation to evidence of rape, recording of statement of the victim shall be conducted at the residence of the victim or in place of her choice and

as far as practicable by the woman police officer in presence of her parent or guardian or near relative or social worker of the locality;

(3) Section 157A has been inserted for preparing a compensation scheme for the victim by every State Government in co-ordination with the Central Government; and

(4) In s. 372 a proviso has been inserted by which the victim has been given a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting him for lesser offence of imposing inadequate compensation.

1.Changes made by the new Code.—

The existing definition of "warrant-case" has been amended to secure that offences punishable with imprisonment for a term not exceeding *two years* would be tried by the summons-case procedure. In its Fourteenth Report, [91] the Law Commission recommended that for securing expeditious disposal of a large number of cases, particularly those under special laws, summons-case procedure should be prescribed for offences punishable with imprisonment up to three years instead of one year as at present. Although in its Forty-first Report, [92] the Commission did not recommend any change, it was considered necessary by the Select Committee that the existing limit of one year should be raised to two years for securing greater expedition in the disposal of a larger number of cases. This was not likely to result in any hardship to the accused as summons procedure secures all the essentials of a fair trial although some formalities are dispensed with. [93]

2. Distinction between 'Summons-case' and 'Warrant-case'.—

1. The sole test for differentiating a summons-case from a warrant-case is the measure of the punishment prescribed by the Code for the offence to which the case relates. It is a warrant-case if the offence is punishable with (a) death, or (b) imprisonment for a term exceeding two years (which includes imprisonment for life). All other cases are summons-cases, irrespective of the question whether the accused could be arrested without a warrant or whether a summons was actually issued in the case or not. [94]
2. The definition refers to a single offence, but where a person is charged for several offences under different provisions of the substantive law, the proceeding should be as follows:

   (i) The warrant procedure is to be followed where out of the same transaction different charges arise against the same accused, [95] or against different accused [96] persons, and some of them fall under the definition of a 'warrant-case' and some under the definition of a 'summons-case'.

   (ii) Conversely, a warrant case cannot be split up into its component parts, in order to try each of them under the summons procedure. [97]

3. Whether a case is to be tried under the summons procedure or the warrant procedure is to be determined at the commencement of the trial, and the warrant procedure being more formal and detailed, a trial which had commenced under the warrant procedure cannot be converted into a summons case, to the prejudice of the accused. [98] In such a case, even if in course of the trial the Court finds that the offence is triable as a summons case, he must complete the trial under the warrant procedure. [1]

Conversely, if in course of the trial of summons case, the Court finds that the offence falls under the definition of a 'warrant-case', it should proceed *de novo* under the warrant procedure, if he is otherwise competent to try the warrant case. [2] Apart from this, the *new* s. 259 confers a discretion upon a Magistrate trying a summons case punishable with imprisonment for a term exceeding 6 months, to re-hear the case under the warrant procedure, if it appears to him to be necessary 'in the interests of justice'.

3. Points of difference between 'summons' procedure and 'warrant' procedure.—

As stated earlier, different procedures are prescribed by the Code for the trial of 'warrant' and 'summons' cases, in Chaps. XIX [ss. 238-250] and XX [s s. 251-259], respectively. The principal point of difference is that in warrant cases, a 'charge' must be framed against the accused [s. 240] and he is to be adjudged innocent or guilty on such charge; but in a summons case, no charge need be framed, but the particulars of the offence of which he is accused are to be stated to him [s. 251] and evidence is taken thereon. The following are the successive stages under the two procedures in the *new* Code :

(i) The procedure for a summons-case aims at a speedier disposal of case. In a summons-case, when the accused is brought before the Magistrate, the Magistrate shall ask him if he has any cause to show why he should not be convicted s. 251. If the accused pleads guilty, the Magistrate has a discretion to convict the accused forthwith, without going into any evidence [ss. 252-253].

In a warrant-case, the Magistrate has no such discretion to convict the accused without any hearing. The accused shall be asked whether he has any defence to make, only after *the charge is framed.* It is then, that the accused gets the opportunity of pleading guilty and the Court has the discretion to convict the accused on such plea [ss. 241-242, 246(2)-(3)].

(ii) In a summons-case no charge need be framed [s. 251].

But in a warrant case, a charge must be framed against the accused if the Magistrate is of opinion that a case has been made out by the prosecution and that the accused should be tried [ss. 240(1); 246(1)].

(iii) In a summons case instituted upon complaint, if the complainant absents himself on any day fixed for hearing, the accused is entitled to be acquitted, unless the Magistrate dispense with the personal attendance of the complainant [s. 256].

In a warrant-case instituted upon complaint, the Magistrate has, in a similar case, only the power to *discharge* the accused and this discretionary power of the Magistrate to discharge is limited by two conditions; it can be exercised only (a) until the charge has been framed; and (b) if the offence is compoundable or non-cognizable [s. 249].

(iv) In a summons-case instituted upon complaint, it is competent for the complainant to apply to the Court, at any time before the passing of final orders, for permission to withdraw the complaint [s. 257].

In warrant cases, the complainant has a power to withdraw only to a limited extent, *viz.* , that when several charges have been framed against the accused and the accused has already been convicted of any of them, the complainant or the prosecution officer may, with the consent of the Court, withdraw the remaining charge or charges [s. 224].

4. ‘ Case’.—

The word ‘case’ which is used in various sections of the Code, is not defined, and is to be understood in different senses according to the context in which it is used. (a) In the context of provisions relating to trial, it ordinarily means a proceeding for the prosecution of a person alleged to have committed an offence, and which results either in discharge, conviction, or acquittal of such accused person. [3] This is the sense in which it is used in the definition of summons-case in s. 2(w) and warrant case in s. 2(x) and in the connected provisions in Chaps. XX and XIX. (b) More technically, it refers to the charge against the accused and the evidence by which the State proposes to prove the guilt of the accused, as in ‘the case for the prosecution’ [s. 226]. (c) In some provisions, it refers to an original proceeding as distinguished from an ‘appeal’, as in s s. 406-409, but an appeal against acquittal was held to be a ‘case’, in the generic sense. [4] (d) In a still wider sense, it refers to proceedings anterior to trial *e.g.* , a cognizable or non-cognizable case (pp. 9-10, *ante*), in connection with the powers of police to investigate, arrest and the like. s s. 2(c), (1); Chap XII. [See also pp. 9-10, *ante* .]

1. Applicability of the definition given in the IPC .—

The following definition in the *IPC* , *inter alia* will be applicable for interpreting the corresponding expressions used in the *new* Code:

I.P.C.	*New Code*
(a) S. 8 (‘he’)	(a) S. 125(1)(d) 5 *Areefa v. Sahib* , (1983) Crlj 412 (para 7).
(b) S. 349 (‘force’)	(b) S. 456(1).
(c) S. 503 (‘criminal intimidation’).	(c) S. 456(1).
(d) S. 19 (‘Judge’)	(d) S. 297(1)(a).
(e) S. 21 (‘public servant’). 6 *Mohd. Hadi Raja v. State of Bihar* , AIR 1998 SC 1945 [*LNIND 1998 SC 497*]:	(e) S. 195(1)- (2)

(1998) 5 SCC 91 [LNIND 1998 SC 497] : 1998 Crlj 2826 : (1998) 2 Crimes 284 .	

A Government Company is not a public servant under *s. 21 of the Indian Penal Code*, but every employee of that Government Company is a public servant.[7]

But the application of the definition in the *Penal Code* is excluded if the context of the word or expression in the *CrPC* requires a different meaning.[8]

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35 Inserted by Act No. 45 of 1978, S. 2 (w.e.f. 18-12-1978).

90 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 2 (w.e.f. 31-12-2009).

50 . *Eshar Singh v. State of A.P.*, AIR 2004 SC 3030 [LNIND 2004 SC 329]: (2004) 11 SCC 585 [LNIND 2004 SC 329] : 2004 Crlj 5021 : (2004) 3 Crimes 38 .

51 *Avinash v. State of Maharashtra*, (1983) Crlj 1833 (para 8) Bom.

52 *Delhi Admn* . v. *Prakash*, AIR 1967 Del 151 [LNIND 1967 DEL 20] (para 4).

53 This codifies the proposition 'laid down in *Pravin Chandra Modv. State of A.P.*, AIR 1965 SC 1185 [LNIND 1964 SC 364] (para 6) : (1965) 1 SCR 269 [

LNIND 1964 SC 364] :
(1965) 2 Crlj 250 .

54 *Vijayaraghavan* *v.* *C.B.I.,*
(1984) Crlj 1277 (paras 10-11) (Ker).

55 *Vijayaraghavan* *v.* *C.B.I.,*
(1984) Crlj 1277 (paras 10-11) (Ker).

56 *Vijayaraghavan* *v.* *C.B.I.,*
(1984) Crlj 1277 (paras 10-11) (Ker).

57 41st Rep. of the Law Commission, Vol. 1, para 1.26, p. 10.

58 *Bhimappa* *v.* *Laxman,*
AIR 1970 SC 1153 1156 : (1970) 1 SCC 665 :
1970 Crlj 1132 .

59 *Bhimappa* *v.* *Laxman,*
AIR 1970 SC 1153 1156 : (1970) 1 SCC 665 :
1970 Crlj 1132 .

60 *Bhimappa* *v.* *Laxman,*
AIR 1970 SC 1153 1156 : (1970) 1 SCC 665 :
1970 Crlj 1132 .

61 *Sadiee* *v.* *Gaya* *Prasad,*
AIR 1941 Pat 144 .

62 *Bhimappa* *v.* *Laxman,*
AIR 1970 SC 1153 1156 : (1970) 1 SCC 665 :
1970 Crlj 1132 .

63 *Shyam* *Lal* *v.* *State,*
AIR 1958 All 76 [
LNIND 1957 ALL 116].

64 *Debendra* *v.* *State* *of* *W.B.,*
AIR 1972 SC 1607 1609 : (1972) 3 SCC 414 :
1972 Crlj 1037 .

65 *State* *v.* *Ismail,*
(1979) Crlj 557 (para 7) J&K.

66 *Tej* *Singh* *v.* *State,*
AIR 1965 All 508 510 .

67 *State of Orissa v. Nazrul,* (1985) Crlj 1310 (para 4) Mad.

68 *Bhimappa v. Laxman,* AIR. 1970 SC 1153 (1156) : (1970) 1 SCC 665 : 1970 Crlj 1132 .

69 *Subodh v. Jamser,* AIR 1949 Cal 55 .

70 *Yusuf* , AIR 1931 All 53 ; *Manicka* , in re., AIR 1968 Mad 225 .

71 *Imam* , (1900) 27 Cal 662 .

72 (1897) 24 Cal 729 (732).

73 *Chathu v. Niranjan,* (1893) 20 Cal 729 .

74 *Jaswant* , 56 Bom LR 819.

75 *Dedar v. Shyamapada,* 41 Cal 1013; *Sevantilal v. State of Gujarat,* AIR 1969 Guj 14 [*LNIND 1967 GUJ 112*](para 8).

76 *Sevantilal v. State of Gujarat,* AIR 1969 Guj 14 [*LNIND 1967 GUJ 112*]: 1969 Crlj 63 .

77 *D.N. Arya v. State,* 1985 Crlj NOC 13Pat .

78 *Sardarilal v. State of Punjab,* 1983 Crlj 733 (para 11) (P&H).

79 *Rajesh Bajaj v. State NCT of Delhi,* AIR 1999 SC 1216 [*LNIND 1999 SC 233*]: (1999) 3 SCC 259 [*LNIND 1999 SC 233*] : 1999 Crlj 1833 .

80 *Mohammed Yousuf v. Aftav Jahan,* AIR 2006 SC 705 [*LNIND 2006 SC 1*]:

(2006) 1 SCC 627 [
LNIND 2006 SC 1] :
(2006) 1 SCC 406 (Cri) :
2006 Crlj 788 .

81 *Maya Ram v. Surjit* , (1967) SC [Cr 250/64, dated 16.3.1967].

82 *Maya Ram v. Surjit* , (1967) SC [Cr 250/64, dated 16.3.1967].

83 *Prakash Singh Badal v. State of Punjab,*
AIR 2007 SC 1274 [
LNIND 2006 SC 1091]:
(2007) 1 SCC 1 [
LNIND 2006 SC 1091] :
(2007) 1 SCC 1 [
LNIND 2006 SC 1091]93(Cr) .

84 *State of Bihar v. Sakaldip,*
AIR 1966 Pat 473 (para 7); [see however, *Bains v. State,*
(1980) Crlj 1308 (1311); *Abhinandan v. Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144]].

85 *Sadiee v. Gaya Prasad,*
AIR 1958 All 76 [
LNIND 1957 ALL 116].

86 *Rameshwar v. Bhatu,*
AIR 1958 Pat 11 .

87 *Qasim v. State,*
(1984) Crlj 1677 (para 5) All; *Tula v. Kishore,*
AIR 1977 SC 2401 [
LNIND 1977 SC 284]:
(1977) 4 SCC 459 [
LNIND 1977 SC 284] :
1978 Crlj 8 .

88 *Sarju v. Harihar,*
AIR 1970 Pat 26 (para 4).

89 *State of Bihar v. Sakaldip,*
AIR 1966 Pat 473 (para 7); [see however, *Bains v. State,*
(1980) Crlj 1308 (1311); *Abhinandan v. Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144]].

90 *Basudeo v. State of U.P.,* (1983) All Cr R 513.

91 *Qasim v. State,*
(1984) Crlj 1677 (para 5) All; *Tula v. Kishore,*
AIR 1977 SC 2401 [

LNIND 1977 SC 284]:
(1977) 4 SCC 459 [
LNIND 1977 SC 284] :
1978 Crlj 8 .

92 See the history of the law in App. 3 to the 37th Rep. of the Commission.

93 Rep. of the Jy. Committee on the Bill of 1970, p. 7 (on Cl. 2); *Biswanath v. State,* (1978) Crlj 318 (Cal) .

94 *State of U.P* . v. *Bhura* , (1985) Crlj 536 (para 5) All. [Offence under s s. 3, 5 of the Railway Property (Unlawful Possession Act, 1966)]; *Rama v. Station Officer,* (1986) Crlj 392 (para 6) Ker.

95 *Keshav Lal Thakur v. State of Bihar,* (1996) 11 SCC 557 [
LNINDORD 1996 SC 245] : 1997 SCC (Cr) 298 :
(1996) 4 Crimes 121 [
LNINDORD 1996 SC 245].

1 *Chillikkudathil v. State of Kerala,* (1984) Crlj 1897 (paras 14-16) Ker.

2 The view taken in *Chittaranjan v. State* , X, AIR 1963 Cal 191 [
LNIND 1962 CAL 63]or *State of M.P* . v. *Abdul* , AIR 1963 M.P. 71 [
LNIND 1962 MP 193], will not be 'good, law under the *new* Code.

3 *State of Bihar v. Sakaldip,* AIR 1966 Pat 473 (para 7); [See, however, *Bains v. State,* (1980) Crlj 1308 (1311); *Abinandan v. Dinesh,* AIR 1968 SC 117 [
LNIND 1967 SC 144]].

4 *Mailsauri v. State,* (1994) Crlj 2238 (para 8) Mad.

5 *Antulay v. Nayak,* AIR 1984 SC 718 [
LNIND 1984 SC 42](para 6) :
1984 Crlj 647 :
(1984) 2 SCC 500 [
LNIND 1984 SC 42]; *Mailram v. State,* 1994 Crlj 2238 Mad .

6 *Biswanath v. State,* (1978) Crlj 318 (para 3) Cal.

7 *Badaku v. State of Mysore,* AIR 1966 SC 1746 [

LNIND 1966 SC 68](paras 9, 11) :
(1966) 3 SCR 698 [
LNIND 1966 SC 68] :
1966 Crlj 1353 .

8 *C.H.O. Storage Co. v. Prafulla,*
AIR 1967 Bom 126 [
LNIND 1966 BOM 7].

9 *Raja Ram v. State of Bihar,*
AIR 1964 SC 828 [
LNIND 1963 SC 94](para 10) :
(1964) 2 SCR 752 [
LNIND 1963 SC 94] :
(1964) 1 Crlj 705 .

10 *Prasad v. State of A.P.,*
(1985) Crlj 930 (para 4) AP.

11 *Lal Khan v. Emp.,*
AIR 1945 Lah. 43 45 ; *Ranjit v. State,*
AIR 1952 HP 81 87 .

12 As recommended by the 41st Rep. of the Commission [paras 1.26(v), 1.27(ii)].

13 *Surajmani v. State of Orissa,*
(1980) Crlj 363 (Or.) (Para 5).

14 *Suvendra Gupta v. Bhagwan Devi,*
AIR 1996 SC 509 [
LNIND 1994 SC 388]:
(1994) 4 SCC 657 [
LNIND 1994 SC 388] : 1994 SCC (Cr) 1318.

15 *Vishwa v. Poddar,*
AIR 1984 SC 5 [
LNIND 1983 SC 277](para 5) :
(1983) 4 SCC 701 [
LNIND 1983 SC 277] :
1984 Crlj 1 ; *Antulay v. Nayak,*
AIR 1984 SC 718 [
LNIND 1984 SC 42](para 6) :
(1984) 2 SCC 500 [
LNIND 1984 SC 42] :
1984 Crlj 647 .

16 *Misrilal v. Rajmallu,*
(1978) Crlj 1360 (para 3) AP.

17 *Ganesh* , in re., (1889) 13 Bom 590 600.

18 *Vishwa* *v.* *Poddar,*
AIR 1984 SC 5
LNIND 1983 SC 277
(1983) 4 SCC 701
LNIND 1983 SC 277
1984 Crlj 1
AIR 1984 SC 718
LNIND 1984 SC 42
(1984) 2 SCC 500
LNIND 1984 SC 42
1984 Crlj 647
[ ](para 5) : [ ] : ; *Antulay v. Nayak,* [ ](para 6) : [ ] : .

19 *Public* *Prosecutor* *v.* *Dawood,*
AIR 1957 Andhra 977
AIR 1957 Pat 687
(1978) Crlj 532
; *Udit Narayan v. Rampur,* ; *Alwaye Municipality v. Co-op. Soc.,* (para 8) Ker.

20 *Public* *Prosecutor* *v.* *Dawood,*
AIR 1957 Andhra 977
AIR 1957 Pat 687
(1978) Crlj 532
; *Udit Narayan v. Rampur,* ; *Alwaye Municipality v. Co-op. Soc.,* (para 8) Ker.

21 *Misrilal* *v.* *Rajmallu,*
(1978) Crlj 1360
(para 3) AP.

22 *Churiaram* *v.* *Aggarwal* *Sweets,*
1990 Crlj 2460
Del .

23 *Ashwin* *v.* *State* *of* *Maharashtra,*
AIR 1967 S. 983
(1967) 1 SCR 807
LNIND 1966 SC 246
1967 Crlj 943
(985) : [ ] : .

24 *Surajmani* *v.* *State* *of* *Orissa,*
(1980) Crlj 363
(Or.) (Para 5).

25 *Surajmani* *v.* *State* *of* *Orissa,*
(1980) Crlj 363
(Or.) (Para 5).

26 *Surajmani* *v.* *State* *of* *Orissa,*
(1980) Crlj 363
(Or.) (Para 5).

27 *Surajmani* *v.* *State* *of* *Orissa,*
(1980) Crlj 363
(Or.) (Para 5).

28 Cf. *Ramendra* *v.* *Mohit,*
AIR 1969 Cal 535
LNIND 1969 CAL 84
[ ](para 6).

29 *Shankar* *v.* *Shivaputra,*
(1984) Crlj 1814 (para 12) Knt; *Kauavi v. State of Mysore,*
(1965) 1 Mys LJ 242 .

30 *Arun* *v.* *Haridas,*
(1984) Crlj 1028 (Cal) ; *Union of India v. Subodh,*
(1984) Crlj 367 (Cal) .

31 *State of Kerala* , in the matter of,
AIR 1969 Ker 111 (para 9); *Jagia v. Sant,* (1977) Crl-J 523 (paras 14-15) Pat (DB).

32 *State of Kerala* , in the matter of,
AIR 1969 Ker 111 (para 9); *Jagia v. Sant,* (1977) Crl-J 523 (paras 14-15) Pat (DB).

33 *Prasad* *v.* *State of A.P.,*
(1985) Crlj 1930 (para 5) A.P.

34 *Prasad* *v.* *State of A.P.,*
(1985) Crlj 1930 (para 5) A.P.

35 *Abhinandan* *v.* *Dinesh,*
(1967) 3 SCR 668 [
LNIND 1967 SC 144] :
AIR 1968 SC 117 [
LNIND 1967 SC 144]:
1968 Crlj 97 .

36 *Bains* *v.* *State,* (1980)
CrLJ 1308 (1311) :
AIR 1989 SC 1883 : (1984) 4 SCC 631.

37 *Lajpat* *v.* *State,*
(1983) Crlj 888 (paras 26-27) Del.

38 41st Rep. of the Commission, p. 103, paras 15.74-75.

39 *State of Bihar* *v.* *Ram Naresh,*
AIR 1957 SC 389 [
LNIND 1957 SC 9](para 8) :
1957 SCR 279 [
LNIND 1957 SC 9] :
1957 Crlj 567 .

40 *Laxminarayan* , in re.,
AIR 1928 Bom 390 .

41 *Motilal v. Hiralal,* (1921) 46 Bom 61 66.

42 *Jamuna Prasad v. Ramprit,* AIR 1953 Pat 922 93 ; *Krishnavatharam* , in re, AIR 1948 Mad 117 [*LNIND 1947 MAD 22*].

43 *Ali Mahomed v. Tarak,* (1908) 13 CWN 420 .

44 *State of U.P* . v. *Lakshmi* , AIR 1983 SC 439 [*LNIND 1983 SC 82*](para 13) : (1983) 2 SCC 372 [*LNIND 1983 SC 82*] : 1983 Crlj 839 reversing *Lakshmi v. State,* (1976) Crlj 118 (All), setting the controversy on the point and affirming author's view.

45 *Kapur v. Kairon,* AIR 1966 All 66 68 [*LNIND 1965 ALL 4*].

46 *Ghinua* , AIR 1918 Pat 179 181 .

47 *Gulati v. Birmani,* (1986) Crlj 770 (paras 8) Del (DB).

48 *Shambhu v. State of Bihar,* (1987) Crlj 510 (para 8) Pat.

49 *Motilal v. Hiralal,* (1921) 46 Bom 61 66.

50 *Delhi Admn* . v. *Ram Singh* , AIR 1962 SC 63 67 : (1962) 2 SCR 694 : (1962) 1 Crlj 106 .

51 *Fazaul v. State of Karnataka,* (1984) Crlj 1625 (para 8) Knt.

52 *Director v. Deepak,* (1994) 1 SCJ 599 (paras 115, 122).

53 *Fazaul v. State of Karnataka,* (1984) Crlj 1625 (para 8) Knt.

54 *Ramesh v. State* of W.B., (1969) 2 SCR 451 ; *Badaku v. State of Mysore,* (1966) 3 SCR 698 [*LNIND 1966 SC 68*].

55 *Ramesh v. State* of W.B., (1969) 2 SCR 451 ; *Badaku v. State of Mysore,* (1966) 3 SCR 698 [*LNIND 1966 SC 68*].

56 *Ramesh v. State* of W.B., (1969) 2 SCR 451 ; *Badaku v. State of Mysore,* (1966) 3 SCR 698 [*LNIND 1966 SC 68*].

57 *H.N. Rishbud v. State of Delhi,* (1955) 1 SCR 1150 [*LNIND 1954 SC 177*] 1157 : AIR 1955 SC 196 [*LNIND 1954 SC 177*]: 1955 Crlj 526 ; *State of M.P v. Mubarak,* AIR 1959 SC 707 711 : 1959 Supp (2) SCR 201 : 1959 Crlj 920 .

58 Including their medical examination (vide s s. 53-54), *post* , where necessary [*Ananth v. State of A.P.,* AIR 1977 AP 1797 (para 13)], conducting a raid or laying trap to detect bribery [*Maha Singh v. State,* AIR 1976 SC 449 [*LNIND 1976 SC 6*](para 37)] : (1976) 1 SCC 644 [*LNIND 1976 SC 6*] : 1976 Crlj 346 ; *Sailendra v. State of Bihar,* AIR 1968 SC 1292 [*LNIND 1968 SC 83*]: (1968) 3 SCR 563 [*LNIND 1968 SC 83*] : 1968 Crlj 1484 .

59 *H.N. Rishbud v. State of Delhi,* (1955) 1 SCR 1150 [*LNIND 1954 SC 177*] 1157 : AIR 1955 SC 196 [*LNIND 1954 SC 177*]: 1955 Crlj 526 ; *State of M.P v. Mubarak,* AIR 1959 SC 707 711 : 1959 Supp (2) SCR 201 : 1959 Crlj 920 .

60 *Union of India v. P.P. Hinduja,* AIR 2003 SC 2612 [*LNIND 2003 SC 540*]: 2003 Crlj 3117 : (2003) 6 SCC 195 [*LNIND 2003 SC 540*].

61 *State of U.P* . v. *Bhagwant* , AIR 1964 SC 221 224 : (1964) 3 SCR 71 : (1964) 1 Crlj 140 ; *Rugmini v. State of Kerala,* (1987) Crlj 200 (paras 5-6) FB.

62 *State of U.P* . v. *Bhagwant* , AIR 1964 SC 221 224 : (1964) 3 SCR 71 :

(1964) 1 Crlj 140 ; *Rugmini v. State of Kerala,*
(1987) Crlj 200 (paras 5-6) FB.

63 *H.N. Rishbud v. State of Delhi,*
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] 1157 :
AIR 1955 SC 196 [
LNIND 1954 SC 177]:
1955 Crlj 526 ; *State of M.P v. Mubarak,*
AIR 1959 SC 707 711 : 1959 Supp (2) SCR 201 :
1959 Crlj 920 .

64 *State of U.P* . v. *Bhagwant* ,
AIR 1964 SC 221 224 : (1964) 3 SCR 71 :
(1964) 1 Crlj 140 ; *Rugmini v. State of Kerala,*
(1987) Crlj 200 (paras 5-6) FB.

65 *Raj v. Union of India,*
(1981) Crlj 97 (para 21) SC; *State of U.P. v. Durga,* (1974)
CrLJ 1465 (1469) :
AIR 1974 SC 2136 [
LNIND 1974 SC 248]:
(1975) 3 SCC 210 [
LNIND 1974 SC 248]; *Balkishan v. State of Maharashtra,* (1980)
CrLJ 1424 (1438) :
AIR 1981 SC 379 [
LNIND 1980 SC 298]:
(1980) 4 SCC 600 [
LNIND 1980 SC 298].

66 *R. Sarala v. T.S. Velu,*
AIR 2000 SC 1731 [
LNIND 2000 SC 657]: (2000) 4 SCC 459 :
2000 SCC (Cri) 471 :
2000 Crlj 344 .

67 *Hoshide v. Emp.,*
AIR 1940 Cal 97 .

68 *H.N. Rishbud v. State of Delhi,*
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] 1157 :
AIR 1955 SC 196 [
LNIND 1954 SC 177]:
1955 Crlj 526 ; *State of M.P v. Mubarak,*
AIR 1959 SC 707 711 : 1959 Supp (2) SCR 201 :
1959 Crlj 920 .

69 *Dharmeshbhai Vasudevbhai v. State of Gujarat,*
(2009) 6 SCC 576 [
LNIND 2009 SC 1108] :
(2009) 3 SCC 76 (Cri) :
2009 Crlj 2969 .

70 *Vidyadharan v. State of Kerala,*
AIR 2004 SC 536 [

LNIND 2003 SC 985]:
(2004) 1 SCC 215 :
2004 SCC (Cri) 260 [
LNIND 2003 SC 985] :
2004 Crlj 605 .

71 *Tuneswar v. State of Bihar,*
(1978) Crlj 1080 (para 5) Pat (FB).

72 *Hoshide v. Emp.,*
AIR 1940 Cal 97 .

73 *Laxminarayan , in re.,*
AIR 1928 Bom 390 .

74 *Palaniandy v. Emp.,* 32 Mad 218.

75 *Haridas v. Saritulla,* 15 Cal 608(FB) .

76 *Dagdu v. Punja,*
AIR 1937 Bom 55 .

77 *Neamat v. Hanuman,*
AIR 1931 Cal 626 632 .

78 *State of Bihar v. Naresh,*
AIR 1957 SC 389 394 : 1957 SCR 279 :
1957 Crlj 567 .

79 *State of Bihar v. Naresh,*
AIR 1957 SC 389 394 : 1957 SCR 279 :
1957 Crlj 567 .

80 *Ali Mahomed v. Tarak,*
(1908) 13 CWN 420 .

81 *Surja* ,
AIR 1948 Mad 510 [
LNIND 1948 MAD 88].

82 *Surja* ,
AIR 1948 Mad 510 [
LNIND 1948 MAD 88].

83 *Konetiraju v. Subbaraja,*
AIR 1954 Mad 1019 [
LNIND 1954 MAD 32].

84 *State of Bihar v. Naresh,* AIR 1957 SC 389 394 : 1957 SCR 279 : 1957 Crlj 567 .

85 *Alim v. Taufiq,* (1982) Crlj 1264 (para 7); *Gulati v. Birmani,* (1986) Crlj 770 (para 8) Del.

86 *Alim v. Taufiq,* (1982) Crlj 1264 (para 7); *Gulati v. Birmani,* (1986) Crlj 770 (para 8) Del.

87 *Prasad v. State,* AIR 1951 All 549 [*LNIND 1950 ALL 321*].

1 Cf. *Maha Singh v. State,* AIR 1976 SC 449 [*LNIND 1976 SC 6*](paras 37-38) : (1976) 1 SCC 644 [*LNIND 1976 SC 6*] : 1976 Crlj 346 .

2 Cf. *Maha Singh v. State,* AIR 1976 SC 449 [*LNIND 1976 SC 6*](paras 37-38) : (1976) 1 SCC 644 [*LNIND 1976 SC 6*] : 1976 Crlj 346 .

3 *Emp. v. Tulja,* (1888) 12 Bom 36 42.

4 *Basant* , AIR 1954 All 447 [*LNIND 1953 ALL 280*]; *Clarke v. Brojendra,* (1912) 39 Cal 953 PC .

5 *Gholam v. Ismail,* 1 All 1 (13).

6 *Veni v. Wajid,* AIR 1937 All 90 93 .

7 *Tirunarasimha v. Emp.,* (1895) 19 Mad 18; *Govind v. Basanti,* AIR 1929 Pat 46 .

8 *Bahadur v. Eradatulla,* (1910) 37 Cal 642 FB .

9 *Kanchan v. Ram Kishun,* (1908) 36 Cal 72 .

10 *Hameed* *v.* *State,* AIR 1957 All 121 122 .

11 *Faiz* *Ali* *v.* *Emp.,* (1909) 37 Cal 27 .

12 *Abdul* *Aziz* , (1916) 18 Crlj 491 495.

13 *Subba* *Reddy* *v.* *State,* AIR 1969 A.P. 281 (para 11); *Nangla v. Om,* (1994) Crlj 2160 (para 14) Bom.

14 *Mithan* *v.* *Municipal* *Bd.,* AIR 1956 All 851 855 .

15 *Q.E. v. Harchandra,* 25 Cal 440.

16 *Q.E. v. Harchandra,* 25 Cal 440.

17 *Kamalapati* *v.* *State* *of* *W.B.,* AIR 1979 SC 777 [*LNIND 1978 SC 383*](paras 7, 38) : (1980) 2 SCC 91 [*LNIND 1978 SC 383*] : 1979 Crlj 679 .

18 *Shrichand* *v.* *State* *of* *M.P.,* (1993) Crlj 495 (para 8).

19 Cf. *Maha* *Singh* *v.* *State,* AIR 1976 SC 449 [*LNIND 1976 SC 6*](paras 37-38) : (1976) 1 SCC 644 [*LNIND 1976 SC 6*] : 1976 Crlj 346 .

20 *Shrichand* *v.* *State* *of* *M.P.,* (1993) Crlj 495 (para 8).

21 *Purshottam v. Emp.,* (1921) 45 Bom 834 : AIR1921 Bom (FB).

22 *Radhika v. Lalmohon,* 20 Cal 719; *Q.E. v. Bharma,* (1886) 11 Bom 702(FB) .

23 *Shrichand* *v.* *State* *of* *M.P.,* (1993) Crlj 495 (para 8).

24 *Shrichand v. State of M.P.,* (1993) Crlj 495 (para 8).

25 *Nallasivam v. Ramalingam,* 32 MLJ 402.

26 *Manaji* , (1888) 14 Bom 381.

27 *Soundararajan v. Sankarapandia,* AIR 1958 Mad 69 [*LNIND 1956 MAD 304*].

28 *Shrichand v. State of M.P.,* (1993) Crlj 495 (para 8).

29 *State of M.P* . v. *Mobarak* , AIR 1959 SC 707 710 [*LNIND 1959 SC 16*]: 1959 Supp (2) SCR 201 : 159 Crlj 920; *State of U.P. v. Bhagwant,* AIR 1964 SC 221 226 : (1964) 3 SCR 71 : (1964) 1 Crlj 140 .

30 *Anandayya* , in re, AIR 1915 Mad 312 .

31 *Rishbud v. State of Delhi,* (1955) 1 SCR 1150 [*LNIND 1954 SC 177*] 1162; *State of M.P* . v. *Mobarak* , AIR 1959 SC 707 711 : 1959 Supp (2) SCC 201 : 1959 Crlj 920 .

32 *Delhi Administration v. Ram Singh,* AIR 1962 SC 63 67 : 1962 SCR 694 : 1962 Crlj 106 . [Immoral Traffic in Women & Girls Act, 1956].

33 *State of M.P* . v. *Mobarak* , AIR 1959 SC 707 710 [*LNIND 1959 SC 16*]: 1959 Supp (2) SCR 201 : 1959 Crlj 920 ; *State of U.P. v. Bhagwant,* AIR 1964 SC 221 226 : (1964) 3 SCR 71 : L (1964) 1 Crlj 140 .

34 *Delhi Administration v. Ram Singh,* AIR 1962 SC 63 67 : 1962 SCR 694 : 1962 Crlj 106 . [Immoral Traffic in Women & Girls Act, 1956].

36 *Govind* , AIR 1925 Nag 236 .

37 *Kapurchand v. State of Bombay,* AIR 1958 SC 993 997 : 1959 SCR 250 : 1958 Crlj 1558 .

38 Cf. *Maqbool v. State of Bombay,* AIR 1953 SC 325 [LNIND 1953 SC 51] : 1953 SCR 730 [LNIND 1953 SC 51] : 1953 Crlj 1432.

39 *Badhu* , 3 NLR 51.

40 *Imam* , (1990) 27 Cal 662 ; *Dirjajit v. Katara,* (1983) Crlj 315 (para 7) Guj.

41 *Lakhpat* , 15 All 365.

42 *Srinath v. Ajmaddi,* (1897) 24 Cal 395 398.

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3 *Gantapalli v. Gantapalli,* (1897) 20 Mad 470 474 FB; *Edmund v. Asstt. Collector,*
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4 Cf. *Mansoor v. State of M.P.,* (1971) II SCWR 592 (para 13).

7 *National Small Industries Corporation Ltd. v. State,*
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER I
PRELIMINARY

S. 3
Construction of references.

(1) In this Code—

(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires—

(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class shall, in relation to an area outside a metropolitan area, be construed as a reference to a Judicial Magistrate of the second class, and, in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;

(c) any reference to a Magistrate of the first class shall,—

(i) in relation to a metropolitan area, be construed as a reference to a Metropolitan Magistrate exercising jurisdiction in that area;

(ii) in relation to any other area, be construed as a reference to a Judicial Magistrate of the first class exercising jurisdiction in that area;

(d) any reference to the Chief Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Chief Metropolitan Magistrate exercising jurisdiction in that area.

(2) In this Code, unless the context otherwise requires, any reference to the Court of a Judicial Magistrate shall, in relation to a metropolitan area, be construed as a reference to the Court of the Metropolitan Magistrate for that area.

(3) Unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code—

(a) to a Magistrate of the first class, shall be construed as a reference to a Judicial Magistrate of the first class;

(b) to a Magistrate of the second class or of the third class, shall be construed as a reference to a Judicial Magistrate of the second class;

(c) to a Presidency Magistrate or Chief Presidency Magistrate, shall be construed as a reference, respectively, to a Metropolitan Magistrate or the Chief Metropolitan Magistrate;

(d) to any area which is included in a metropolitan area, as a reference to such metropolitan area, and any reference to a Magistrate of the first class or of the second class in relation to such area, shall be construed as a reference to the Metropolitan Magistrate exercising jurisdiction in such area.

(4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters—

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

STATE AMENDMENTS

Andaman and Nicobar Islands (U.T.). — *The following amendments were made by Regn. 1 of 1974, S. 3 (w.e.f. 30-3-1974)* .

S. 3-A. —

(1) In its application to Union Territory of Andaman and Nicobar Islands, after S. 3, S. 3A shall be inserted as follows—

"3-A. Special provision relating to Andaman and

Nicobar Islands. —

(1) References in this Code to—

(a) the Chief Judicial Magistrate shall be construed as references to the District Magistrate or, where the State Government so directs, also to the Additional District Magistrate;

(b) a Magistrate or Magistrate of the first class or of the second class or Judicial Magistrate of the first class or of the second class, shall be construed as references to such Executive Magistrate as the State Government may, by notification in the Official Gazette, specify.

(2) The State Government may, if it is of opinion that adequate number of persons are available for appointment as Judicial Magistrates, by notification in the Official Gazette, declare that the provisions of this section shall, on and from such day as may be specified in the notification, cease to be in force and different dates may be specified for different islands.

(3) On the cesser of operation of the provisions of this section, every inquiry or trial pending, immediately before such cesser before the District Magistrate or Additional District Magistrate or any Executive Magistrate, as the case may be, shall stand transferred, and shall be dealt with, from the stage which was reached before such cesser, by such Judicial Magistrate as the State Government may specify in this behalf."

Arunachal Pradesh & Mizoram. — *The following amendments were made by Gaz. of Ind., dt. 20-3-1974. Pt. II, Section 3(ii), Ext., p. 421 (w.e.f. 1-4-1974)* .

S. 3 (5). —In its application to the Union Territories of Arunachal Pradesh and Mizoram this provision stands modified as under:

(i) After sub-section (4) insert following sub-section (5)—

"(5) Notwithstanding anything contained in the foregoing provisions of this sub-section—

(i) Any reference in such of the provisions of this Code, as apply to the Union Territories of Arunachal Pradesh and Mizoram, to the Court mentioned in column (1) of the Table below shall, until the Courts of Session and Courts of Judicial Magistrates are constituted in the said Union territories, be construed, as references to the Court of Magistrate mentioned in the corresponding entry in column (2) of that Table.

Table

1	2
Court of Session or Sessions Judge or Chief Judicial	District Magistrate Magistrate or Magistrate of the First

Magistrate	Class or Judicial Magistrate of the First Class Executive Magistrate.

(ii) the functions mentioned in Clause (a) of sub-section (4) shall be exercisable by an Executive Magistrate."

Nagaland. — *The following amendments were made by Nagaland Gaz., dt. 19-6-1975, Extra. No. 15.*

S. 3 (5). — **Modifications of the provisions with reference to the State of Nagaland are as follows :—**

(a) After sub-section (4) following sub-section (5) which shall be deemed always to have been inserted :—

"(5) Notwithstanding anything contained in the foregoing provisions of this section—

(i) any reference in such of the provisions of this Code as apply to the State of Nagaland to the Court and authority mentioned in column (1) of the Table below shall, until the Courts of Session and Court of Judicial Magistrates are constituted in the said areas, be construed as references to the Court and authority mentioned in corresponding entry in col. (2) of that Table.

Table

1	2
Court of Session or Sessions Judge or Chief Judicial Magistrate	District Magistrate or Additional District Magistrate.
Magistrate or Magistrate of the First Class or Judicial Magistrates of the First Class	Executive Magistrate.

(ii) references mentioned in sub-section (3) to a Judicial Magistrate and functions mentioned in sub-section (4) exercisable by a Judicial Magistrate and Executive Magistrate shall be construed as references to and exercised by, Deputy Commissioner and Additional Deputy Commissioner and Assistant to Deputy Commissioner appointed under any law in force:

Provided that an Assistant to Deputy Commissioner shall exercise such powers of a Judicial Magistrate as may be invested by the Governor."

1. Changes made by the new Code.—

This is a new section, inserted by the Joint Committee, in order to remove any difficulties in construction owing to the new categorisation of Magistrates, and the separation of the criminal judiciary from the executive, by the creation of 'Judicial Magistrates'.

While sub-secs. (1)-(2) explain references made in the Code, sub-secs. (3)-(4) provide construction of similar expression in other enactments. The expression 'Presidency Magistrate' has, in the *new* Code, been substituted by 'Metropolitan Magistrate'.

2. Sub-sec. 1(a). 'Magistrate' means a 'Judicial Magistrate'.—

Since the *new* Code divides Magistrates into two classes—Judicial and Executive, this clause indicates which class is referred to in a provision of the Code where the general word 'Magistrate' is used. s. 3(1)(a) provides that wherever the *new* Code uses the word 'Magistrate' without any qualifying words, it shall mean a Judicial Magistrate; and s. 3(3)(a) says that a similar use of the words 'Magistrate of the first class' in any enactment passed before 1974, will refer to a Judicial Magistrate of the First Class. [9] It follows that if a Sub-divisional Magistrate takes cognizance of a case s. 190(1), or commits a case to the Sessions Court s. 209, his order shall be without jurisdiction. [10]

3. Sub-sec. (4).—

While sub-sec. (1) explains references of the word 'Magistrate' in this Code, sub-section (4) serves the same purpose where the word 'Magistrate' is used in some law *other than* this Code, *e.g.* , the A.P. Police Standing Orders. [11] This sub-section says that, in such a case, the word will refer to a Judicial Magistrate if it involves a *judicial* function such as a *decision* involving any punishment or detention in custody pending any investigation, inquiry or trial Cl. (a).

If, on the other hand, the provision in question involves an *administrative* function, such as the granting, suspension or cancellation of a licence, or the sanctioning or withdrawing from prosecution, it will refer to an Executive Magistrate, subject to the provisions of the Code. Thus, the District Magistrate being the Chief executive authority of the district, may direct an inquiry by the Sub-divisional Magistrate into an alleged torture of a person by a Police officer. Such inquiry will be an administrative and not a judicial inquiry as contemplated under the Code. [12]

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9 *Madhusudan v. Asstt. Registrar,* (1978) Crlj 570 (para 5) Cal.

10 *Sukhdeo* *v.* *State of Bihar,* (1977) Crlj 1350 (Pat) .

11 *A.P.P.O. Assocn* . v. *Collector* , (1981) Crlj 641 (paras 9-10); see also *Yusuf v. State of Rajasthan,* AIR 1994 Raj 116 (para 15).

12 *A.P.P.O. Assocn. v. Collector,* (1981) Crlj 641 (paras 9-10); see also *Yusuf v. State of Rajasthan,* AIR 1994 Raj 116 (para 15).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER I
PRELIMINARY

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

(1) All offences under the *Indian Penal Code (45 of 1860)* shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

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

1. Scope of Section 4.—

This section reproduces *old* s. 5, without any change. While the procedure under this Code would apply in the case of offences under the *Indian Penal Code* [sub-sec. (1)], the applicability of this Code to offences under *other laws* would be subject to the provisions of those other laws sub-section (2). Section 4 of the Code applies where an offence under the *Indian Penal Code* or under any other law is being investigated, inquired into, tried or otherwise dealt with. The offences under any other law could also be investigated, inquired into or tried with according to the provisions of the Code except in case of an offence where the procedure prescribed there under is different than the procedure prescribed under the Code.[13]

It is only when the special statute provides a special procedure, those provisions will prevail but when the special statute is silent about the procedure, the Code will prevail. [14]

So, the procedure of the Code can only be enforced when there is an irresistible conclusion flowing from the necessary implication of the special statute. [15]

When the police officer while carrying on investigation under the Code recovers by chance narcotic drugs, then from that stage empowered officer under the Narcotic Drugs and Psychotrophic Substance Act, 1985 shall commence investigation for the offences under the above Act. [16]

When offences under both *IPC* and *Transplantation of Human Organs Act, 1994* were alleged, CBI could carry out investigation of both the offences in exercise of its authorization under s. 13(3)(iv) of T.O.H.O. Act. If special statute lays down special procedures, procedure laid down by the general statute shall not be followed. [17]

2. Sub-section (1) : Whether the jurisdiction of the ordinary Courts to try an offence under the Penal Code can be barred. —

Though sub-section (1) lays down that all offences under the *Penal Code* shall be tried in accordance with the provisions of the *CrPC* ,[18] a competent Legislature, exercising power under Entries 1 and 2 of List III of the 7th Sch. of the *Constitution* , is competent to enact that offences under the *Penal Code* relating to some specific matter or specific area, shall be triable by Courts other than those set up under the *CrPC* or otherwise than according to the procedure laid down by the Code. In such cases, the jurisdiction of the ordinary Criminal Courts to try such offences would be barred. Such ouster is, however, subject to two conditions :

(a) That the ouster of the jurisdiction of the ordinary Courts by such enactment is clear and operative. [19]

Hence, where the statutory Rules made under the Act which sets up the special Court are *ultra vires* [20] or where there is *no* machinery provided by the special law for the exercise of the special jurisdiction in a specific case, [21] the jurisdiction of the ordinary Courts to try such cases is not excluded. [22] The provisions of the *Army Act* ,*e.g.* , indicate that offences under the *IPC* or other laws are to be tried by the ordinary Criminal Courts, [23] subject to the provisions of s. 475 [*old* s. 549]. [24]

(b) That the jurisdiction of the special Courts is limited to a particular field. [25]

3. Scope of sub-section (2) : Offences under any law other than the Penal Code .—

1. While sub-section (1) provides that an offence under the *IPC* must be dealt with in accordance with the provisions of the

CrPC, sub-section (2) provides that an offence under *any law other than the IPC* shall be dealt with according to the *CrPC*,[26] except to the extent that there is some other enactment which (a) regulates the manner or place of investigating, inquiring into, trying, [27] or (b) 'otherwise dealing with' such offences. [28] This only means that unless the 'other law' prescribes a special procedure for the trial of an offence under that law, the procedure prescribed by the Code shall be applicable for the trial of such offence as for an offence under the *IPC*, as referred to in sub-section (1) of the section. [29]

2. The words ' *otherwise* dealing with' are all-comprehensive, of which investigation, inquiry and trial are some aspects. [30] It would, therefore, include apprehension of the offender, search and seizure; [31] transfer under s. 407, (*old* s. 526); [32] disposal of property (s. 45— *old* s. 516A); [33] discharge of accused under s. 245(1); [34] eligibility for making a complaint. [35]

The expression 'otherwise dealt with' in s. 4 refers to such dealing with offence as is provided in the Code apart from the provisions of investigation, enquiry or trial. [36]

It means in the absence of any contrary provision in any other law, the provisions of the Code will apply. [37]

The jurisdiction of the Criminal Court under s. 4 of the Code is comprehensive and exhaustive. Therefore, when no special machinery is provided, the jurisdiction of the Judicial Magistrate or the Metropolitan Magistrate is not excluded. [38]

The expression 'otherwise' points to the fact that the expression 'dealt with' is all comprehensive. [39]

3. Where, therefore, a statute creates a new offence and also sets up a machinery for 'dealing' with it, the provisions of the *CrPC* relating to the *matters covered by such statute* would not be applicable to the offence. [40]

On the other hand, the Code shall apply on matters on which the special Act is *silent* . [41]

4. As instances of such statutes excluding the provisions of the *CrPC*, *pro tanto* , may be mentioned—

(i) *The Immoral Traffic (Prevention) Act, 1956* .—ousting the jurisdiction of an ordinary Police Officer (*i.e.,* not being a Special Police Officer under the Act) to make an investigation into an offence under the Act, under s. 156(1) of the Code, [42] a Magistrate cannot, therefore, take cognizance under s. 190(1)(b) of the Code on the report of such Police Officer. [43]

(ii) *Foreign Exchange Regulations Act, 1973* **.—** The Foreign Exchange Regulations Act, 1973 being a special statute containing comprehensive provision of investigation, enquiry and trial of offences, ss. 4 and 5 of the Code are not applicable for investigation of offences by a member of Delhi Special Police Establishment to investigate into the offence under *FERA* in a particular State even with the consent of the State Government in the absence of any notification under *FERA* authorizing such members to discharge the duties and functions of the officers of Enforcement Directorate. [44]

But the provision of Sections 167 of the Code will be applicable during investigation or enquiry under the *FERA* and the *Customs Act, 1962* and the Magistrate can remand

such accused or release the accused on bail as there is no provision contrary to s. 167 of the Code in any of the above statutes. [45]

(iii) *Cantonment Act, 1924*,— Section 267(2), relating to compounding of offence excluding contrary provisions in the Code. [46]

(iv) *Sections 5 of the Public Gambling Act* .—excluding the provisions of the Code relating to search. [47]

(v) *The Customs Act, 1962*, —excluding the provisions of the Code relating to investigation *e.g.*, s. 162; [48] s. 452 (*post*). [49]

(vi) *The West Bengal Premises Tenancy Act, 1997.*— Penal provisions under the Act are conferred in ss. 28 to 34. The Rent Controller exercises the power and Rule 17 of the West Bengal Premises Tenancy Rules 1999 provides that in case of enquiries relating to offences under the Act, the Rent Controller has to follow the procedure for trial of cases under the *Code of Criminal Procedure, 1973*. But no punishment has been provided in those penal sections and the only penalty is fine and the Rent Controller for imposing the penalty is deemed to be a Magistrate and also for holding enquiry. But he has no obligation to follow s *s. 200* to *204 Cr.P.C.* in dealing with the complaints under the above penal provisions. No summons is required to be issued and only show cause notice has to be issued.[50]

Penalty imposed by the Rent Controller is not treated as a conviction in a criminal offence. [51]

(vii) *Essential Commodities Act, 1955* .— Section 6A excludes the application of s s. 452 and 457 of the Code. [52]

(viii) *Prevention of Food Adulteration Act, 1954* .— It is a complete Code in itself with regard to manufacture and sale of food articles and contravention thereto. It has its own set of authorities which are authorised to conduct investigation, search, seizure and/or launch a conduct prosecution. The police has no power to investigate into any of the offences under the above Act . So, action of the Police in respect of any offence under the Act is without jurisdiction. [53]

(ix) *Drugs and Cosmetics Act* .— The Act makes out special offence and provision for its enquiry and prosecution. The procedure of this Act has also to be followed in derogation to procedure as prescribed under the *Code of Criminal Procedure*.[54]

5. But in matters with respect to which the special Act is *silent*, the general law, *i.e.*, the provisions of the *CrPC* will apply.[55] Thus—

(i) *The Immoral Traffic (Prevention) Act, 1956*, does not bar a Magistrate from taking cognizance of an offence under the Act upon the complaint of a Magistrate or a private party. [56]

(ii) As no special procedure is prescribed for the trial of offences the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* the Special Courts constituted under the Act for the trial of offences under the Act who are Sessions Judges cannot take cognizance of offences unless the case under the Act is committed to him by the committing Magistrate.[57]

(iii) *The U.P. Panchayat Raj Act, 1947* , makes certain offences cognizable by the Panchayat Adalat to the exclusion of the Courts of general jurisdiction. But the Act applies only to residents of the State. Hence, it cannot operate as a bar to cognizance taken by a Magistrate appointed under the *CrPC* of an offence in which some of the accused were non-residents of the State.[58]

(iv) *Sections 624 of the Companies Act, 1956* , only mentions the person through whom the appeal is to be presented and does not deal with the right to appeal to High Court against acquittal, which is governed by s. 378 of the Code [*old* s. 417]. [59] , [60]

(v) *Sections 7(1)(b) of the Essential Commodities Act, 1955* , deals with the forfeiture of property for contravention of the Licensing Order. But there is no provision to deal with the case where there is no claimant to the property. Hence, in the latter case, s. 452(1) [*old* . s. 517(1)] of the Code is applicable. [61] If, however, the accused is the claimant and it is found that the goods belonged to him, it should be returned to him. [62]

(vi) For the same reason, a Special Judge, trying a case under the *Prevention of Corruption Act* , 1947, has jurisdiction to order confiscation of the property which formed the subject-matter of the charge, under s. 452(1) of the Code, since that special act is silent on the question of confiscation. [63]

(vii) The provisions of the Code relating to 'complaint' and investigation shall apply to proceedings under the *Dowry Prohibition Act* , 1961. [64]

(viii) A person other than the Registrar may make a complaint with respect to offences *other than* under ss. 81, 82, 83. [65]

(ix) There is nothing in the *Drugs and Cosmetics Act* , 1940, to override the general provisions in s. 29(1) of the Code. [66]

(x) In the absence of any special provisions in the *Criminal Law Amendment Act* , 1952, the provisions of the Code regarding investigation and trial shall apply to offences under that Act. [67]

(xi) By reason of *s. 51 of the Narcotic Drugs Act, 1985* , the provisions of the Code shall apply in so far as they are not inconsistent with the provisions of *Narcotic Drugs and Psychotropic Substances Act, 1985* , to all warrants issued and arrest, searches, seizures made under the said Act. [68]

Thus, s *s. 100* and *165* of the *CrPC* , which are not inconsistent with the provisions of the *NDPS Act* , are applicable for effecting search, seizure or arrest under that

Act.[69]

If the Police, while carrying out searches in course of investigation of *other* offences discovers any substance covered by the *N.D.P.S. Act*, the question of complying with the provisions of that Act prior to *that stage would not* arise. But thereafter, the relevant provisions of that Act would be attracted and the *further* steps shall have to be taken in accordance with the provisions of that Act (para 7). [70]

Relating to bail under *Narcotic Drugs and Psychotropic Substances Act, 1985*, the provisions of *s. 439 Cr.P.C.* is subject to the provisions of s. 37 of the Act. So, without complying of s. 37(1)(b) of the Act granting of bail by the High Court was not proper.[71]

However, for trial of offences under *Sections 138 of the Negotiable Instruments Act, 1881*, the Court can, in its discretion, take recourse to *s. 219 Cr.P.C.* relating to joinder of charges.[72]

4. 'Offences under any other law'.—

These words refer to a law other than the *IPC* which creates an offence. Hence, where an offence exists before an enactment, it cannot be said to come under the above expression. An instance to the point is the inherent power of the High Court and the Supreme Court to punish for contempt as a Court of record, [73] which exists independently of any law. [74] [As to contempts of other Courts, see under s s. 345-346,*post*]. 'Law' and 'enactment' include an Ordinance, but not statutory rules, [75] unless they are a part of the enactment, according to the provisions of the Act itself. [76]

5. 'According to the same provisions'.—

These words refer to the provisions of the Code, as mentioned in sub-section (1), and not to the provisions of 'other laws'. [77]

6. Trial of offences under I.P.C. by Special Court trying offences under Prevention of Corruption Act. 1988.—

There are several accused to be tried by the Special Court constituted under the *Prevention of Corruption Act, 1988*. But the appellant accused is not charged under the *Prevention of Corruption Act, 1988* but under ss. 420 and 120B/420 I.P.C. But other accused are also charged under the offences under the *Prevention of Corruption Act, 1988*. Applying s *Sections 3* and *4* of the *Prevention of Corruption Act, 1988* and s *s. 220* and *223* *Cr.P.C.*, the appellant and his co-accused could be jointly tried by Special

Judge appointed under *P.C. Act* .[78]

7. Applicability of the Code in Special statutes.—

It is clear that the procedure of the Code will be applicable to the special statutes. When that is the irresistible conclusion following from the necessary implication of the special statute [79] . On interpreting the words 'otherwise dealt with' in s. 4, it is held by the Supreme Court that in the absence of contrary provision in any of other law, the provision of the Code shall prevail. [80]

Jurisdiction of the Criminal Court under s. 4 of the Code is comprehensive and exhaustive. So, even if a Court of limited jurisdiction is created by any special statue under the *Delhi Municipal Corporation Act* , but no special machinery has been created by the Act, jurisdiction of the Judicial Magistrate or Metropolitan Magistrate in the Metropolitan area to try offences under the above Act is not excluded.[81]

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13 *Vishal Agrawal v. Chhattisgarh State Electricity Board,* *2014 (1) MLJ (Crl) 489* [LNIND 2014 SC 62] : 2014 (1) SCALE 660 [LNIND 2014 SC 62].

14 *Directorate of Enforcement v. Deepak Mahajan,* AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1999 SCC (Cri) 785 : 1994 Crlj 2269.

15 *State of M.P. v. Rameshwar Rathod,* AIR 1990 SC 1849 [LNIND 1990 SC 318]: 1990 Crlj 1756.

16 *State of Punjab v. Balbir Singh,* AIR 1994 SC 1872 : (1994) 3 SCC 299 : 1994 SCC (Cri) 634 [LNIND 2004 SC 1094] : 1994 Crlj 3702.

17 *Jeewan Kumar Raut v. CBI,* (2009) 7 SCC 526 [LNIND 2009 SC 1418] : (2009) 3 SCC 475 [LNIND 2008 SC 2430](Cri) : AIR 2009 SC 2763 [LNIND 2009 SC 1418].

18 *Khatri* *v.* *State* *of* *Bihar,*
(1981) Crlj 597
AIR 1981 SC 1068
LNIND 1981 SC 146
(1981) 3 SCR 145
LNIND 1981 SC 146
(para 3) : [ ]: [ ].

19 *Bhim* *Sen* *v.* *State* *of* *U.P.,*
AIR 1955 SC 435
LNIND 1955 SC 22
(1955) 1 SCR 1444
LNIND 1955 SC 22
1955 Crlj 1010
[ ]: [ ] : .

20 *Bhim* *Sen* *v.* *State* *of* *U.P.,*
AIR 1955 SC 435
LNIND 1955 SC 22
(1955) 1 SCR 1
LNIND 1954 SC 52
1955 Crlj 1010
[ ]: [ ] 444 : .

21 *Bhim* *Sen* *v.* *State* *of* *U.P.,*
AIR 1955 SC 435
LNIND 1955 SC 22
(1955) 1 SCR 1
LNIND 1954 SC 52
1955 Crlj 1010
[ ]: [ ] 444 : .

22 *Bhim* *Sen* *v.* *State* *of* *U.P.,*
AIR 1955 SC 435
LNIND 1955 SC 22
(1955) 1 SCR 1
LNIND 1954 SC 52
1955 Crlj 1010
[ ]: [ ] 444 : .

23 *Barsay* *v.* *State* *of* *Bombay,*
AIR 1961 SC 1762
LNIND 1961 SC 196
(1962) 2 SCR 195
LNIND 1961 SC 196
[ ](1762-63, paras 18-20) : [ ].

24 *Barsay* *v.* *State* *of* *Bombay,*
AIR 1961 SC 1762
LNIND 1961 SC 196
(1962) 2 SCR 195
LNIND 1961 SC 196
[ ](1762-63, paras 18-20) : [ ].

25 *Bhim* *Sen* *v.* *State* *of* *U.P.,*
AIR 1955 SC 435
LNIND 1955 SC 22
(1955) 1 SCR 444
1955 Crlj 1010
[ ]: : .

26 Cf. *Benodri* *Lal* ,
(1943) FCR 96
AIR 1933 Cal 145
; *Legal Remembrancer v. Raisalle,* .

27 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

28 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

29 *Antulay v. Ramdas,*
AIR 1984 SC 718 [
LNIND 1984 SC 42](para 16) :
1984 Crlj 647 .

30 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

31 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

32 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

33 *Antulay v. Ramdas,*
AIR 1984 SC 718 [
LNIND 1984 SC 42](para 16) :
1984 Crlj 647 .

34 *Murlidhar v. State of Maharashtra,*
(1978) Crlj 70 (Bom) .

35 *Vishwa v. Poddar,*
AIR 1984 SC 5 [
LNIND 1983 SC 277](para 4) :
(1983) 4 SCC 701 [
LNIND 1983 SC 277] :
1984 Crlj 1 .

36 *R.P. Kapoor v. Pratap Singh,*
(1964) 1 Crlj 224 :
(1964) 4 SCR 204 [
LNIND 1963 SC 180] :
AIR 1964 SC 295 [
LNIND 1963 SC 180].

37 *Gangulla Ashok v. State of A.P.,*
AIR 2000 SC 740 [
LNIND 2000 SC 185]:
(2000) 2 SCC 504 [

LNIND 2000 SC 185] :
2000 Crlj 819 .

38 *Attiq-Ur-Rahaman v. Municipal Corporation of Delhi,*
AIR 1996 SC 956 : (1996) 3 SCC 37 :
1996 SCC (Cri) 457 :
1996 Crlj 1997 :
AIR 1996 SC 1267 .

39 *State of Punjab v. Balbir Singh,*
AIR 1994 SC 1872 : (1994) 3 SCC 299 :
1994 SCC (Cri) 634 [
LNIND 2004 SC 1094] :
1994 Crlj 3702 .

40 *Delhi Administration v. Ram Singh,*
AIR 1962 SC 63 67 : (1962) 2 SCR 694 :
(1962) 2 Crlj 106 .

41 *Lajpat v. State,*
(1983) Crlj 888 (paras 18, 22, 36) Del.

42 *Basdeo v. Badal,* 49 All 188.

43 *Tara v. State,*
AIR 1965 All 372 .

44 *CBI v. State of Rajasthan,*
AIR 1996 SC 2402 [
LNIND 1996 SC 1008]:
(1996) 9 SCC 735 [
LNIND 1996 SC 1008] :
1996 SCC (Cri) 1090 [
LNIND 1996 SC 1012] :
1996 Crlj 3480 .

45 *Directorate of Enforcement v. Deepak Mahajan,*
AIR 1994 SC 1775 : 1994 Crlj 2269 :
(1994) 1 SCJ 599 :
(1994) 3 SCC 440 .

46 *K.E. v. Rajhumal,*
AIR 1947 Sind 128 .

47 *Ram Prasad* , in re,
AIR 1937 Nag 251 ; *Raghavalu* , in re,
AIR 1953 Mad 233 .

48 *Pukhraj v. Ganguly,*
AIR 1968 Bom 433 [
LNIND 1967 BOM 107](para 25); *Asstt. Collector v. Misrimal,*

(1977) Crlj 1551 (Mad) ; *Ruli v. Asstt. Collector,* (1986) Crlj 1631 (para 4) UP.

49 *Pukhraj v. Ganguly,* AIR 1968 Bom 433 [*LNIND 1967 BOM 107*](para 25); *Asstt. Collector v. Misrimal,* (1977) Crlj 1551 (Mad) ; *Ruli v. Asstt. Collector,* (1986) Crlj 1631 (para 4) UP.

50 *K.N. Singhdeo v. K. Shridharan,* 1985 (1) CHN 73 : 89 CWN 319 (A case under West Bengal Premises Tenancy Act, 1956).

51 *Prem Pathak v. Anita Ghosh,* 1992 (1) CHN 63 (a case under West Bengal Premises Tenancy Act, 1956).

52 *State v. Abdul,* AIR 1967 Mys 231 (paras 13-14).

53 *Satish Mishra v. State of Bihar,* 2007 Crlj NOC 190Pat .

54 *Satish Mishra v. State of Bihar,* 2007 Crlj NOC 190Pat .

55 *Bhim Sen v. State of U.P.,* AIR 1955 SC 435 [*LNIND 1955 SC 22*]: (1955) 1 SCR 1 [*LNIND 1954 SC 52*] 444 : 1955 Crlj 1010 .

56 *Shakila v. State,* AIR 1961 All 633 635 [*LNIND 1961 ALL 35*].

57 *Jyoti Arora v. State of Hariyana,* 1998 Crlj 2662 (P&H) .

58 *Bhim Sen v. State of U.P.,* AIR 1955 SC 435 [*LNIND 1955 SC 22*]: (1955) 1 SCR 1 [*LNIND 1954 SC 52*] 444 : 1955 Crlj 1010 .

59 *Nilratan v. Lakshmi Narayan,* AIR 1965 SC 1 4 , (Re. *s. 22A of the Forward Contracts (Regulation) Act* , 1954; as to search and seizure see *Bullion Exchange v. Froward Market Commission,* AIR 1968 All 338 [*LNIND 1967 ALL 68*]). *See* now, *Director v. Deepak,* (1994) 1 SCJ 599 .

60 *Asstt. Registrar v. Standard Paint Works,* (1971) 1 SCWR 389 (392-93).

61 *Gour v. State,* AIR 1968 Orissa 67 ; *Paul v. State of Kerala,* AIR 1960 Ker 235 [*LNIND 1959 KER 226*].

62 *Puskar v. State of M.P.,* AIR 1953 SC 508 : 1954 Crlj 153; see also *Bagga v. A.I.R.,* AIR 1969 Bom 302 [*LNIND 1968 BOM 136*][*Copyright Act, 1957*].

63 *Mirza v. State of U.P.,* (1983) Crlj 154 (para 2).

64 *Vishwa v. Poddar,* AIR 1984 SC 5 [*LNIND 1983 SC 277*](para 4) : (1983) 4 SCC 701 [*LNIND 1983 SC 277*] : 1984 Crlj 1 .

65 *Vishwa v. Poddar,* AIR 1984 SC 5 [*LNIND 1983 SC 277*](para 4) : (1983) 4 SCC 701 [*LNIND 1983 SC 277*] : 1984 Crlj 1 .

66 *Ravindra v. Union of India,* (1984) Crlj 1321 (All) .

67 *Antulay v. Ramdas,* AIR 1984 SC 718 [*LNIND 1984 SC 42*](para 16) : 1984 Crlj 647 .

68 *State of Punjab v. Balbir,* (1994) 3 SCC 299 (paras 4,5, 10) : AIR 1994 SC 1872 : 1994 Crlj 3702 : (1994) 1 Crimes 753 [*LNIND 2016 PNH 7348*].

69 *State of Punjab v. Balbir,* (1994) 3 SCC 299 (paras 4,5, 10) : AIR 1994 SC 1872 : 1994 Crlj 3702 : (1994) 1 Crimes 753 [*LNIND 2016 PNH 7348*].

70 *State of Punjab v. Balbir,* (1994) 3 SCC 299 (paras 4,5, 10) : AIR 1994 SC 1872 : 1994 Crlj 3702 : (1994) 1 Crimes 753 [*LNIND 2016 PNH 7348*].

71 *State of M.P. v. Kajad,* (2001) 7 SCC 673 [*LNIND 2001 SC 1949*] : AIR 2001 SC 3317 [*LNIND 2001 SC 1949*]: 2001 Crlj 4240 ; *State v. Syed Amir Hasnani,* (2002) 10 SCC 88 : 2003 SCC (Cri) 1690 ; *Narcotic Control Bureau v. Dilip,* AIR 2004 SC 2950 [*LNIND 2004 SC 361*]: (2004) 3 SCC 619 [*LNIND 2004 SC 361*] : 2004 Crlj 1815 : (2004) 1 Crimes 429 .

72 *K.P. Bhagvagar v. State of Gujarat,* 2007 Crlj 3958 Guj DB .

73 *Sukh Dev v. Chief Justice,* (1954) SCR 454 [*LNIND 1953 SC 108*] : AIR 1954 SC 186 [*LNIND 1953 SC 108*]: 1954 Crlj 460 ; *State of U.P. v. Radheshyam,* (1983) Crlj 1153 (paras 12-15) All.

74 *Sukh Dev v. Chief Justice,* (1954) SCR 454 [*LNIND 1953 SC 108*] : AIR 1954 SC 186 [*LNIND 1953 SC 108*]: 1954 Crlj 460 ; *State of U.P. v. Radheshyam,* (1983) Crlj 1153 (paras 12-15) All.

75 *Gobardhan v. Doolichand,* 25 CWN 661.

76 *Sen Gupta* , AIR 1953 Cal 414 [*LNIND 1952 CAL 204*]][See Author's *Administrative Law* , Latest Edition].

77 *State of Karnataka v. Seenappa,* (1979) Crlj NOC 11(Kant) .

78 *Vivek Gupta v. Central Bureau of Investigation,* (2003) 8 SCC 628 [*LNIND 2003 SC 835*] : (2003) 4 Crimes 174 : 2004 SCC (Cr) 51.

79 *State of M.P v. Rameshwar,* AIR 1990 SC 1849 [

LNIND 1990 SC 318]:
1990 Crlj 1756 :
(1990) 4 SCC 21 [
LNIND 1990 SC 318].

80 *Gangula Ashok v. State of A.P.,*
AIR 2000 SC 740 [
LNIND 2000 SC 185]:
(2000) 2 SCC 604 :
2000 Crlj 819 .

81 *Attiq-ur-Rahaman v. Municipal Corporation of Delhi,*
AIR 1996 SC 958 : (1996) 3 SCC 37 :
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1996 Crlj 1997 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER I

PRELIMINARY

S. 5

Saving.

Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

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1. Scope of S. 5.—

This section reproduces the later part of s. 1(2) of the *old* Code.

It means, in short, that when a special law creates offences, it may also crease a special jurisdiction, power or procedure [82] for dealing with them, and such special procedure shall not be invalid for being inconsistent with the Code. [83] If, however, the special law provides a special procedure only for *some* matters, the provisions of the Code shall apply as regards those matters on which the special law is *silent* .

There are three components in the saving Clause of s. 5. They are as follows:

(1) the procedural Code generally governs the matters covered by it;

(2) if a special or local law is in force, covering the same area, the latter law will over the Code;

(3) but if there is a specific provision to the contrary, then that will override the special or local law. [84]

2. 'In the absence of any special provision to the contrary'.—

The application of a special or local law may, however, be excluded by any specific provision of the Code *to the contrary* . [1] Section 27 of the Code is not such a specific provision. What it provides is that a child under the age of 16 years may be *tried* by a Chief Magistrate or any Court specially empowered under the Children Act, 1960. This is not inconsistent with s. 21 of the Haryana Children Act, 1974, which provides that 'notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment . . . .' [2]

On the other hand, the following provisions of the Code are such specific provisions:

(i) s. 125 as against the Shariat Law; [3]

(ii) s. 433A as against any local law relating to commutation of sentences; [4]

(iii) s. 12(2) as regards powers of an Additional Judicial Magistrates. [5]

3. Special or local law.—

It means enacted law as distinguished from family or customary law. [6] While a 'local law' is a law which is confined, in its operation, to a particular part of the territory of India, a 'special law', as defined in s. 41 of the I.P.C., means a law applicable to a particular subject. The following are instances of Acts coming under the above expression—

(i) The Coroner's Act . [7]

(ii) The *Evidence Act* . [8]

(iii) The *Cattle Trespass Act* .[9]

(iv) The Bihar Land Encroachment Act, 1950. [10]

(v) The Bombay Village Panchayats Act, 1935. [11]

(vi) The Mysore Sales Tax Act (s. 22). [12]

(vii) The Panchayat Acts of the different States. [13]

(viii) The *Indian Divorce Act* . [14]

(ix) The Army, Navy or *Air Force Act* s;[15] *Border Security Force Act* .[16]

(x) The *Essential Commodities Act, 1955* .[17]

(xi) The *Drugs and Cosmetics Act, 1940* . [18]

(xii) The Haryana Children Act, 1974; [19] the U.P. Children Act, 1952. [20] West Bengal Children Act, 1959. [21]

(xiii) The *Prisons Act, 1894* . [22]

(xiv) The Terrorist Affected Areas (Special Court) Act, 1984.

4. 'Special jurisdiction'.—

In the absence of any specific definition, these words, in the Code, must be taken at their natural meaning, *i.e.* , a jurisdiction relating to a special subject which is conferred by special law. [23] , [24] It would thus include—

(i) The inherent power of the High Court or the Supreme Court to punish for its contempt as a Court of record. [25] It follows that the Supreme Court has no power to transfer a contempt proceeding from one High Court to another in the exercise of its power under s. 406 (*old* s. 527) of the Code. [26]

For the same reason, the jurisdiction under *Sections 5 of the Contempt of Courts Act* would be excluded from the procedural provisions of the Code.[27]

(ii) The jurisdiction under s s. 20-23 of the *Cattle Trespass Act* .[28]

5. 'Special Power'.—

Instances of such powers are to be found in s. 29 of the Letters Patent which empowers a High Court to transfer criminal cases before itself. [29]

6. 'Special Procedure'.—

Sections 6- of the 10 of the *Criminal Law Amendment Act* , 1952, for instance, lay down a special procedure for the trial of the offences specified in that Act, *e.g.* , under ss. 161, 165 or 165A of the *IPC* ; *Sections 5(2) of the Prevention of Corruption Act* , 1947.[30] The Special Judge has exclusive jurisdiction to try these offences. [31]

See also the West Bengal Children Act . [32]

7. 'Specific provision to the contrary'.—

1. Even in the case of a special or local law or a law laying down a special procedure, power or jurisdiction, the provisions of the Code may be applicable if there is a specific provision to that effect either in the Code itself or in the special law [33] which, however, must be explicit and certain (as distinguished from 'by implication'). [34]

Strictly construed in a case involving extradition *s. 41(1)(g) Cr.P.C.* may not have any application. *Section 41(1)(g) Cr.P.C.* clearly contemplates the power of the police to arrest anyone under any law relating to extradition, thereby contemplating the exercise of powers subject to the provisions of the *Extradition Act, 1962* . Thus, the provisions of the Code are subject to those under the *Extradition Act* .[35]

Instances to the point are the provisions of—

(a) The Code itself, such as s. 12(2)*old* s. 10(2), [36] s. 162(1) which overrides s *s. 145* and *157* of the *Evidence Act* , [37] Sections 433A relating to remission will prevail over any contrary provisions in Rules made under the *Prisons Act, 1894* . [38]

(b) S. 65 of the Haryana Children Act, 1974, *excludes* the application of s. 29B of the Criminal Procedure Code , 1898.[39]

(c) Sections 172 of the Sea *Customs Act* , 1878, attracts the provisions of the Code to search warrants issued under the Act. [40]

(d) *Sections 19(3) of the Foreign Exchange Regulation Act* , 1947, provides that the provisions of the Code "relating to searches . . . . shall, so far as the same are applicable, apply to searches under this sub-section". In the result, ss. 99, 100 (*old* ss. 101, 102 and 103) of the Code are applicable to searches made under s. 19(3) of this Act; but not ss. 93-94 (*old* ss. 96 and 98) because these matters are dealt with in s. 19(3). [41] Similarly, nothing in the Code relating to the return of the documents seized would apply because that matter is dealt with in s. 19A of that Act . [42]

(e) As there is no specific provision in the *Army Act* similar to *s. 433A Cr.P.C.* contrary to it, s. 433A would operate in the field.[43]

(f) The Drugs, and cosmetics Act, 1940 does not contain special procedure for trial of offences but the maximum punishment under s. 27(a) of the Act being ten years, such offence is triable by the Sessions Judge. [44]

2. But in the absence of such specific provision, nothing in the Code will affect any special or local law. Thus,—

(i) The provisions of s. 125 (*old* s. 488), *CrPC* , shall have no effect on *Sections 44 of the Indian Divorce Act* .[45]

(ii) S. 162(2) of the Code specifically saves s. 27 and 32(1) of the *Evidence Act* .

(iii) S. 428 of the *new* Code has no application to a person sentenced by a Court martial under the *Navy Act* .[46]

(iv) S. 457(1) of the *new* Code has no application to a commodity seized under an order under the *Essential Commodities Act, 1955* , to view of s. 6A of that Act. [47]

(v) The power to grant anticipatory bail under Sections 438 of the Code shall be exercisable by the Special Court under the *Essential Commodities Act* , and not by the Court of Session. [48]

(vi) *Sections 197 Crpc* would be excluded by the provisions of *Prevention of Corruption Act* , 1947.[49]

8. Juvenile Justice Act, 1986.—

The law relating to Juvenile, both negligent and delinquent is governed by that Juvenile Justice Act, 1986. It is enforced as a special statute. Jurisdiction of all other Courts are ousted and it is solely conferred on the Juvenile Court constituted under the Juvenile Justice Act and in absence of such Court by the concerned Judicial Magistrate First Class. The trial of juvenile delinquent, whatever may be the offence, shall be tried in accordance with that Act. [50]

9. U.P. Children Act .—

When the accused claims to be a child and to be governed by a particular Children Act, such plea has to be raised at the early stage. When for the first time before the Supreme Court a certificate was produced that the accused was the child on the date of occurrence and triable under the U P Children Act, such certificate cannot be entertained at such a late stage. [51]

10. Exceptions to the law of limitation under the new Code.—

It is somewhat striking that even before the *new* Code could come into force, Parliament had to enact a law, to engraft exceptions to the rule of limitation, introduced for the first time, in s. 468 of the *new* Code, that a criminal proceeding would be barred by limitation on the expiry of the period specified in sub-section (2) of that section (as may be applicable to the case).

"This Act,—the *Economic Offences (Inapplicability of Limitation) Act, 1974* (Act 12 of 1974),—provides that the rule of limitation laid down in Chapter XXXVI of the Code shall *not* be applicable to—

(i) any offence punishable under any of the enactments specified in the Schedule; or

(ii) any other offence, which under the provisions of that Code, may be tried along with such offence."

Hence, there will be no limitation for the institution of criminal proceedings or for taking cognizance of offences, under the following Acts, which are mentioned in the Schedule to this Act 12 of 1973—

Capital Issue (Control) Act 1947; Central Excises and Salt Act, 1944; *Central Sales Tax Act, 1956* ; *Companies (Profits) Surtax Act, 1964* ; *Customs Act, 1962* ; Emergency Risks (Factories) *Insurance Act* , 1962; Emergency Risks (Goods) *Insurance Act* s, 1962, 1971; Emergency Risks (Undertakings) *Insurance Act* , 1971; *Foreign Exchange Regulation Act* s, 1947, 1973; *General Insurance Business (Nationalisation) Act, 1972* ; Gift Tax Act, 1958; Gold (Control) Act, 1968; Imports and Exports (Control) Act, 1947; Income Tax Acts, 1922, 1961; Medicinal and Toilet Preparations (Excise) Duties Act, 1955; Stamp Act, 1899; Wealth Tax Act, 1957.

11. Applicability of the Limitation Act .—

1. The general rule, embodied in the *old* Code, was that the law of limitation does not apply to criminal proceedings. [52] Thus, there was no limitation for filing a complaint, [53] though inordinate delay might raise doubts as to its *bona fides* . [54]

New Code. —A revolutionary change, on this point, has been introduced in the *new* Code, by inserting Chapter XXXVI—'Limitation for taking cognizance of certain offences' [ss. 467-473], at the instance of the Joint Committee on the Bill of 1970 (Com. 1-5, pp. XXX-XXXI, on ss. 467-473). These sections, which will be more fully explained in their proper places, provide definite periods of limitation for the institution of criminal proceedings, whether by complaint, information or police-report, by debarring a Court from taking cognizance of an offence beyond the specified period, *e.g.,* 6 months is the case of an offence punishable with fine only; 1 year in the case of an offence punishable with imprisonment not exceeding 1 year; 3 years in the case of an offence punishable with imprisonment for a term between 1 year and 3 years [s. 468]. No limitation has, however, been imposed for the more serious offences which are punishable with imprisonment exceeding 3 years. [55]

The provisions of this Chapter are self-contained, as they specify the date of commencement of the limitation under different contingencies, exclusion of time in certain cases and also embodies [Sections 473] the principle embodied in *s. 5 of the Limitation Act, 1963* , namely, that the aforesaid bar of limitation may be condoned by the Court taking cognizance where "the delay has been properly explained or it is necessary so to do in the interests of justice". [56] Thus, there is no scope for invoking any provision of the *Limitation Act* in cases where the provisions of the *new* Chapter XXXVI of the Code are applicable.

2. Some of the provisions in the Code, however, prescribe special periods of limitation for certain proceedings, *e.g.* , s. 378(5) [*old* s. 417(4)], special leave to appeal against acquittal by complainants; s. 125(3),*Prov.* 1 [*old*

s. 488(3), *Prov.* 2], application for recovery of maintenance; s. 84(4) [*old* s. 88(6D)], suit to establish right to property attached.

The question is whether the general provisions of the *Limitation Act* are applicable to the foregoing provisions.

There was no doubt as to the applicability of s *s. 4* , 9-18 and *22* of the *Limitation Act* , 1908. The question arose as to the applicability of the other sections by reason of *Sections 29(2)(b) of the Limitation Act* of 1908, which provided that other provisions would not apply where any period of limitation has been prescribed by any special or local law.

The conflict was set at rest by the decision of the Supreme Court [57] holding that the Code is no doubt a general law regulating the procedure in criminal trial generally, but, the provisions specifying the bar of time for particular classes of cases amount to 'special law' and so s. 5 would not apply in cases of application under s. 417(3)(4) of the *old* Code [*new* Sections 378(5)] . The *Limitation Act*

of 1963 has changed the position. Section 29(2) of this Act provides—

"Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the schedule, the provisions of s. 3 shall apply, as if such periods were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in ss. 4 to 25 (inclusive) shall apply only in so far as, and to the extent to which, they are expressly excluded by such special or local law".

It is now clear that *Sections 5 of the Limitation Act, 1963* [*old* s. 5] *shall* apply to extend the period specified in s. 178(5) of the *new* Code, because its application is not expressly barred by anything in the Code,—taking the provision in s. 378(5) to be a 'special law' as held by the Supreme Court. [58] For the same reason, *Sections 12(2) of the Limitation Act, 1963* , would also be applicable to an application under s. 378(5) of the Code. [59]

12. Applicability of Art. 254 of the Constitution.—

Since s. 5 of the Code itself gives way to a special law, there is no room for application of

Art. 254 of the Constitution . [60]

13. Ss. 4(2) and 5 of the Code.—

Section 5 is *not* in derogation of s. 4(2). Section 5 only relates to the *extent* of application of the Code in the matter of territorial and other *jurisdiction* , but does not nullify the effect of s. 4(2).

In the result, in the absence of (a) any contrary provision in a Special Act or (b) any special provision excluding jurisdiction or applicability of the Code, the provisions of the Code will be applicable to the area of 'investigation, inquiry and trial' of the offences included in the *Foreign Exchange Regulation Act, 1973* , and the *Customs Act, 1962* ,—including the operation of s. 167 of the Code.[61]

Ss. 4(2) and 26(b) of the Code. The combined effect of these two provisions is that the offence complained of under any Act shall be investigated, inquired into or trial according to the provisions of this Code where the enactment which creates the offence, indicates *no special procedure* . [62]

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82 *Maruram v. Union of India,* AIR 1980 SC 2147 [*LNIND 1980 SC 446*](paras 33-36) : (1981) 1 SCC 107 [*LNIND 1980 SC 446*] : 1980 Crlj 1440 .

83 *Rhotas v. State of Haryana,* AIR 1979 SC 1838 (para 6) : (1980) 4 SCC 799 3 : 1979 Crlj 1382 .

84 In re, Director General of Prosecution 1993 Crlj 760 Ker DB ; *Anand Singh v. Union of India,* 1986 Crlj 563 Cal ; *Maru Ram v. Union of India,* AIR 1980 SC 2147 [*LNIND 1980 SC 446*]: (1981) 1 SCC 107 [*LNIND 1980 SC 446*] : 1980 Crlj 1440 .

1 *Raghubir v. State of Haryana,* (1918) Crlj 1497 (para 9) : AIR 1981 SC 2037 [*LNIND 1981 SC 380*].

2 *Rhotas v. State of Haryana,* AIR 1979 SC 1838 (para 6) :

(1980) 4 SCC 799 3 : 1979 Crlj 1382 ; *Raghubir v. State of Haryana,* (1918) Crlj 1497 (para 9) : AIR 1981 SC 2037 [*LNIND 1981 SC 380*].

3 *Isak v. Nyamatbi* , Crlj 1180 (Bom) (para 14); *Ahmed v. Shah Bano,* AIR 1985 SC 945 [*LNIND 1985 SC 145*]: (1985) 2 SCC 556 [*LNIND 1985 SC 145*] : 1985 Crlj 875 . [superseded by the *Muslim Women (Protection of Rights on Divorce) Act, 1986*].

4 *Maruram v. Union of India,* AIR 1980 SC 2147 [*LNIND 1980 SC 446*](paras 33-36) : (1981) 1 SCC 107 [*LNIND 1980 SC 446*] : 1980 Crlj 1440 .

5 *Central Talkies v. Dwarka,* AIR 1961 SC 606 [*LNIND 1961 SC 20*](para 8) : (1961) 1 Crlj 740 : (1961) 3 SCR 495 [*LNIND 1961 SC 20*].

6 *Thillu v. Saukuni,* 37 MLJ 361.

7 *R. v. Jogeswar,* 31 Cal 1.

8 *R. v. Faujdar,* AIR 1933 All 440 442 .

9 *Budhan v. Issur,* 34 Cal 926.

10 *Brij Bhukan v. S.D.O.,* AIR 1955 Pat 1 .

11 *State of Mysore v. Gurupadappa,* AIR 1961 Mys. 257

12 *State of Mysore v. Ismail,* AIR 1958 Mys 143

13 *Bhim Sen v. State of U.P.,* AIR 1955 SC 435 [*LNIND 1955 SC 22*]: 1955 Crlj 1010 : (1955) 1 SCR 1444 [*LNIND 1955 SC 22*].

14 *James v. Rowland,*
AIR 1959 Cal 703 [
LNIND 1957 CAL 109].

15 *Chandrasekaran v. Govt. of India,*
(1977) Crlj 677 (Mad) ; *Jesuratnam v. Chief of Air Staff,*
(1976) Crlj 65 (Del) ; *Subramanium v. Armares Workshop,*
(1979) Crlj 617 (Ker) .

16 *Anand v. Union of India,*
(1986) Crlj 563 (paras 7-8) Cal-DB.

17 *Bharat v. State of U.P.,*
(1975) Crlj 890 (All) .

18 *Supdt. of Legal Affairs v. Mangal,*
(1976) CHN 6 (para 9); *Ranjit v. State of W.B.,*
(1986) Crlj 1847 (para 6) Cal.

19 *Rhotas v. State of Haryana,*
AIR 1979 SC 1838 (para 6) :
(1980) 4 SCC 799 3 :
1979 Crlj 1382 .

20 *State of U.P. v. Phoolwati,*
(1979) Crlj 111 (NOC) (All) .

21 *Robin v. State,*
(1986) Crlj 381 (Cal) .

22 *Maru Ram v. Union of India,*
AIR 1980 SC 2147 [
LNIND 1980 SC 446](paras 19, 38) :
(1981) 1 SCR 1196 [
LNIND 1980 SC 446] :
(1981) 1 SCC 107 [
LNIND 1980 SC 446] :
1980 Crlj 1440 .

23 *Sukh Dev v. Chief Justice,*
(1954) SCR 454 [
LNIND 1953 SC 108] :
AIR 1954 SC 186 [
LNIND 1953 SC 108]:
1954 Crlj 460 ; *State of U.P. v. Radheshyam,*
(1983) Crlj 1153 (paras 12-15) All.

24 *Kapur v. State of T.N.,*
AIR 1972 SC 858 [
LNIND 1972 SC 96]:
(1972) 2 SCR 417 :
1972 Crlj 643 :

(1972) 1 SCC 70 [
LNIND 1971 SC 560].

25 *Sukh Dev v. Chief Justice,*
(1954) SCR 454 [
LNIND 1953 SC 108] :
AIR 1954 SC 186 [
LNIND 1953 SC 108]:
1954 Crlj 460 ; *State of U.P. v. Radheshyam,*
(1983) Crlj 1153 (paras 12-15) All.

26 *Sukh Dev v. Chief Justice,*
(1954) SCR 454 [
LNIND 1953 SC 108] :
AIR 1954 SC 186 [
LNIND 1953 SC 108]:
1954 Crlj 460 ; *State of U.P. v. Radheshyam,*
(1983) Crlj 1153 (paras 12-15) All.

27 *State of U.P. v. Radhe Shyam,*
(1983) Crlj 1153 (para 17) All.

28 *Shama v. Lachu,* 23 Cal 300.

29 *Sitapathi* , 6 Mad 32.

30 Cf. *Asgarali v. State of Bombay,*
AIR 1957 SC 503 506 : 1957 Crlj 605.

31 *Barsay v. State of Bombay,*
AIR 1961 SC 1762 [
LNIND 1961 SC 196]:
(1962) 2 SCR 195 [
LNIND 1961 SC 196].

32 *Gopinath v. State of W.B.,*
AIR 1984 SC 237 [
LNIND 1983 SC 331](paras 7, 9) : (1984) Supp SCC 228 :
1984 Crlj 168 .

33 *Devsingh v. State of M.P.,*
(1978) Crlj 585 (para 7) MP (FB).

34 *Maru Ram v. Union of India,*
AIR 1980 SC 2147 [
LNIND 1980 SC 446](para 36) :
(1981) 1 SCC 107 [
LNIND 1980 SC 446] :
1980 Crlj 1440 .

35 *Bhavesh Jayanti Lakhani v. State of Maharashtra,* [(2009) 9 SCC 551 *LNIND 2009 SC 1646*].

36 Cf. *Central Talkies v. Dwarka Prasad,* AIR 1961 SC 606 609 : (1961) 1 Crlj 740 : (1961) 3 SCR 495 [*LNIND 1961 SC 20*].

37 *Sheo Shankar* , AIR 1953 All 652 [*LNIND 1952 ALL 301*].

38 *Maru Ram v. Union of India,* AIR 1980 SC 2147 [*LNIND 1980 SC 446*](para 36) : (1981) 1 SCC 107 [*LNIND 1980 SC 446*] : 1980 Crlj 1440.

39 *Rhotas v. State of Haryana,* AIR 1979 SC 1838 (para 6) : (1980) 4 SCC 799 3 : 1979 Crlj 1382.

40 *Serajuddin v. Misra,* AIR 1962 SC 759 [*LNIND 1961 SC 363*](762-63) : (1962) 1 Crlj 692 ; *Nilratan v. Lakshmi,* AIR 1965 SC 1 [*LNIND 1964 SC 136*](4-5) : (1964) 7 SCR 724 [*LNIND 1964 SC 136*] : (1965) 1 Crlj 100.

41 *Nilratan v. Lakshmi,* AIR 1965 SC 1 [*LNIND 1964 SC 136*](4-5) : (1964) 7 SCR 724 [*LNIND 1964 SC 136*] : (1965) 1 Crlj 100.

42 *Maru Ram v. Union of India,* AIR 1980 SC 2147 [*LNIND 1980 SC 446*](para 36) : (1981) 1 SCC 107 [*LNIND 1980 SC 446*] : 1980 Crlj 1440.

43 *Union of India v. Sadha Singh,* (1999) 8 SCC 375 [*LNIND 1999 SC 951*] : AIR 1999 SC 3833 [*LNIND 1999 SC 951*]: 2000 Crlj 15.

44 *R.P. Arya v. Union of India,* 1984 Crlj 1321 All .

45 *Rowland v. Rowland,* AIR 1959 Cal 703 [*LNIND 1957 CAL 109*].

46 *Chandrasekaran v. Govt. of India,* (1977) Crlj 677 (Mad) ; *Anand v. Union of India,* (1986) Crlj 563 (para 9) Cal (DB) See, now, *Director v. Deepak,* (1994) 1 SCJ 599 (paras 124, 130, 135).

47 *Bharat v. State of U.P.,* (1975) Crlj 890 (All) .

48 *Pijush v. State,* (1985) Crlj 1664 (para 15) Cal (DB).

49 *State of W.B. v. Manmal,* (1977) Crlj 1164 ; *Rajinder v. State of Punjab,* (1982) Crlj 1718 (P&H) .

50 *Sarita Narayan Sawant, v. State,* 1990 Crlj 351 Bom .

51 *Hari Om v. State of U.P.,* 1993 SCC (Cri) 396 : 1993 Crlj 1383 : (1993) 1 Crimes 294 [*LNIND 1993 ALL 13*] : 1993 Supp (2) SCC 1.

52 *Nageshappa* , (1895) 20 Bom 540.

53 *Nageshappa* , (1895) 20 Bom 540.

54 *Sher Singh v. Jitendra,* 36 CWN 16 (27).

55 *Delhi Bottling Co. v. Municipal Corpn.,* (1979) Crlj 290 (para 12) Del.

56 *Delhi Bottling Co. v. Municipal Corpn.,* (1979) Crlj 290 (para 12) Del.

57 *Kousalla v. Gopal,* AIR 1964 SC 260 [*LNIND 1963 SC 350*]: (1964) 4 SCR 982 [*LNIND 1963 SC 350*] : (1964) 1 Crlj 152 .

58 *Kousalla* *v.* *Gopal,* [ ]: (1964) 4 SCR 982 : AIR 1964 SC 260 *LNIND 1963 SC 350* (1964) 1 Crlj 152 .

59 *Lala Ram v. Hari Ram,* (1969) II SCWR 768 (paras 4, 9).

60 *Rhotas* *v.* *State* *of* *Haryana,* (para 6) : 3 : AIR 1979 SC 1838 (1980) 4 SCC 799 1979 Crlj 1382 .

61 *Director* *v.* *Deepak,* (1994) 1 SCJ 549 (paras 124, 130, 136).

62 *Director* *v.* *Deepak,* (1994) 1 SCJ 549 (paras 124, 130, 136).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 6
Classes of Criminal Courts.

Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely—

(i) Courts of Session;

(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates.

1. Changes made by the new Code.—

(a) Abolition of Magistrates of the Third Class. (b) Separation of Judiciary from the Executive, by dividing Magistrates into two classes—Judicial and Executive.

2. Separation of the Executive from the Judiciary : Executive and Judicial Magistrates.—

The revised set-up of Criminal Courts and the allocation of magisterial functions between two categories of Magistrates, under the *new* Code, are intended to bring about separation of the Judiciary from the Executive, as far as possible.

As a consequence of the separation there will be two categories of Magistrates, namely, the Judicial

Magistrates and the Executive Magistrates [s. 6], the former being under the control of the High Court and the latter under the control of the State Government [s s. 9, 15, 22-23]. *Broadly speaking* , functions which are essentially judicial in nature will be the concern of the Judicial Magistrates while functions which are "police" or administrative in nature will be the concern of the Executive Magistrate.

(a) For performing magisterial functions allotted to the Executive [Cf. s. 3(4)], there will be, in each district, the District Magistrate, the Additional District Magistrate (where necessary), the Sub-divisional Magistrates and the other subordinate Executive Magistrates. These last ones will not be classified into First, Second and Third Class Magistrates; they will all be designed as Executive Magistrates [s. 20]; and Special Executive Magistrates [s. 21].

(b) On the judicial side, for each district (other than a Metropolitan area) there will be a Chief Judicial Magistrate [s. 12(1)] who will correspond to the District Magistrate on the Executive side. He will be a senior Magistrate whose important function will be to guide, supervise and control other Judicial Magistrate whose important function will be to guide, supervise and control other Judicial Magistrate in the district. He will himself try important cases (including cases where there are approvers) and will have powers to impose a sentence of imprisonment not exceeding seven years [s. 29(1)].

In addition to the Chief Judicial Magistrate, there will be Magistrate of the First Class and Magistrates of the Second Class on the judicial side, apart from Special Judicial Magistrates [s. 13]. Third Class Magistrates are considered unnecessary, [1] and have been abolished by the *new* Code. In determining the number of Courts of Magistrates and their location, the State Government is required to act in consultation with the High Court. The power to define local limits of jurisdiction is conferred on the Chief Judicial Magistrate, subject to the control of the High Courts [s. 14(1)]. The High Court has the power to designate certain Magistrates as Judicial Sub-divisional Magistrates for exercising specified powers of supervision [s. 12(3)].

Under the *old* Code, there were certain special arrangements in respect of the cities of Madras, Bombay and Calcutta, which are called Presidency-towns; magisterial functions, mostly of a judicial nature, were discharged by a special category of Magistrates called Presidency Magistrates. Usually, persons appointed to these posts had special qualifications or experience and are paid higher emoluments. Although the reasons for such special arrangements are historical, the system has been found useful in respect of such big cities, where crimes are sophisticated and the volume of work is heavy requiring quicker disposal of cases. It has since been extended to certain other cities by local law. Agreeing with the Commission, it was proposed not only to continue the system with some modifications but also to enable its extension by any State Government to other big cities within the State where the population is not less than one million (to be called Metropolitan areas) by means of a notification [s. 8(9)]. The existing designation of Presidency Magistrates will be changed to Metropolitan Magistrates [s. 16(1)].

Under the *old* Code, in Presidency-towns and certain other cities there were no District Magistrates and some of the functions of a District Magistrate were discharged by the Commissioner of Police and some by the Chief Presidency Magistrate. The Commission [2] recommended that this arrangement should be changed and these cities also should have District magistrates and Sub-divisional Magistrates like other places. This recommendation of the Commission was not approved by the Joint Committee, [3] but Government has implemented the Commission's report and the Bill of 1972 has been so passed by Parliament that a metropolitan area shall also have a District Magistrate [s. 20(1)] and Sub-divisional Magistrates to discharge executive functions [s. 20(4)].

3. A. Classes of Criminal Courts under the new Code.—

Criminal Courts are divided into the following categories by the *new* Code for the purpose of application of its different provisions:

1. *The High Courts*

Each of the States in India has a High Court, which stands at the head of the Judiciary in the State and all these High Courts possess appellate [s. 374(2)], reference and revisional jurisdiction [s. 395*et seq*] over the inferior Criminal Courts.

It has already been pointed out that under the *new* Code, the High Court shall have no Ordinary Original Criminal Jurisdiction, [4] *e.g.* , to try a sessions case in the Presidency-towns. The words 'High Courts', in the present section, therefore, refer to the extraordinary criminal jurisdiction [vide s. 374(1),*post*] or the Admiralty jurisdiction of the High Courts of Calcutta, Bombay and Madras, under Cl s. 24[5] and 33 of the Letters Patent, [6] and the jurisdiction to take over on transfer from any subordinate Criminal Court, for trial before the High Court itself under s. 407(1)(iv) [*old* s. 526(1)(iii)], apart from their jurisdiction as Courts of appeal or revision (Chapts. XXIX-XXX, *post*).

Under this *extraordinary* original criminal jurisdiction, for instance, the High Court shall be competent to try a case which has been brought before it by commitment by *any* Magistrate, which has been reserved by s. 26,*post* (notwithstanding the abolition of its *ordinary* original jurisdiction), [7] a sessions case arising within the jurisdiction of the High Court (*e.g.,* on the river Hooghly), which the City Sessions Court has no jurisdiction to try. [8]

The procedure to be followed by the High Court in this extraordinary jurisdiction, is that referred to in s. 474,*post* . [9]

2. *Sessions Courts*

Each State is divided into one or more sessions divisions and there is a Court of Session for each division presided over by a Sessions Judge appointed by the State Government. The State Government may also appoint Additional and Assistant Sessions Judges to exercise jurisdiction in one or more of such Session Courts [ss. 7-9], according to the volume of work.

(a) A Sessions Court has got appellate and revisional jurisdiction over the inferior Criminal Courts [s s. 374(3); 397-399; 449(1)].

(b) A Sessions Court has also got original jurisdiction to try what are known as 'sessions cases' but it has no power to take cognizance of such cases unless they are committed to it by a Magistrate [s s. 209(a), 226], excepting where a Public Prosecutor makes a complaint as to an offence of defamation having been committed by a person against the President of India and other specified dignitaries [s.

199(2)]; and also where it exercises its power, under s. 344, to summarily try a witness for giving false evidence.

3. *Judicial Magistrates*

In every district, outside the 'metropolitan area', there shall be Judicial Magistrates of the first class and second class [s. 11(1)]. One of the Judicial Magistrates of the first class shall be appointed the Chief Judicial Magistrate [s. 12(1)] who shall be subordinate to the Sessions Judge [s. 15(1)].

Other categories of Judicial Magistrates shall be: (a) The Sub-divisional Judicial Magistrate in charge of a sub-division [s. 12(3)]; (b) Special Judicial Magistrates, having second class power, and appointed for a term of one year at a time [s. 13].

Powers of Judicial Magistrate **.—**

See under s. 29,*post* .

4. *Metropolitan Magistrates*

The Metropolitan Magistrate are the Judicial Magistrate in a 'metropolitan area'. The Commission (37th Rep., paras 69, 101; 41st Rep., para 2.11) recommended the continuance of the Presidency Magistrates (under the *old* Code) in the Presidency towns, on the ground that of the special problems of these big cities deserved special treatment. But the name 'Presidency town' is now a misnomer, owing to a change in its historical background, and there is no reason why this special magistracy should be confined to the three Presidency towns instead of being extended to all big cities, as may be declared 'metropolitan area' under the *new* provision in s. 8, read with s. 2(k).

Section 16 empowers the High Court to appoint Metropolitan Magistrates, who will correspond to Judicial Magistrates in the districts outside the metropolitan areas. The number of such Magistrates shall be determined by the State Government in consultation with the High Court [s. 16(1)].

Following the pattern of Judicial Magistrates in the districts, Metropolitan Magistrates shall be sub-divided into the following categories: (a) Chief Metropolitan Magistrate [s. 17(1)]; (b) Additional Chief Metropolitan Magistrate [s. 17(2)]; (c) Special Metropolitan Magistrate [s. 18(1)]. Presumably owing to the smallness of a metropolitan area, there is no provision for appointing someone as a Sub-divisional Metropolitan Magistrate on the Judicial side, though there is no bar to a sub-divisional Executive Magistrate being appointed for a Metropolitan area, under s. 20(4),*post* . [10]

5. *Executive Magistrates*

Since all powers of adjudication, including even the power to tender pardon to an accomplice [s. 306(1)*contra*

old s. 377(1)] have been vested by the *new* Code in Judicial Magistrate, complications would obviously be caused by specifying 'Executive Magistrates' as a category of 'Courts' in s. 6, particularly because the word 'Court' is not defined in the *new* Code, as in the *old* . Under the *old* Code, since Magistrate used to perform both judicial and executive functions, it was held that a Magistrate was a 'Court', when acting judicially, [11] *e.g.* , when taking cognizance of a case. [12] It was expected by some High Courts that the anomaly caused by calling a Magistrate a 'Court' would be removed when the separation of the Judiciary from the Executive was effected fully. [13]

But, even though powers of trial have been taken away from Executive Magistrate by the *new* Code, they have been included in the enumeration of 'Courts' in the instant section. An analysis of the status and powers of Magistrates is accordingly necessary to find out when and for what purposes a Magistrate may be regarded as a Court under the *new* Code:

I. The primary distinction between Judicial and Executive Magistrates lies in the mode of their appointment and responsibility :

(i) While Judicial Magistrates are to be appointed by the High Court [s. 11(2)], Executive Magistrates are to be appointed by the State Government [s. 20(1)], without even consulting the High Court.

(ii) While all Judicial Magistrates shall be subordinate to and under the control of the Sessions Judge, through the Chief Judicial Magistrate [s. 15(1)], and under the ultimate control and supervision of the High Court, Executive Magistrates shall be subordinate to the District Magistrate [s. 23(1)], the latter being obviously under the administrative control of the State Government.

Nevertheless, any order made by an Executive Magistrate shall be subject to the revisional jurisdiction of the High Court or a Sessions Judge [Expl. to s. 397(1)].

II. The powers which are conferred on Executive Magistrates under the *new* Code are administrative or at best *quasi* -judicial **,** *e.g* ., —

(i) Arrest for offence committed in his presence [s. 44].

(ii) Control over persons arrested without warrant by the Police [ss. 58-59].

(iii) Execution of Warrant under orders of Court and grant of bail [s. 81(1)], Proviso 1 [ss. 78-81].

(iv) Power to require the postal authority to deliver any document necessary for investigation, etc. [s. 92].

(v) Issue of search warrant [s s. 93-94, 97]; and to direct search in his presence [s. 103].

(vi) Compelling restoration of abducted woman [s. 98].

(vii) Ordering security for keeping the peace in cases other than on conviction [s s. 107-110; 117]; ordering imprisonment in default of security [s. 122(1)] release from such imprisonment [s. 123].

(viii) Dispersal of unlawful assembly [s s. 129-131]; order for removal of public nuisance [s. 133]; or prohibition of its continuance [s. 143].

(ix) Prohibitory orders in cases of nuisance or apprehended danger [s. 144], or dispute as to immovable property [s. 145]; or dispute relating to land or water [s. 143].

(x) To hold inquests into cases of suicide, accident or suspicious death [s. 174(4)].

(xi) Power to issue commission for examination of witness [s. 284].

(xii) Making complaint under s. 340,[14] read with s. 195 [*old* ss. 476; 195].

(xiii) Affidavits may be sworn before any Judge or Magistrate [s. 297(1)(a)].

(xiv) Power to hold local inspection [s. 310].

(xv) Transfer or withdrawal of any case under s. 411 [*old* s. 528].

(xvi) Disposal of property seized by Police which is not produced before a Criminal Court [s s. 457-459].

(xvii) Discharge of sureties under s. 444 [*old* s. 502].

(xviii) Power to forfeit bond and impose penalty, under; para 2 of s. 446(1), read with s. 107.

In view of the foregoing provisions, it would have been more convenient to place the Executive Magistrates under a separate chapter or, at least, a separate heading.

It is to be noted, however, that where the *new* Code vests a particular power exclusively in the Executive Magistrate (*e.g.,* under s. 145,*post*), the exercise of that power by a Judicial Magistrate will render the proceeding without jurisdiction and void [*see* s. 461(i), *post*]. [15]

III. While Judicial Magistrates are divided into two classes,—first class and second class, according to the judicial power conferred upon them to try cases, under s. 29(2)- (3), read with col. 6 of the First Sch.,—power of trial having been taken away from the Executive Magistrates, Executive Magistrates [s. 6(iv)] are not sub-divided into classes, though, of course, the offices of the District Magistrate and Sub-divisional Magistrate [s. 20] and Special Executive Magistrates [s. 21] are retained in the *new* Code. [16]

4. 'State'.—

This word includes a 'Union Territory' by reason of *Section 3(58)(b) of the General Clauses Act* ; and also a metropolitan are included within a State [s. 8(1)].

5. 'Criminal Court'.—

1. The word 'Court' is not defined in s. 2 of the Code. In the absence of a general definition, the literal meaning of the word should be taken to interpret the word used in the different provisions of the Code, except where a particular section engrafts a special definition for the purposes of that section, *e.g.* , in s s. 195(3), 340(4). In a wider sense, the word 'Court' would include all tribunals, including administrative tribunals exercising *quasi* -judicial power, and it is in this wider sense that the word has been defined in s. 195(3).

2. But outside such special provisions, the word 'Court' as used in the Code, *e.g.* , in s. 6 would refer to *judicial* tribunals only, meaning a place where 'justice is judicially administered' (Coke on Littleton) and would not, therefore, include an administrative tribunal even though it might exercise *some* judicial functions, [17] or a particular proceeding before it is a 'criminal proceeding', [18] such as a Rent Controller

under the W.B. Premises Tenancy Act ; [19] a Civil Court exercising power under s. 340 [*old* s. 476] of the Code. [20]

3. The enumeration of 'Criminal Courts' in s. 6 is exhaustive, so that in the absence of any contrary provision in any special law, any other tribunal set-up by a statute would not be a 'Criminal Court' for the purposes of the Code, and no appeal from its decisions would lie to a Court of appeal under the Code. [21]

4. But there are certain sections of the Code which use the word 'Court' as distinguished from the expression 'Criminal Court' which is used and exhaustively enumerated in s. 6. It has been held that a tribunal may be a 'Court' within the meaning of s. 2(g) ['inquiry'], so that preliminary inquiry held by a Civil Court, under s. 340(1) [*old* s. 476] of the Code would be an 'inquiry' governed by the provisions of the Code; [22] but revision against such order is now specifically barred by *new* s. 341(2), *post* .

5. As regards 'Executive Magistrates', they would come within the ambit of the word in particular sections, *e.g.* , s. 195(3); s. 446(1)- (3), imposing penalty on forfeiture of bond executed under s s. 107,[23] 407, [24] 482. [25]

Above all, the utility of calling an Executive Magistrate a 'Criminal Court' appears when we turn to judicial subordination of such Magistrates to the Sessions Judge and the High Court for the purposes of revision under s. 397(1), the Explanation to which has made it clear that an Executive Magistrate shall be deemed to be a Criminal Court inferior to the Sessions Judge for the purposes of revision. The power of revision which a District Magistrate and a Sub-divisional Magistrate had under *old* s. 335(1) has been taken away be *new* s. 397(1). Thus, it is clear under the *new* Code, that an order made by an Executive Magistrate under s. 133 or s. 145 shall be revisably by the Sessions Judge, and the District magistrate shall have no power of revision, concurrent [26] or exclusive. [27]

But a Magistrate arresting a person under s. 44 would not be acting as a 'Court'. [28]

6. An Executive Magistrate would be an 'Inferior Court' under s. 6 and other provisions of the Code only when he exercises powers under the Code. In the absence of express provision to the contrary, where he passes an *administrative* order under a special law, he cannot be treated as an inferior Court for purposes of revision of that order, *e.g.* , under s. 16(1) of the Telegraph Act, 1885. [29]

7. Rent controller appointed under the West Bengal Provinces Tenancy Act, 1956 is not a Criminal Court because he neither convicts nor acquits but only imposes fine. [30]

6. B. Courts Constituted under any law other than the Code.—

'Courts constituted under any law'. **—** This expression means that besides the Courts specified in s. 6 there may be other 'Criminal Courts' if any special law vests them with the jurisdiction to try 'offences', [31] as defined in s. 2(n),*e.g.* , a Municipal Magistrate under the Calcutta Municipal Act, 1923; [32] a Panchayat under the Punjab Village Panchayat Act, 1939; [33] a Special Judge under the *Criminal Law Amendment Act* , 1952, [34] Special Judge under the *Prevention of Corruption Act* , 1947.[35]

Status and powers of a Special Judge under the *Prevention of Corruption Act* , 1947. The following propositions emerge from Supreme Court decisions:—

i. A Special Judge is a Criminal Court under s. 6, constituted by a law other than the Code. [36]

ii. It is a Court of original criminal jurisdiction and shall have all the powers of any Court of original criminal jurisdiction under the Code, except those which are excluded by the statute by which it was created. [37]

iii. By reason of s. 4 of the Code, the Special Judge will be governed by all the provisions of the Code relating to investigation, inquiry or trial, except in so far as excluded by the relevant statute. [38]

iv. A Special Judge is not debarred from taking cognizance of an offence on a private complaint. [39]

v. A Special Judge can try a case without the accused being committed to him for trial. [40]

vi. While taking cognizance, the Special Judge enjoys the powers under s. 190 of the Code. [41]

vii. It is not obligatory for him to order inquiry or investigation before taking cognizance on a private complaint. [42]

viii. As regards trial, he must follow the procedure for the trial of *warrant* cases as laid down in the Code in respect of Magistrates. [43]

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1 Commission's 41st Rep, para 2.7.

2 41st Rep., para 2.13a.

3 Notes on Clauses on the Bill of 1970 as reported by the Joint Committee, p. 239.

4 41st Rep. of the Commission, para 3.1-3.5.

5 *Asoke* *v.* *State,* (1977) CHN 625 (paras 6-10).

6 See Author's *Constitutional Documents* , Latest Edition.

7 *Asoke* *v.* *State,* (1977) CHN 625 (paras 6-10).

8 *Asoke* *v.* *State,* (1977) CHN 625 (paras 6-10).

9 *Asoke* *v.* *State,* (1977) CHN 625 (paras 6-10).

10 41st Rep of the Commission, para 2.15.

11 *Clarke* *v.* *Brojendra,* (1912) 39 Cal 953 966PC ; *Vedappan v. Perianan,* AIR 1928 Mad 1108 [*LNIND 1928 MAD 149*].

12 *Lalit* *v.* *Surja,* (1901) 28 Cal 709 713.

13 E.g., *Vrajlal* *v.* *State of Gujarat,* AIR 1967 Guj 225 [*LNIND 1966 GUJ 21*].

14 Cf. *Masand* *v.* *State,* (1970) Crlj 399 (Bom) .

15 *Somari* *v.* *Raghu,* (1977) Crlj 817 (DB) .

16 41st Rep, para 2.6.

17 *Shell Co.* *v.* *Fed. Commrs.,* *(1931) AC 275* (298).

18 *Matura Prosad* *v.* *Kanailal,* AIR 1968 Cal 170 [*LNIND 1967 CAL 95*](para 9); *Rampati v. Jadunandan,* AIR 1968 Pat 100 104 FB .

19 *Matura Prasad* *v.* *Kanailal,* AIR 1968 Cal 170 [*LNIND 1967 CAL 95*](para 9).

20 *Rampati* *v.* *Jadunandan,* AIR 1968 Pat 100 104 FB .

21 *Matura Prosad* *v.* *Kanailal,* AIR 1968 Cal 170 [*LNIND 1967 CAL 95*](para 9).

22 *Rampati* *v.* *Jadunandan,* AIR 1968 Pat 100 104 FB ; This is made clear by the definition in new sub-section (4) of s. 340, post; Cf. *Kafoor v. State of Kerala,* (1973) KLR 144 .

23 This is made clear by the definition in new sub-section (4) of s. 340, post; Cf. *Kafoor v. State of Kerala,* (1973) KLR 144 .

24 *Krishna* *v.* *State* *of* *Kerala,* (1981) Crlj 1793 (para 4) Ker.

25 *Krishna* *v.* *State* *of* *Kerala,* (1981) Crlj 1793 (para 4) Ker.

26 Cf. *Jaswant* *v.* *Pritam,* AIR 1967 Punj 482 .

27 Cf. *Budh* *Ram* *v.* *Puran,* AIR 1967 Punj 191 ; *Vrajlal v. State,* AIR 1967 Guj 225 [*LNIND 1966 GUJ 21*], which are no longer good law.

28 *Harihara*nanda , AIR 1954 All 601 [*LNIND 1954 ALL 78*]; see also *Vedappan* , 52 Mad 962.

29 *Mammoo v. State of Kerala,* (1980) Crlj NOC 75(Ker) FB.

30 *Triloki* *Nath* *v.* *Malali* *Bibi,* AIR 1967 Cal 145 [*LNIND 1966 CAL 149*]: 1967 Crlj 442 ; *Prem v. Anita,* 1992 (1) CHN 63 .

31 *Goberdhone* *v.* *Doolichand,* (1921) 48 Cal 955 982.

32 *Ram* *Gopal* *v.* *Corpn.of* *Calcutta,* (1925) 52 Cal 962 969.

33 *Dhrijoo* *v.* *Kamna,* (1945) 51 Crlj 1109 (HP) .

34 Cf. *Gurcharan* *Das* *v.* *State* *of* *Rajasthan,* AIR 1966 SC 1418 [*LNIND 1965 SC 328*]: (1966) 2 SCR 678 [*LNIND 1965 SC 328*] : 1966 Crlj 1071 ; *Antulay v. Nayak,* AIR 1984 SC 718 [*LNIND 1984 SC 42*](paras 27-28) : (1984) 2 SCC 500 [*LNIND 1984 SC 42*] : 1984 Crlj 647 .

35 *Antulay* *v.* *Nayak,* AIR 1984 SC 718 [*LNIND 1984 SC 42*](paras 27-28) : (1984) 2 SCC 500 [

LNIND 1984 SC 42
1984 Crlj 647
] :

36 *Antulay* *v.* *Nayak,*
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[ ](paras 27-28) : [ ] :

37 *Antulay* *v.* *Nayak,*
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[ ](paras 27-28) : [ ] :

38 *Antulay* *v.* *Nayak,*
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[ ](paras 27-28) : [ ] :

39 *Antulay* *v.* *Nayak,*
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[ ](paras 27-28) : [ ] :

40 *Antulay* *v.* *Nayak,*
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[ ](paras 27-28) : [ ] :

41 *Antulay* *v.* *Nayak,*
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1984 Crlj 647
[ ](paras 27-28) : [ ] :

42 *Antulay* *v.* *Nayak,*
AIR 1984 SC 718
LNIND 1984 SC 42
(1984) 2 SCC 500
LNIND 1984 SC 42
1984 Crlj 647
[ ](paras 27-28) : [ ] :

43 *Antulay* *v.* *Nayak,*
AIR 1984 SC 718
LNIND 1984 SC 42
(1984) 2 SCC 500
[ ](paras 27-28) : [

LNIND 1984 SC 42] :
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 7
Territorial divisions.

(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts :

Provided **that every metropolitan area shall, for the said purposes, be a separate sessions division and district.**

(2) The State Government may, after consultation with the High Court, alter the limits or the number of such divisions and districts.

(3) The State Government may, after consultation with the High Court, divide any district into sub-divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code, shall be deemed to have been formed under this section.

1. Scope of ss. 7-8.—

These two sections deal with the territorial divisions, for purposes of criminal justice in a State, comprising the districts and metropolitan areas. Every metropolitan area shall be treated as a separate sessions division and district for the purposes of these sections [*Proviso* to s. 7(1)].

2. Section 7(1) : 'Sessions division'.—

A sessions division shall be constituted of one entire district or a number of districts, but not a fraction of a district, [44] though, under sub-section (9), the State Government has the power to alter the limits of a district. The importance of a 'sessions 'division' is that, under s. 9(1), there shall be a Court of session for each sessions division.

3. District'.—

District does not mean a 'revenue district', but a district for purposes of criminal administration; [45] and the creation of a new revenue district would not *per se* alter the jurisdiction of existing sessions districts. [46] The importance of a 'district' is that there shall be Judicial Magistrate [s. 11] and Executive Magistrate [s. 20] in each district.

4. Proviso.—

This provision lays down that every 'metropolitan area' as declared under s. 8(1) shall be treated as a separate sessions division and a district for the purposes of the Code. In fact, this *new* provision incorporates into the Code a similar provision which had been introduced in West Bengal by Act 20 of 1953 and in Bombay by Act 23 of 1951. [47]

5. Sub-section (2) : Power of State Government.—

This sub-section corresponds to *old* s. 7(2), with this change that the State Government must consult the High Court in the matter of altering the number or limits of the existing [*see* sub-section (4)] sessions divisions and districts.

6. Sub-section (3) : Sub-divisions.—

This sub-section corresponds to *old* s. 8(1) with this change that for creation of sub-divisions out of districts, the State Government shall have to consult the High Court.

The importance of a sub-division lies in the provision for the appointment of a sub-divisional Judicial Magistrate [s. 12(3)] or a sub-divisional Magistrate on the executive side [s. 20(4)].

7. Ss. 7 and 9(6).—

Under s. 9(1), there shall be one Sessions Judge for each Sessions Division as appointed by the *State Government* . Under s. 9(6), the Court of Session may be required to sit at such place or places within the Sessions Division as the High Court may specify but the *High Court* cannot create a *new* Court of Sessions Judge [s. 7]. When the High Court directs the Additional Sessions Judge of a District to sit at a place within that district and to dispose of such cases as the Sessions Judge may make over to him, this is an exercise of the power under s. 9(6), and does not involve a violation of s. 7, since the Additional Sessions Judge while sitting at the specified place would not be entitled to act as a 'Sessions Court' with power to receive Original Applications Appeals or Revisions, but only such cases as the District and Sessions Judges might make over to him. [48]

44 Cf. *Gurcharan Das v. State of Rajasthan,* AIR 1966 SC 1418 [*LNIND 1965 SC 328*]: (1966) 2 SCR 678 [*LNIND 1965 SC 328*] : 1966 Crlj 1071 .

45 *Arumugha* , re., AIR 1931 Mad 697 [*LNIND 1931 MAD 15*].

46 *Moideen v. State of Kerala,* (1970) Crlj 920 (921).

47 Under which respectively the Presidency-towns of Calcutta and Greater Bombay were constituted separate sessions divisions.

48 *Ranganayakulu v. Registrar,* (1908) Crlj 1162 (paras 2, 5) AP.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 8
Metropolitan areas.

(1) The State Government may, by notification, declare that, as from such date as may be specified in the notification, any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purposes of this Code.

(2) As from the commencement of this Code, each of the Presidency-towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be declared under sub-section (1) to be a metropolitan area.

(3) The State Government may, by notification, extend, reduce or alter the limits of a metropolitan area but the reduction or alteration shall not be so made as to reduce the population of such area to less than one million.

(4) Where, after an area has been declared, or deemed to have been declared to be, a metropolitan area, the population of such area falls below one million, such area shall, on and from such date as the State Government may, by notification, specify in this behalf, cease to be a metropolitan area; but notwithstanding such cesser, any inquiry, trial or appeal pending immediately before such cesser before any Court or Magistrate in such area shall continue to be dealt with under this Code, as if such cesser had not taken place.

(5) Where the State Government reduces or alters, under sub-section (3), the limits of any metropolitan area, such reduction or alteration shall not affect any inquiry, trial or appeal pending immediately before such reduction or alteration before any Court or Magistrate, and every such inquiry, trial or appeal shall continue to be dealt with under this Code as if such reduction or alteration had not taken place.

Explanation **.—In this section, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.**

1. Scope of Section 8.—

This is a *new* section. Under the *old* Code, in the absence of a definition of a 'presidency-town', the local jurisdiction of Presidency-Magistrates had to be determined with reference to *old* s. 20 and various questions arose, *e.g.* , whether a Presidency-Magistrate could try an offence committed during a voyage on the high seas, [49] or his jurisdiction was limited to the port area up to the high watermark. [50]

The *new* Code seeks to simplify the foregoing position by replacing *old* s. 20 by *new* sub-section (3) of s. 16 which says that the jurisdiction of a Metropolitan Magistrate shall extend 'throughout the metropolitan area', as defined by the notification of the appropriate State Government under s. 8 read with s. 2(k), *ante* .

2. Analysis of Section 8.—

By virtue of sub-section (2), the Presidency towns of Bombay, Calcutta, Madras and the city of Ahmedabad shall be deemed to be metropolitan areas for the purposes of this Code. Besides, any other city or town may be declared by the State Government, under sub-section (1), to be a metropolitan area if it conforms to the requisite standard of population, *i.e.* , above one million. Subject to this standard of one million [according to the latest census (Expl.)] for each metropolitan area, the State Government shall have the power to extend, reduce or alter the limits of a metropolitan area [sub-section (3)], or to declare that an area has ceased to be a metropolitan area if, at any subsequent time, the population of such area falls below the standard of one million [sub-section (4)]. But no such alteration of area or cesser shall affect any inquiry, trial or appeal which was pending before such notification was made [sub-sections (4)-(5)].

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49 *K.E. v. Chief Officer,* 25 Bom 620.

50 *Joomabhai* (Bom unreported).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 9
Court of Session.

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation **.—For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.**

STATE AMENDMENTS

Orissa.— In its application to the State of Orissa, in s. 9, to sub-section (3), add the following proviso, namely:—

" *Provided* that notwithstanding anything to the contrary contained in this Code, an Additional Sessions Judge in a district or sub-division, other than the district or sub-division, by whatever name called, wherein the headquarters of the Sessions Judge are situated, exercising jurisdiction in a Court of Session shall have all the powers of the Sessions Judge under this Code, in respect of the cases and the proceedings in the Criminal Courts in that district or sub-division for the purposes of sub-section (7) of s. 116, s s. 193 and 194, clause (a) of s. 209 and s s. 409 and 449:

Provided further that the above powers shall not be in derogation of the powers otherwise exercisable by an Additional Sessions Judge or a Sessions Judge under this Code." —*Orissa Act 6 of 2004, Section 2.*

Uttar Pradesh. — *The following amendments were made by U.P. Act 1 of 1984, S. 2 (w.e.f. 1-5-1984).*

S. 9(5-A). —In its application to Uttar Pradesh in s. 9 after sub-section (5), insert the following sub-section:—

"(5-A) In the event of the death, resignation, removal or transfer of the Sessions Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held, the senior-most among the Additional Sessions Judges and the Assistant Sessions Judges present at the place, and in their absence the Chief Judicial Magistrate shall without relinquishing his ordinary duties assume charge of the office of the Sessions Judge and continue in charge thereof until the office is resumed by the Sessions Judge or assumed by an officer appointed thereto, and shall subject to the provision of this Code and any rules made by the High Court in this behalf, exercise any of the powers of the Sessions Judge."

The following amendments were made by U.P. Act 16 of 1976, Sec. 2 (w.e.f. 28-11-1975).

S. 9(6). —In Section 9 in sub-section (6) insert following proviso:—

"Provided that the Court of Session may hold, or the High Court may direct the Court of Session to hold its sitting in any particular case at any place in the sessions division, where it appears expedient to do so for considerations of internal security or public order, and in such cases, the consent of the prosecution and the accused shall not be necessary."

West Bengal. — *The following amendments were made by W.B. Act No. 24 of 1988, S. 3.*

S. 9(3). —In sub-section (3) of Section 9 of the principal Act, the following proviso shall be added:—

" *Provided* that notwithstanding anything to the contrary contained in this Code, an Additional Sessions Judge in a sub-division, other than the sub-division, by whatever name called, wherein the headquarters of the Sessions Judge are situated, exercising jurisdiction in a Court of Session, shall have all the powers of the Sessions Judge under this Code, in respect of the cases and proceedings in the Criminal Courts in that sub-division, for the purposes of sub-section (7) of s. 116, s s. 193 and 194, Clause (a) of s. 209 and s s. 409, 439 and 449:

" *Provided further* that the above powers shall not be in derogation of the powers otherwise exercisable by an Additional Sessions Judge or a Sessions Judge under this Code."

1. Scope of s. 9.—

This section corresponds to s. 9 of *old* Code, with substantial changes.

2. Changes made by the new Code.—

(i) The power to appoint persons as Sessions Judges, Additional and Assistant Sessions Judges has been taken away from the State Government and vested in the High Court, though the power to establish a Sessions Court, and the power to appoint a person to the Judicial Service or as a District Judge remains with the State Government [s. 9(1); *Explanation*]. [51]

(ii) Sub-section (5) of *old* s. 9 has been omitted.

(iii) The new sub-section (5) provides for temporary arrangements in case of vacancy in the office of the Sessions Judge.

3. Sub-sections (2)-(3) : Sessions Judge.—

As will appear from the *Explanation* to the present section, the *new* Code has made it clear that person can exercise the powers of a Sessions Judge only on being appointed to *preside* over a Court of session. Hence, a person who has ceased to be the Sessions Judge of one Sessions division is not entitled to exercise the powers of a Sessions Judge until he is appointed to preside over another Court of Session. [52]

While the expression 'Sessions Judge' cannot include an Additional or Assistant Sessions Judge, the expression 'Court of Session' would include them as well, by reason of sub-section (3), subject to the other provisions of the Code, *e.g.* , s. 194.

4. Sub-section (3) : Additional and Assistant Sessions Judges.—

This sub-section corresponds to sub-section (3) of *old* s. 9, with this change that (a) the appointment shall now be made by the High Court (subject to the *Expl., below*), instead of the State Government; (b) the words 'one or more such Courts' have been substituted by the words 'in a Court of Session', so that it will no longer be legitimate to appoint a person as an Additional or Assistant Sessions Judge to exercise jurisdiction in two sessions divisions or over Courts of session more than one. [53] But under sub-section (4), the Sessions Judge of one sessions division may also be appointed an *Additional* Sessions Judge of another session division.

A Civil Judge cannot exercise the power of a Sessions Court without being *appointed* an Additional or an Assistant Sessions Judge. The appointment of an Additional or an Assistant Sessions Judge takes place under the present section, and not under s. 32 [*old* s. 39] which deals with the mode of 'conferment of powers'. When a Civil Judge is appointed an Additional Sessions Judge, he practically holds two offices and it is immaterial whether he is first appointed as a Civil Judge and then as an Additional Sessions Judge or the two appointments are made at the same time. [54]

5. Powers of Sessions Judge : Additional and Assistant Sessions Judges.—

1. What is to be noted, in the present context, is that there shall be only one Court of Session in a sessions division and one Sessions Judge. Additional and Assistant Sessions Judges are appointed 'to exercise jurisdiction' in that Court; they do not constitute Additional Courts of Session. A practical result of this is that a complaint under s. 340 [*old* s. 476] may be made by a Sessions Judge in respect of a case which he has assigned to an Additional or Assistant Sessions Judge, for, they are Judges of the same 'Court'. [55]

2. The appointment, under s. 9(3), to exercise jurisdiction in a Court of Session does not *ipso facto* vest an additional or Assistant Sessions Judge with power to take up for trial any case before the Court in the same manner as the Sessions Judge. As s. 194 [*old* s. 193(2)] says, an Additional or Assistant Sessions Judge may try only such cases as are 'made over' to him by the Sessions Judge [s. 194] or are directed to be tried by him by a special order of the High Court. Such making over by the Sessions Judge does not constitute a 'transfer' of the case, so that the Sessions Judge still remains competent to dispose of it. [56] An Additional Sessions Judge has no power to transfer a case to his own file from that of the Sessions Judge. [57] Conversely, an Additional Sessions Judge has no power to question the validity of the assignment of a case to him by the Sessions Judge under s. 10(3) or s. 194. [58]

However Additional Sessions Judge has all the power and jurisdiction of the Sessions judge to try cases enumerated in the Code. [59] Under *s. 36 of NDPS Act* empowers Sessions Judge to hold trial of the offenders under the above Act when no Special Court was appointed under the Act. An Additional Sessions Judge can try such cases.[60]

3. As to the power to sentence of the Additional or Assistant Session Judge, see under s. 28(2)- (3).

4. The *appellate* power, under s. 373 and 374(2), is vested in the Court of Session, and neither the Additional nor an Assistant Sessions Judge has the power to entertain or to decide an appeal, unless it is made over to him to hear, under s. 381(2), subject to this limitation that an Assistant Sessions Judge may hear only an appeal from conviction by a Magistrate of the Second Class.

5. An Assistant Sessions Judge possesses no power of revision over inferior Criminal Courts. But an Additional Sessions Judge may hear a revision proceeding and exercise all the powers of revision conferred upon the Sessions Judge under s. 399, if such proceeding is transferred to him by the Session Judge, under s. 400.

6. Appeal.—

An appeal from a conviction—

(a) by an Additional Sessions Judge lies to the High Court [s. 374)2)];

(b) by an Assistant Session Judge lies to the Court of Session, *i.e.* , the Sessions Judge [s. 374(3)(a)].

7. Revision.—

An Assistant Sessions Judge is under the revisional jurisdiction of the Sessions Judge, but not an Additional Sessions Judge, because the Sessions Judge has no appellate jurisdiction over an Additional Sessions Judge, under s. 374(2)- (3),—the appellate power being regarded as a test of 'inferiority' within the meaning of s.

397(1) [*old* s. 435(1)]. [61]

8. Sub-section (5) : Office of the Sessions Judge being vacant.—

A vacancy may be caused in the office of a Sessions Judge by his death or sudden transfer, in which case, it may take some time to post another Sessions Judge in his place. Since an Assistant or an Additional Sessions Judge cannot try any case unless it is assigned to him by the Sessions Judge, a vacuum may be caused in the Court of Session, during such a contingency. To tide over this temporary difficulty, the present sub-section has been inserted by the *new* Code, in pursuance of the recommendation of the Commission. This sub-section empowers the High Court, in such contingency, to empower (i) an Additional Sessions Judge, or (ii) an Assistant Session Judge, (iii) a Chief Judicial Magistrate of that Sessions Division to dispose of urgent applications before the Court of Session, whether already pending or to be instituted during the continuance of the aforesaid vacancy. [62]

9. Analogous provision.—

While the present sub-section provides for a contingency of *vacancy* in the office of the Sessions Judge, s. 10(3) makes provision for a contingency caused by the temporary absence or inability of the Sessions Judge.

10. Sub-section (6) : Places of sitting of Court of Session.—

This sub-section has two parts: (a) the first part refers to the power of the High Court, and (b) the second part provides the power of the Session Court itself.

(A) *High Court.*— The power to fix the place or places where a Court of Session will ordinarily sit belongs to the High Court. This power may be exercised in respect of the trial of a particular place; [63] and the place of sitting may be within a jail. [64] The condition in the second part of the sub-section namely, consent of the prosecution and the accused does not attach to the power of the High Court.

If a trial is held in a private house or jail, as soon as it becomes the venue of trial of a criminal case, it is deemed to be trial at open place and every person who wants to go and attend the trial can do it subject to the restrictions of the number of persons which could be contained in such premises. [65]

Therefore, even a place in jail is a ‘place’ mentioned in s. 9 (6) of the Code. [66]

B. *Court of Session.* —Apart from the foregoing power of the High Court, the Court of Session is competent to hold its sitting at some place other than the those fixed by the High Court, subject to the conditions specified below.

11. Power of Court of Session to hold its sitting at a place other than the place specified by the High Court.—

This power of the Court of Session is subject to the following conditions:

(i) The power may be exercised only for the purpose of a particular case.

(ii) Such place must be within the sessions division to which the Court belongs.

(iii) The Court must itself be of opinion that it will be to the general convenience of the parties and witnesses to hold its sitting at such other place.

(iv) The prosecution and the accused must consent to the proposed change of venue.

(v) Subject to the foregoing conditions, the change of place of sitting may be made either for the disposal of the case *in toto* or may be limited to the examination of any witness or witnesses only.

(vi) The place selected must be open to the public, or an 'open Court' [s. 327].

The trial at a place other than that notified by the High Court shall come under the latter part of s. 9(6) and shall be valid only if the prosecution and the accused consent to the trial being held at such place. Hence, in the absence of a High Court notification to that effect, a trial held in jail without the consent of the accused shall be invalid, [67] subject, of course, to s. 465,*post* . But once the High Court issues a Notification, declaring the Jail as a place where the Sessions Court could hold its sitting, there would be no illegality in holding the trial at that Jail. [68]

12. Explanation : Appointment of Sessions Judges.—

Under the *Constitution* , the initial appointment of a person to the Judicial Service is vested in the Governor, act ing in consultation with the Public Service Commission and the High Court [Art. 234]; and the initial appointment of person to be a District Judge or any other Judicial Officer of the categories mentioned in Art. 236(a) is vested in the Governor, acting in consultation with the High Court [Art. 233].

Since the present sections speaks of a Sessions Judge, Additional and Assistant Sessions Judge being appointed by the High Court, apparent inconsistency between this section of the Code with the relevant provisions of the *Constitution* arises. The *Explanation* has been added by the *new* Code in order to remove that inconsistency, [69] by controlling the meaning of the word 'appoint' as used in this section. The resulting position will be as follows:

(i) The *initial* appointment of a person to the Judicial Service or as a District Judge or any of the other Judges specified in Art. 236 will remain with the State Government, as required by the *Constitution* or any other law in force.

(ii) The power to post a person already appointed by the State Government to preside over a particular Sessions Court as Sessions Judge, or to act as an Additional or Assistant Sessions Judge shall belong to the High Court, under the *new* Code. [70] So also the power to transfer a Sessions Judge from one Sessions Court to another. [71]

(iii) It also follows that the appointment of a person under s. 9(2) or (3) must be in relation to a specified Court of Session. [72]

Since
Art. 236(a) of the Constitution includes Sessions Judge, Additional and Assistant Sessions Judges also in the category of a District Judge, it comes to this that it will not be competent for the High Court to appoint any person direct from the Bar or from the general public to be a sessions judge by virtue of the present section, thus circumventing the power of initial appointment vested in the State Government by Art. 233.

In the result, the word 'appoint', in the present section, means nothing more than assigning to a Judge the powers of a Session Judge and posting him to discharge such functions in a particular Sessions Court.

13. 'For the purposes of this Code.—

By reason of these words, the word 'appoint' will have to be interpreted by this *Explanation* , not only as it is used in s. 9(2), (3), (4), but also as used in s s. 11(2); 12(1), (2).

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51 *Ranganayakulu* *v.* *Registrar,* (1908) Crlj 1162 (paras 2, 5) AP.

52 Cf. *Patan Ali* , in re., 48 Crlj 81 (85).

53 Cases like the following shall no longer be good law : *Palanisamy* , AIR 1957 Mad 351 [*LNIND 1956 MAD 242*]; *Kamaleshwar* , AIR 1957 Pat 375 .

54 *Prem Nath* *v.* *State of Rajasthan,* AIR 1967 SC 1599 [*LNIND 1967 SC 73*](1604-05) : (1967) 3 SCR 186 [*LNIND 1967 SC 73*] : 1967 Crlj 1569 .

55 *Ijjatullah* , AIR 1931 Cal 190 ; *Kamaleswar* , AIR 1957 Pat 375 (FB) .

56 *Birju* *v.* *Emp.,* (1921) 44 All 157 .

57 *Habib* , AIR 1959 J&K 11.

58 *State v. Mohinder,* AIR 1964 Punj 543 (para 4).

59 *Abdul Mannan v. State of W.B.,* AIR 1996 SC 905 [*LNIND 1995 SC 1245*] : (1996) 1 SCC 665 [*LNIND 1995 SC 1245*] : 1996 SCC (Cri) 197 [*LNIND 1995 SC 1245*] : (1995) 4 Crimes 721 .

60 *Ashok Kumar Yadav v. Union of India* , 2007 Crlj (NOC) 133 (All) : 2007 (1) ALJ 618 .

61 *Krishnaji* , AIR 1949 Bom 29 .

62 Cf. *Emp. v. Lakshman,* (1931) 22 Crl-J 1147 (1148)FB .

63 *Ranjit v. Chief Justice,* (1986) Crl-J 632 (para 4).

64 *Ranjit v. Chief Justice,* (1986) Crl-J 632 (para 4).

65 *Kehar Singh v. State,* AIR 1988 SC 1883 [*LNIND 1988 SC 887*]: 1989 Crlj 1 : (1988) 3 Crimes 709 : (1988) 3 SCC 609 [*LNIND 1988 SC 887*].

66 *Birendra Kumar Rai v. Union of India,* 1992 Crlj 3866 All FB .

67 *Visheswar v. State,* (1977) Crilj 521 (para 9) All.

68 *Kehar v. State,* AIR 1988 SC 1883 [*LNIND 1988 SC 887*](para 23) : (1988) 3 SCC 609 [*LNIND 1988 SC 887*] : 1989 Crlj 1 .

69 41st Rep. of the Commission, paras 2. 18, 2.20.

70 41st Rep. of the Commission, paras 2. 18, 2.20.

71 Cf. *State of Assam v. Ranga Md.*, [AIR 1967 SC 903]: [*LNIND 1966 SC 199*] ([1967] 1 SCR 454 [*LNIND 1966 SC 199*]).

72 Cf. *Silar* , AIR 1941 Mad 681.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 10
Subordination of Assistant Sessions Judges.

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judges may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application.

1. Scope of s. 10.—

This section corresponds to s. 17(3)- (4) of the *old* Code, with verbal changes.

2. Sub-section (1) : 'Subordinate'.—

1. The word, which occurs in s s. 10(1), 15(1), 19(1), 23(1) is wider than the word 'inferior' [73] which is used in s s. 397*et seq.* , for the purposes of appeal or revision. But the word 'subordinate' indicates that a subordinate Court shall be under the administrative superintendence and control of the superior Court, apart from such judicial control by way of appeal or revision as may be prescribed by the Code, specifically. 'Inferior' means judicially inferior. [74]

2. Under the *new* Code, separate provisions have been made as to the subordination of the Executive Magistrates:

   (a) The Judicial Magistrates are subordinate to the Chief Judicial Magistrate, who shall be subordinate to the Sessions Judge [s. 15(1)].

   (b) The Executive Magistrates shall be 'subordinate' to the District Magistrate and not to the Chief Judicial Magistrate or the Sessions Judge [s. 23(1)], even though an Executive Magistrate shall be 'inferior' to the Sessions Judge for purposes of revision [s. 397(1),*Expl.*].

3. Special provisions for subordination.—

Apart from the general provisions for subordination in ss. 10, 15, 19, 25, s. 195(4) provides for subordination for the purposes of that section.

4. Assistant Sessions Judge.—

1. An Assistant Sessions Judge shall have jurisdiction in a Court of Session by virtue of his appointment under s. 9(1), and can, thus, exercise the power of pardon under s. 307 [*old* s. 338], in respect of a case committed to the Court of Session. [75]

2. But he shall be subordinate to the Sessions Judge or that Court of Session, and what business shall be done by an Assistant Sessions Judge will be determined by the order of the Sessions Judge, under s. 194, in accordance with rules made by the Sessions Judge, under s. 10(2), or by a specific order of the High Court under s. 194.

3. In the absence of such order, an Assistant Sessions Judge has no competence to do any act, *e.g.* , to receive and dispose of an application except those which are filed [76] in connection with a case of which he is in seisin. Even his power to hear a particular appeal is dependent on an order to the Sessions Judge or High Court, under s. 381(2).

4. He has no power, under the Code, to receive and admit an appeal direct from the appellant. [77] But under sub-section (3) of the present section, the Sessions Judge may empower him to dispose of an 'urgent application', *e.g.* , to receive and admit an appeal. But—

   (a) Such delegation can be made by the Sessions Judge only in the event of his absence or inability to act. It would be invalid when the Sessions Judge is present at the headquarters and capable of act ion. [78]

   (b) In the absence of any such authorisation under sub-section (3), an Assistant Sessions Judge shall have no jurisdiction to dispose of any application excepting those arising in connection with a case of which he is already in seisin. [79]

5. When a case is so made over to an Assistant Sessions Judge by the Sessions Judge, the Sessions Judge does not lose his jurisdiction over such case. [80]

5. Appeal and revision.—

From an Assistant Sessions Judge, appeal lies to the Court of Session [s. 374(3)] and revision lies to the Sessions Judge or High Court [s. 397]. An Assistant Sessions Judge is thus both 'subordinate' and 'inferior' to the Sessions Judge.

6. Sub-section (3) : Disposal of urgent applications by Additional or Assistant Sessions Judge.—

An order under this sub-section need not be made on each occasion of absence or inability of the Sessions Judge, but may be a general one, [81] which, however, would confer jurisdiction on the Additional or Assistant Sessions Judge only when the Sessions Judge is actually absent or unable to perform his duties. [82] , [83] Pressure of other work may be a reason for inability. [84]

Non-mention of reason in the order would not vitiate it. [85]

7. Authorisation in favour of Chief Judicial or Additional Chief Judicial Magistrate.—

1. The authorisation by the Sessions Judge under sub-section (3) can be made to a Chief Judicial Magistrate only in case on Addl. or Asstt. Sessions Judge is available. [86]

2. Authorisation in favour of an Addl. Chief Judicial Magistrate would be invalid, except where, under s. 12(2),*post* , the High Court has appointed an Addl. Chief Judicial Magistrate, to exercise the powers of a Chief Judicial Magistrate under the Code. [87]

Civil Judge and Judicial Magistrate cannot exercise the powers of the Sessions Judge in charge unless so empowered by the High Court. So, he cannot grant bail in a murder case. [88]

8. Analogous Provisions. —

Section 194 (*post*) provides for transfer of trial case, s. 381(2) provides for transfer of appeals, to Additional and Assistant Sessions Judges, and s. 400 for transfer of revision cases, to Additional Sessions Judge.

An application for bail may be transferred only under s. 10(3). [89]

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73 Cf. *Opendra* *v.* *Dukhini,* (1886) 12 Cal 473 (FB) ; *Laskari* , (1885) 7 All 833 (FB) .

74 Cf. *Opendra* *v.* *Dukhini,* (1886) 12 Cal 473 (FB) ; *Laskari* , (1885) 7 All 833 (FB) ; *Krishnaji v. Emp.,* AIR 1949 Bom 29 .

75 *Ijjatullah* *v.* *Emp.,* AIR 1945 Cal 427 .

76 *State* *of* *Anirudha* , (1971) Crlj 886 (Ori) .

77 *Nanjappa* , in re., AIR 1961 AP 471 [*LNIND 1961 AP 65*].

78 *Kalu* *v.* *State,* AIR 1954 Raj 22 [*LNIND 1951 RAJ 79*].

79 *State* *of* *Anirudha* , (1971) Crlj 886 (Ori) .

80 Cf. *Birju* *v.* *Emp.,* (1921) 44 All 157 .

81 *State* *of* *Anirudha* , (1971) Crlj 886 (Ori) .

82 *Kalu* *v.* *State,* AIR 1954 Raj 22 [*LNIND 1951 RAJ 79*].

83 Rep. of the Joint Committee (p. vi, on Cl. 11).

84 *Sharma* *v.* *Achuthuni,* (1977) Crlj 19 (AP) .

85 *Sharma* *v.* *Achuthuni,* (1977) Crlj 19 (AP) .

86 *Kheraj* *v.* *State* *of* *Rajasthan,* AIR 1984 Raj 408 (paras 3, 5).

87 *Kheraj* *v.* *State* *of* *Rajasthan,* AIR 1984 Raj 408 (paras 3, 5).

88 *State of Karnataka v. Hanumanthapa,* 1992 Crlj 95 Kant .

89 *Sharma v. Achuthuni,* (1977) Crlj 19 (AP) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 11
Courts of Judicial Magistrates.

(1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification, specify:

[[90] ***Provided*** **that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established.]**

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.

STATE AMENDMENTS

Andaman and Nicobar Islands, Dadra and Nagar Haveli and Lakshadweep. — *The following amendments were made by Regn. 1 of 1974 (w.e.f. 30-3-1974).*

S. 11(3). —In its application to the Union territories to which this Regulation extends, in sub-section (3) shall be *substituted* —for the words "any member of the Judicial Service of the State, functioning as a Judge in a Civil Court", the words "any person discharging the functions of a Civil Court".

Bihar. — *The following amendments were made by Bihar Act 8 of 1977, S. 2. (w.e.f. 10-01-1977)*

S. 11(4). —After sub-section (3) of s. 11 insert the following sub-section and shall be deemed always to have been inserted:—

"(4) The State Government may likewise establish for any local area one or more Courts of Judicial Magistrate of the first class or second class to try any particular cases or particular classes or categories of cases."

Haryana. — *The following amendments were made by Haryana Act 16 of 1976, S. 2 (w.e.f. 24-2-76).*

S. 11(1A). —After sub-section (1) of s. 11 insert following sub-section and shall always be deemed to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases or to particular class or classes of cases, or to cases generally in any local area."

[Refer also provisions on *validation* given with Haryana State amendment under s. 13.]

Kerala. — *The following amendments were made by Kerala Act 21 of 1987* .

In s. 11, after sub-section (1), the following sub-section shall be *inserted* namely:—

"(1A) The State Government may likewise establish as many special Courts of Judicial Magistrates of First Class in respect to particular cases or to a particular class or particular classes of cases or in regard to cases generally, in any local area."

(2) The amendments made by sub-section (1) shall be, and shall be deemed to have been, in force for the period commencing from the 2nd day of December, 1974 and ending with the 18th day of December, 1978.

Validation.— Any notification issued by the State Government on or after the 2nd day of December, 1974 and before the commencement of the *Code of Criminal Procedure* (Amendment) Act, 1978 (Central Act 45 of 1978) purporting to establish any special Court of the Judicial Magistrate of the first class having jurisdiction over more than one district shall be deemed to have been issued under section 11 of the said code as amended by this Act and accordingly such notification issued and any act or proceeding done or taken or purporting to have been done or taken by virtue of it shall be deemed to be and always to have been valid."

Punjab. — *The following amendments were made by Punjab Act No. 9 of 1978 (w.e.f. 14-4-1978)* .

S. 11(1). —In s. 11 after sub-section (1) insert the following sub-section and shall always be deemed to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class in respect to particular cases or to particular classes of cases or in regard to cases generally, in any local area."

Rajasthan. — *The following amendments were made by Rajasthan Act No. 10 of 1977, S. 2 (w.e.f. 3-3-1977).*

S. 11(1). —After sub-section (1) of s. 11 insert following new sub-section:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases, or to a particular class or particular classes of cases, or in regard to cases generally, in any local area."

Uttar Pradesh. — *The following amendments were made by U.P. Act No. 16 of 1976, S. 3. (w.e.f. 30-04-1976).*

S. 11(1-A). —After sub-section (1) of s. 11 insert following sub-section and be deemed always to have been inserted:—

"(1A) The State Government may likewise establish as many Courts of Judicial Magistrates of the first class and of the second class in respect to particular cases, or to a particular class or particular classes of cases, or in regard to cases generally, in any local area." [Refer also provision on *validation* given along with U.P. Amendment under s. 13].

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1. Scope of s. 11.—

This section corresponds to s. 10 of the *old* Code, with changes consequent upon the separation of Judiciary from the executive. *New* sub-section (3) makes it possible to confer the powers of a Judicial Magistrate upon a Civil Judge, while functioning as such (*e.g.* , the Munsif-magistrates in some States such as West Bengal under the *old* Code) so long as it is not possible or necessary to appoint a full-time magistrate. [91]

2. Sub-section (1) : Courts of Judicial Magistrates.—

The text of this sub-section is to be compared with that of sub-section (1) of s. 12 of the *old* Code. Under the *old* Code the appointment of a person as a Magistrate of the first, second or third class was *personal* [92] so that the Courts of such Magistrates had no fixed territorial jurisdiction like a Court of Session, District Magistrate or Sub-Divisional Magistrate, which were permanent Courts. [93] But the present sub-section makes it clear that under the *new* Code, the Courts of Judicial Magistrates of the first or second class shall also have a permanent location and jurisdiction as specified in the notification made by the State Government, in consultation with the High Court.

3. Abolition of Benches of Magistrates.—

Under *old* s. 15, there was provision for constituting 'Benches of Magistrates' and investing them with powers to be exercised by them collectively. The *new* Code has omitted [1] this provision, along with s s. 16-19. Hence, all Judicial Magistrates must sit singly.

4. Proviso to s. 11(1) : Special Court of Judicial Magistrate.—

1. This Proviso, inserted in 1978, adds a category of Special Courts of Judicial Magistrates, while the regular Courts of Judicial Magistrates are mentioned in s. 11(1). A Special Court of Judicial Magistrate is also to be established by the State Government in consultation with the High Court; but the special feature of the establishment of the Court of a Special Judicial Magistrate for any local area is that, after such special Court is established for any local area, the regular Courts of Judicial Magistrates in that area shall cease to have any jurisdiction to try those cases or classes of cases for the trial of which the Special Court has been established by the notification of the State Government.

2. Prior to the insertion of this *Proviso* to s. 11(1), in 1978, some problems arose in relation to the jurisdiction of Special Magistrates under the *new* Code [2] , [3] The only provision relating to Special Judicial Magistrates was s. 13 (*post*), but that section had a narrow scope because (a) it authorises the creation of Special Magistrates having second class power only; (b) the jurisdiction of such a

Magistrate was to be confined to one district only. The observations made in an Allahabad case [4] led to a local amendment in the U.P., which widened the scope of s. 13 to include Special Magistrates of the First Class and substituted the words 'local area' in place of 'in any district'. In the result, in the U.P., Special Judicial Magistrates of the 1st as well as 2nd Class could appointed, with jurisdiction to cover more than one district. [5]

That position is sought to be achieved by the Amendment Act 45 of 1978, as regards the whole of India, by making several amendments. Of these, the *Proviso* inserted to s. 11(1) now makes it clear that (a) Special Magistrates may be appointed by the State Government in consultation with the High Court; (b) Such Special Magistrates may be vested with 1st or 2nd class; (c) to try any particular case or class of cases; (d) with jurisdiction extending over any 'local area' as specified in the notification. Since the expression 'local area' is wide enough to include any part of a State or more than one districts, [6] it is now lawful to appoint a Special Magistrate to exercise powers over more than one district in respect of a particular case or class of cases, *e.g.* , cases instituted by the Special Police Establishment, for which the Court of such Special Magistrate has been set up.

A notification of the State Government constituting a Special Court of Judicial Magistrate without consultation of High Court is a technical mistake and can be corrected by the State Government by issuing a fresh notification after consulting the High Court. [7]

5. Effects of establishment of Special Court upon other Courts.—

1. The *Proviso* confers upon the Special Magistrate exclusive power to try the case or class for which his Court has been established. It does not take away the jurisdiction of any other Magistrate having local jurisdiction in the area, to take cognizance of such case under s. 190. [8]
2. The exclusive power to try such case does not, again, mean that the powers of the Special Judicial Magistrates of the first or second class, is enlarged to those of the Sessions Court where the offence is exclusively triable by a Court of Session. [9]

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90 New Proviso added by Act No. 45 of 1978, S. 3 (w.e.f. 18-12-1978).

91 Rep. of the Joint Committee (p. vi, on Cl. 11).

92 *State of M.P. v. Kailash,* (1979) Crlj 377 (MP) .

93 *Ramzani* , AIR 1960 All 350 [*LNIND 1959 ALL 183*].

1 Overriding the Commissions' recommendations in the 41st Rep., para 2.27.

2 *State of M.P* . v. *Kailash* , (1979) Crlj 377 (MP) .

3 *Bajpai v. Ganguly,* (1976) Crlj 514 (All) .

4 *Bajpai v. Ganguly,* (1976) Crlj 514 (All) .

5 *State of M.P. v. Kailash,* (1979) Crlj 377 (MP) .

6 *Sonu v. State of Maharashtra,* AIR 1963 SC 728 [*LNIND 1962 SC 331*]: 1963 Supp (1) SCR 573 : (1963) 1 Crlj 639 .

7 *Mohd. Aslam v. State of U.P.,* AIR 2007 SC 1901 [*LNIND 2007 SC 370*]: 2007 Crlj 3200 : (2007) 12 SCC 667 [*LNIND 2007 SC 370*].

8 *Chauthmal v. State of Rajasthan,* (1982) Crlj 1403 (paras 27-29) Raj; *Lokhpat v. State,* (1980) Crlj 776 (para 6).

9 *Chauthmal v. State of Rajasthan,* (1982) Crlj 1403 (paras 27-29) Raj; *Lokhpat v. State,* (1980) Crlj 776 (para 6).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 12
Chief Judicial Magistrate and Additional Chief Judicial Magistrate, etc.

(1) In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate, and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

(3) (a) The High Court may designate any Judicial Magistrate of the first class in any sub-division as the Sub-divisional Judicial Magistrate and relieve him of the responsibilities specified in this section as occasion requires.

(4) Subject to the general control of the Chief Judicial Magistrate, every Sub-divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrates (other than Additional Chief Judicial Magistrates) in the sub-division as the High Court may, by general or special order, specify in this behalf.

STATE AMENDMENTS

Nagaland. —[Amended by Notification No. Law 170/74 Leg. dated 3-7-1975.] In sub-sections (1), (2) and (3) the words "High Court" shall be substituted by the words "State Government" wherever it occurs.

Uttar Pradesh. — *The following amendments were made by U.P. Act 1 of 1984, S. 3 (w.e.f. 1-5-1984).*

S. 12(4). —In s. 12 after sub-section (3) insert following sub-section (4):—

"(4) Where the Office of the Chief Judicial Magistrate is vacant or he is incapacitated by illness, absence or otherwise for the performance of his duties, the senior most among the Additional Chief Judicial Magistrate and

other Judicial Magistrates present at the place, and in their absence the District Magistrate and in his absence the seniormost Executive Magistrate shall dispose of the urgent work of the Chief Judicial Magistrate."

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1. Scope of s. 12.—

This section corresponds to s. 10 of the *old* Code with changes consequent upon the separation of the Judiciary from the Executive thus—

(a) The appointment of all Judicial Magistrates has been vested in High Court instead of the State Government [*old* s. 10(1)- (2)].

(b) *New* sub-section (3) provides for the designation of one of the Judicial Magistrates as the Sub-divisional Judicial Magistrate.

2. Sub-section (1) : Chief Judicial Magistrate.—

Though the ultimate control over Judicial Magistrates shall be of the Sessions Judge [s. 15(1)], the office of Chief Judicial Magistrate has been created (on the analogy of the District Magistrate on the Executive side), in between the Sessions Judge and the Judicial Magistrates, in order to provide for better inspection and guidance of the Judicial Magistrates, which the Sessions Judge might not be capable of, owing to the pressure of his Judicial business. [10]

But there is no separate Court for a Chief Judicial Magistrate under s. 6. He is a Judicial Magistrate of the First Class [s. 6(ii)], who is appointed by the High Court as the Chief Judicial Magistrate [s. 12(1)]. Hence a trial commenced by him as Chief Judicial Magistrate may be continued by him after he ceases to be the Chief Judicial Magistrate on being reverted as a Judicial Magistrate of the First Class of the same district. [11]

‘ *District* ’.— *See* under s. 7(1),*ante* .

‘ *Not being a metropolitan area* ’.—The office corresponding to that of the Chief Judicial Magistrate, in a metropolitan area, shall be that of the Chief Metropolitan Magistrate [s. 17(1)].

3. Sub-section (2) : ‘Additional Chief Judicial Magistrate’.—

The office of the Additional Chief Judicial Magistrate is district from that of the Chief Judicial Magistrate. Hence, even if an Additional Chief Judicial Magistrate is conferred *all* the powers of the Chief Judicial Magistrate, he cannot be called ‘Chief Judicial Magistrate’, [12] until he is appointed to be the Chief Judicial Magistrate under sub-section (1). Since an Additional Chief Judicial Magistrate may be conferred only *some* of the powers of a Chief Judicial Magistrate, his rank must necessarily be below that of the Chief Judicial Magistrate, even when he is vested with all the powers of the Chief Judicial Magistrate. [13]

A. The position of an Addl. Chief Judicial Magistrate is similar to that of the Chief Judicial Magistrate in the following respects :

(i) The High Court may vest an Additional Chief Magistrate with all the powers of a Chief Judicial Magistrate [s. 12(2)].

(ii) Appeal from conviction by both lies to the Court of Session [s. 374(3)(a)].

B. The office of the Additional Chief Judicial Magistrate differs from that of the Chief Judicial Magistrate in the following respects :

(a) an Additional Chief Judicial Magistrate may not process all the power of a Chief Judicial Magistrate, if the High Court so directs [s. 12(2)].

(b) The Additional Chief Judicial Magistrate shall be subordinate to the Chief Judicial Magistrate [s. 15(2)], but appeal from conviction by an Additional Chief Judicial Magistrate shall lie to the Court of Session and not the Chief Judicial Magistrate [s. 374(3)(a)]. [14]

(c) The Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death, imprisonment for life or for a term exceeding *seven* years. An Additional Chief Judicial Magistrate may only pass the sentence which any other First Class Magistrate is competent to pass, namely, imprisonment for a term not exceeding *three* years or fine not exceeding Rs. 5,000 or both [s. 29(2)].

(d) The rank of the Additional Chief Judicial Magistrate shall be below that of the Chief Judicial Magistrate, even when the former is vested with all the powers of the latter. [15]

4. 'A Judicial Magistrate of the First Class'.—

It is only a Judicial Magistrate of the First Class who is competent to be appointed a Chief Judicial or Additional Chief Judicial or Sub-divisional Judicial Magistrate, under sub-sections (1)-(3) of s. 12. Hence, unless a person in first appointed [16] a Judicial Magistrate of the First Class, his appointment as Additional Chief Judicial Magistrate would be invalid. [17] The position would be the same where the First Class powers of a Judicial Magistrate terminate and he is appointed an Additional Chief Judicial Magistrate thereafter, [18] without extending his appointment as a Magistrate First Class. [19] But a mere anachronism in the notifications relating to the appointments would not invalidate the appointment. [20]

5. Sub-section (3) : Sub-divisional Judicial Magistrate.—

1. The 41st Rep. of the Commission (para 2.9) opined that there was no need for the category of a Sub-divisional Magistrate on the judicial side, for, the work of supervision and control over the work of Judicial Magistrate, from a closer contact than that of the Chief Judicial Magistrate, could be performed by the Additional Chief Judicial Magistrate. The recommendation has not been accepted by parliament, which has inserted sub-section (3) in the present section.

2. The words 'in charge of', which occurred in *old* s. 13(1), have been omitted from the present sub-section (3)(a) of s. 12, but the definite article 'the' makes it

clear that there can be only one Sub-divisional Magistrate in a sub-division. His judicial powers shall be that of a First Class Judicial Magistrate, but he shall, as Sub-divisional Judicial Magistrate, acquire the powers of administrative control over all Judicial Magistrates other than the Additional Chief Judicial Magistrate [sub-section (3)(b)].

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10 41st Rep., para 2.8.

11 Cf. *Emp.* *v.* *Sajjad,* (1906) 4 Crlj 140 141.

12 Cf. *Harichand* *v.* *Batala* *Engineering* *Co.,* AIR 1969 SC 483 [*LNIND 1968 SC 288*]: (1969) 2 SCR 201 [*LNIND 1968 SC 288*] : 1969 Crlj 803 .

13 *Ajaib* *Singh* *v.* *Gurbachan,* AIR 1965 SC 1619 [*LNIND 1965 SC 439*]: (1965) 2 SCR 845 [*LNIND 1965 SC 439*] : (1965) 2 Crlj 553 .

14 Old s. 515 has also been replaced by s. 449(i), post.

15 *Ajaib* *Singh* *v.* *Gurbachan,* AIR 1965 SC 1619 [*LNIND 1965 SC 439*]: (1965) 2 SCR 845 : (1965) 2 Crlj 553 .

16 *Ladhuram* *v.* *Ghosh,* AIR 1957 Cal 667 [*LNIND 1957 CAL 82*].

17 *Chandi* *Charan* *v.* *T.R.O.,* AIR 1968 Cal 257 259 [*LNIND 1967 CAL 118*].

18 *Chandi* *Charan* *v.* *T.R.O.,* AIR 1968 Cal 257 259 [*LNIND 1967 CAL 118*].

19 *Chandi* *Charan* *v.* *T.R.O.,* AIR 1968 Cal 257 259 [*LNIND 1967 CAL 118*].

20 *Chandi Charan v. T.R.O.,* [AIR 1968 Cal 257 259 *LNIND 1967 CAL 118*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 13
Special Judicial Magistrates.

(1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Judicial Magistrate. [21] [of the first class or of the second class, in respect to particular cases or to particular classes of cases, in any local area, not being a metropolitan area :]

Provided **that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.**

(2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

22

[(3) The High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area outside his local jurisdiction.]

STATE AMENDMENTS

Andhra Pradesh. — *Following Amendments were made by A.P. Act No. 2 of 1992, S.2 (w.e.f. 10-4-1992).*

In s. 13, in sub-section (2) for the words "not exceeding one year at a time" the words "not exceeding two years at a time" shall be substituted.

Following proviso were added by A.P. Act 2 of 1992, S. 2. In s. 13 sub-section (2) proviso shall be added namely:—

" *Provided* that any person who is holding the office of Special Judicial Magistrate at the commencement of the *Code of Criminal Procedure* (Andhra Pradesh Amendment) Act, 1992 and has not completed sixty five years of age shall continue to hold office for a term of two years from the date of his appointment."

Bihar. — *Following amendment made by Bihar Act 8 of 1977, S. 3 (w.e.f. 10-1-1977).*

In s. 13 of the said Code for the words "in any district" the words "in any local area" shall be substituted and shall be deemed to have been always substituted.

Haryana. — *The following amendments were made by Haryana Act No. 16 of 1976, S s. 3 and 4 (w.e.f. 24-2-1976).*

S. 13. —In s. 13 of the principal Act,—

(a) for the words "second class", the words "first class or second class" shall be substituted and shall always be deemed to have been substituted;

(b) for the words "in any district" the words "in any local area" shall be substituted and shall always be deemed to have been substituted.

Validation. —Notwithstanding anything contained in any judgment, decree or order of any Court, any notification issued by the Government before the commencement of this Act purporting to establish any Court of Judicial Magistrate having jurisdiction over more than one district shall be deemed to have been issued under s. 11 read with s. 13 of the principal Act as amended by this Act and be deemed to be and always to have been valid.

Himachal Pradesh. — *The following amendments were made by Himachal Pradesh Act 40 of 1976, S. 2 (w.e.f. 13-11-1976).*

S. 13. —In s. 13 for the words "in any district" the words "in any local area" shall be substituted and shall be deemed to have been always substituted.

Punjab. — *The following amendments were made by Punjab Act No. 9 of 1978, S. 3 (w.e.f. 14-4-1978).*

S. 13(1). —In s. 13, sub-section (1), for the words "second class", the words "first class or second class" and for the words "in any district", the words "in any local area" shall be substituted.

Uttar Pradesh. — *The following amendments were made by U.P. Act No. 16 of 1976, S s. 4 and 11.*

S. 13. —In s. 13 for the words "second class" the words "first or second class" shall be substituted and for words, "in any district" words "in any local area" shall be substituted.

Validation .—Notwithstanding any judgment, decree or order of any Court—

(a) any notification of the State Government issued before Nov. 28, 1975 purporting to establish any Court of Judicial Magistrates having jurisdiction over more than one district shall be deemed to have been

issued under s. 11 read with s. 13 of the said Code as amended by this Act and be deemed to be and always to have been valid.

1. Constitutional Validity of s. 13.—

Section 13(1) of the Code is not violative of *Article 14 of the Constitution* on the ground that the section confines appointment of Special Judicial Magistrates to persons holding any post under the Government. [23]

2. Effects of the amendments of 1978.—

This amendment reverses the Code of 1973 and brings it to the 1955 position under s. 14 of the *old* Code, *viz* ., that not only 2nd class but also 1st class powers may now be conferred upon a Government servant (in office or retired) who is made a 'Special Judicial Magistrate' under this section [sub-section (1)], He can be given jurisdiction over specified cases or classes of cases only [sub-section (1)].

Another innovation is that though such Special Magistrate shall have no jurisdiction over any metropolitan area falling with his 'local jurisdiction' as defined in sub-section (1), he may be conferred by the High Court the powers of Metropolitan Magistrate in relation to any area *outside* his 'local jurisdiction' [sub-section (3)].

3. Scope of s. 13, as amended.—

This section corresponds to s. 14 of the *old* Code, as amended in 1955, with changes consequent upon the separation of the Judiciary from the Executive: [24]

(i) Powers of a Judicial Magistrate of the *first* or *second class* can be conferred on a 'special Magistrate' [sub-section (1)].

(ii) The term of such appointment can no longer be for an indefinite period: it may be only for a period of one year at a time, by one or successive orders [sub-section (2)].

(iii) The appointment shall now be in the hands of the High Court, not the State Government [sub-section (1)].

(iv) The person to be appointed must be a Government servant, in service or retired, and must possess the legal qualifications as may be prescribed by the High Court [sub-section (1), *Proviso*].

Another innovation is that though such Special Judicial Magistrate shall have no jurisdiction over any metropolitan area falling within his 'local jurisdiction' as defined in sub-section (1), he may be conferred by the High Court the powers of a Metropolitan Magistrate in relation to any area *outside* his 'local jurisdiction' [sub-section (3)].

4. Abolition of Honorary Magistrate.—

The Law Commission [25] opined that Honorary Magistrates had served a useful purpose in some States in relieving the stipendiary Magistrates in the disposal of petty cases, and in relieving the State from financial burden. But the Joint Committee on the Bill of 1970 [26] observed that there was widespread criticism against this institution, and, hence, recommended that all Magistrate should be stipendiary (*i.e.* , salaried), but cases punishable by a Second Class Magistrate might be made over to 'Special Judicial Magistrates', who must be or have been Government servants, having legal qualifications, and that the regular Judicial Magistrate could thus be relieved by this Special class of Judicial Magistrates.

5. Sub-section (1) : 'Any person who holds or has held any post under the Government'.—

These words have been struck down by a Division Bench of the Madras High Court [27] as violative of *Art. 14 of the Constitution* , on the ground that a person who has held a post in any Department of the Government which is not is any manner connected with the administration of criminal law may not be better fitted than other persons to hold the posts of a Special Judicial Magistrate under s. 13(1) or a Special Metropolitan Magistrate under s. 18(1).

6. 'Particular cases or classes of cases'.—

The section is not hit by Art. 14 because of these words, [28] since the procedure adopted by such Magistrate would be the normal procedure under the Code. [29]

7. 'Any district'.—

the expression 'local area', in *old* s. 14(1), was wide enough to enable a Special Magistrate being appointed in respect of more than one districts. Under the *new* provision, there is no scope for a Special Judicial Magistrate being appointed in respect of several districts.

8. Sections 13(1) and 197(4).—

The power to appoint a Special Judicial Magistrate under s. 13(1) should be distinguished from the specification of the Court before which the trial of the offence under s. 197 [*i.e.* , an offence committed by a Judge, Magistrate or public servant while acting or purporting to act in the discharge of his official duty] is to be held:

(i) Under s. 13(1), the conferment of power can be made only by the High Court, though at the request of the central or State Government. Under s. 197(4), the specification of the Court may be made by the Central or State Government itself.

(ii) The power under s. 13(1) relates to a 'person'; the specification under s. 197(4) relates to 'Court', and does not confer any additional power on the person presiding over such Court. Under s. 197(4), the Government has no power even to specify the person who is to preside over the Court so specified. [30]

(iii) Under s. 197(4), it is not obligatory upon the relevant Government to specify the Court, while sanctioning the prosecution; it is only an enabling provision. [31]

9. Jurisdiction of Special Judicial Magistrates.—

When out of four cases transferred by High Court to be tried by Special Judge, Assam under the *Prevention of Corruption Act, 1988* , two of them cannot be tried by him, those two cases have to be tried by the Special Judicial Magistrate appointed to try such cases.[32]

10. Appeal. —

Special Judicial Magistrate, being a Magistrate of the second class, appeal from an order of conviction on made by him shall lie to the Court of Session [s. 374(3)(a)].

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21 Substituted by Act No. 45 of 1978, S. 4(i) (w.e.f. 18-12-1978).

22 Sub-s. (3) inserted by Act No. 45 of 1978, S. 4(ii) (w.e.f. 18-12-1978).

23 *Kadra Pahadiya v. State of Bihar,*
(1997) 4 SCC 287 :
1997 SCC (Cri) 553 :
1997 Crlj 2232 :
AIR 1997 SC 3750 .

24 As recommended by the Rep. of the Joint Committee of 4-12-1972 [Com 1-5), pp. vi-vii.

25 41st Rep., Vol. II, paras 8-13.

26 Rep. of the Joint Committee, dated 4-12-1972 [Com 1-5], pp (vi)-(vii).

27 *Narayanaswamy v. State of T.N.,*
(1984) Crlj 1583 (Mad) (paras 6-7).

28 *M.K. Gopalan v. State of M.P.,*
1954 SC 362 :
(1955) 1 SCR 168 [
LNIND 1954 SC 59] :
1954 Crlj 1012 .

29 *M.K. Gopalan v. State of M.P.,*
1954 SC 362 :
(1955) 1 SCR 168 [
LNIND 1954 SC 59] :
1954 Crlj 1012 .

30 *M.K. Gopalan v. State of M.P.,*
1954 SC 362 :

(1955) 1 SCR 168 [
LNIND 1954 SC 59] :
1954 Crlj 1012 .

31 *M.K. Gopalan v. State of M.P.,*
1954 SC 362 :
(1955) 1 SCR 168 [
LNIND 1954 SC 59] :
1954 Crlj 1012 .

32 *State of Assam v. Keining James,*
2007 Crlj 897 Gau .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 14
Local jurisdiction of Judicial Magistrates.

(1) Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits of the areas within which the Magistrates appointed under Section 11 or under Section 13 may exercise all or any of the powers with which they may respectively be invested under this Code :

[[33] ***Provided*** **that the Court of a Special Judicial Magistrate may hold its sitting at any place within the local area for which it is established.]**

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

[(3) [34] **Where the local jurisdiction of a Magistrate, appointed under Section 11 or Section 13 or Section 18, extends to an area beyond the district, or the metropolitan area, as the case may be, in which he ordinarily holds Court, any reference in this Code to the Court of Session, Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall, in relation to such Magistrate, throughout the area within his local jurisdiction, be construed, unless the context otherwise requires, as a reference to the Court of Session, Chief Judicial Magistrate, or Chief Metropolitan Magistrate, as the case may be, exercising jurisdiction in relation to the said district or metropolitan area.]**

STATE AMENDMENT

Maharashtra. — *The following amendments were made by Maharashtra Act No. 23 of 1976, S. 2 (w.e.f. 9-6-1976)* .

S. 14-A. —After *s. 14 of the Code of Criminal Procedure, 1973* (2 of 1974), in its application to the State of Maharashtra the following section shall be inserted:—

"14A. Investing Judicial Magistrates with jurisdiction in specified cases or local area. —The High Court may invest any Judicial Magistrate with all or any of the powers conferred or conferrable by or under this Code upon a Judicial Magistrate in respect to particular cases or to a particular class or classes of cases or in regard to cases generally in any local area consisting of all or any of the districts specified by it in this behalf."

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1. Section 14 : Local Jurisdiction of Judicial Magistrates.—

By the *Amending Act* of 1978, two *new* provisions have been added to s. 14: (a) A Special Judicial Magistrate, appointed under s. 11, may hold his Court at any place within the area in relation to which the Special Court has been established. (b) When a Judicial Magistrate is appointed under s s. 11, 13 or 18, and his jurisdiction extends beyond the district or metropolitan area in which he ordinarily holds his Court, provisions in the Code referring to the Courts superior to him, *viz.* , the Court of Session, Chief Judicial Magistrate or Chief Metropolitan Magistrate shall, unless the context otherwise requires, refer to such superior Court which has jurisdiction over the district or metropolitan area where the Judicial Magistrate ordinarily holds his Court.

2. Sub-section (1) : Power to Chief Judicial Magistrate.—

While the jurisdiction of a Judicial Magistrate extends to the limits of the district under sub-section (2), sub-section (1) empowers the Chief Judicial Magistrate, subject to the control of the High Court, to assign a smaller local area to each Judicial Magistrate.

3. Sub-section (2) : Local jurisdiction of a Judicial Magistrate.—

1. The local jurisdiction of a Judicial Magistrate is confined to the district in which he has been appointed under s. 12, so that he cannot direct the Police in another State to conduct an investigation. [35] There is nothing in the *Prevention of Corruption Act* to the contrary.[36]

2. On the other hand, the jurisdiction of a Judicial Magistrate shall extend throughout the district in respect of which he had been appointed under s. 11(1),[37] unless jurisdiction over any part thereof is excluded by an express notification to that effect under sub-section (1) of s. 14. [38] The jurisdiction of Judicial Magistrates under other sections of the Code should be construed accordingly. [39]

3. In other words, even when the local jurisdiction of a Magistrate is defined under sub-section (1), the jurisdiction of such Magistrate over other parts of the district is not excluded in the absence of such exclusion being made expressly or by necessary implication by the order under sub-section (1). Hence, even a Sub-divisional Judicial Magistrate or a Magistrate stationed within one sub-division shall be entitled to exercise his powers beyond the limits of the sub-division specified in the order of the High Court under s. 12(3)(a),*ante* , unless there is anything in the order under s. 14(1) restricting his powers to that sub-division only. [40]

4. For the same reason, a Judicial Magistrate, on transfer from one area to another within the *same* district [41] (as distinguished from a transfer to another district), [42] does not lose his jurisdiction over the

former area, [43] nor do the cases pending in his file in the former automatically pass on his successor in that local area. [44]

5. On the same principle, where the jurisdiction of several Judicial Magistrates within a district is concurrent, the jurisdiction of one of them is not ousted as soon as the seisin of a case is taken up by another. Of course, when the trial is concluded by a judgment, the principle of *autrefois acquit* under s. 300 [*old* s. 403] or the constitutional bar under Art. 20(2) [45] will come into operation, so that thereafter the proceedings in another Court shall be invalid.

4. Local jurisdiction of the Judicial Magistrates, not defined : direction by the High Court.—

In the absence of defining the local jurisdiction of the Judicial Magistrates in the States under the jurisdiction of the High Court and the Judicial Magistrates are exercising jurisdiction throughout the district, it is affecting of working in bail matters. The bail matters are taken up by the Court on one day in the District by one Judicial Magistrate and another Judicial Magistrate on the other day. So, the full bench of the High Court instructed that the High Court may issue necessary instructions to the Chief Judicial Magistrate to define the jurisdiction of the Judicial Magistrates functioning within his jurisdiction. [46]

5. Local Jurisdiction of Chief Judicial Magistrate.—

1. Like all other Judicial Magistrate of the First Class, the Chief Judicial Magistrate is also a Judicial Magistrate of the First Class, and his jurisdiction extends throughout the territory of the district. [47]

2. While the Chief Judicial Magistrate may, by his order under s. 15(2), read with s. 14, define or curtail the local jurisdiction of each Magistrate and distribute business amongst them, he does not thereby lose his own jurisdiction to exercise powers of the First Class throughout the district. [48]

3. The being so, the Chief Judicial Magistrate is competent to take cognizance of any offence, committed anywhere in his district, notwithstanding the fact that the area in which the offence was committed, happens to fall within the local limits of the area assigned by him to some other Judicial Magistrate subordinate to him, by order under s s. 14-15, provided, of course, the complaint or police report upon which cognizance is taken has been presented to the Court of the Chief Judicial Magistrate instead of the Court to the Subordinate Judicial Magistrate to which the area in which the offence was committed, has been assigned by order under s s. 14-15. [49]

6. Effect of trial in a wrong local area.—

This section is to be read with s. 462 [*old* s. 531] which says that trial in a wrong local jurisdiction shall not vitiate the findings, sentence or order of any Criminal Court in the absence of a failure of justice. [50] Hence, so long as it is not set aside, a conviction by a Court having no local jurisdiction stands as valid. [51]

But s. 462 deals with the effects of trial in a wrong jurisdiction and the question whether the decision of the Court should be quashed on that ground. It does not mean that the trial Court is entitled to overlook s. 14. On the other hand, if the question of jurisdiction is raised before him, it is his duty to determine that point. [52] s. 462 [*old* s. 531] will not cure his failure to determine the question of jurisdiction if raised, not his wrong decision on the point. [53] (*See* further, under s. 178,*post*).

‘ *District* ’.— *See* under s. 7(1),*ante* .

7. Sub-section (3).—

This is consequential provision necessitated by the amendments made in s s. 11, 13 and 18, by the same Amendment Act of 1978. It means that when a Judicial Magistrate is appointed under s s. 11, 13 or 18, and his jurisdiction extends beyond the district or metropolitan area in which he ordinarily holds his Court, provisions in the Code referring to the Courts superior to him, *viz.* , the Court of Session, Chief Judicial Magistrate or Chief Metropolitan Magistrate shall, unless the context otherwise requires, refer to such superior Court which has jurisdiction over the district or metropolitan area where the Judicial Magistrate ordinarily holds his Courts.

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33 New proviso added by Act No. 45 of 1978, S. 5(a) (w.e.f. 18-12-1978).

34 Sub-s. (3) inserted by Act No. 45 of 1978, S. 5(b) (w.e.f. 18-12-1978).

35 *Union of India v. Ananthapadmanabhiah,* [AIR 1971 SC 1836 *LNIND 1971 SC 249*](para 10).

36 *Union of India v. Ananthapadmanabhiah,* [AIR 1971 SC 1836 *LNIND 1971 SC 249*](para 10).

37 Cf. *Shantabai v. Iishnupant,* [AIR 1965 Bom 107 *LNIND 1964 BOM 21*].

38 *Bai Meghi v. Harijan,* (1971) Crlj 717 (Guj) (para 8).

39 Cf. *Shantabai v. Iishnupant,* [AIR 1965 Bom 107 *LNIND 1964 BOM 21*].

40 *Om Prakash* , [AIR 1962 All 157 *LNIND 1961 ALL 95*]; *Golam v. Kalipada,* (1939) 36 CWN 796 797; *Baliram v. Dowlat,* AIR 1945 Nag 56 57 .

41 *Karuppanna v. Ahobalamatam,* 22 Mad 47.

42 *Baishnab* *v.* *Amin,* (1923) 50 Cal 664 .

43 *Karuppanna v. Ahobalamatam,* 22 Mad 47.

44 *Chhoti* *v.* *Kacheru,* (1920) 42 All 649 654.

45 See Author's *Constitutional Law of India* , Latest Edition

46 In re. *State* *of* *Assam* 2007 Crlj 927 Gau FB .

47 *Mahesh v. State of Rajasthan* , (1985) 301 (para 15) FB.

48 *Mahesh v. State of Rajasthan* , (1985) 301 (para 15) FB.

49 *Mahesh v. State of Rajasthan* , (1985) 301 (para 15) FB.

50 *Ram* *Chandra* *v.* *State* *of* *Bihar,* AIR 1961 SC 1629 1632 : (1962) 2 SCR 50 : (1961) 2 Crlj 811 .

51 *Haji* *Md.* , (1951) 52 Crlj 74 (All) .

52 *Radharani* *v.* *Rahim,* AIR 1946 Cal 459 460 .

53 *Satwant* , 1956 ALJ 134 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 15
Subordination of Judicial Magistrates.

(1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the judicial Magistrates subordinate to him.

STATE AMENDMENT

Bihar. — *The following amendments were made by Bihar Act No. 8 of 1977, S. 4 (w.e.f. 10-1-1977).*

S. 15(3). —In its application to State of Bihar, after S. 15(2), sub-section (3) inserted and deemed always to have been so inserted:—

"(3) Any Judicial Magistrate exercising powers over any local area extending beyond the district in which he holds his Court, shall be subordinate to the Chief Judicial Magistrate of the said district and references in this Code to the Sessions Judge shall be deemed to be references to the Sessions Judge of that district where he holds his Court."

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1. Scope of s. 15.—

This section corresponds to s. 17 of the *old* Code, with the major change that the present section is confined to the subordination of Judicial Magistrates, while the subordination of Executive Magistrates is dealt with by s. 23,*post* .

The table below will give a graphic account of the subordination of all Magistrates,—Judicial and Executive.

TABLE OF SUBORDINATION OF MAGISTRATES

	Class of Magistrate		*Subordinate to whom*
1.	Chief Judicial Magistrate.		Sessions Judge [s. 15(1)]
2.	Additional Chief Judicial and other Judicial Magistrate.		Chief Judicial Magistrate [s. 15(1)].
3.	Chief Metropolitan and Addl. Chief Metropolitan Magistrate		Session Judge [s. 19(1)].
4.	All other Metropolitan Magistrates.		Chief Metropolitan Magistrate [s. 19(1).
5.	Addl. Chief Metropolitan Magistrate.		Chief Metropolitan Magistrate, to the extent defined by the High Court [s. 19(2)].
6.	District Magistrate and Addl. District Magistrate.		State Government.
7.	All other Executive Magistrates.		District Magistrate [s. 23(1)].
8.	Executive Magistrates Functioning in a sub-division,other than the Sub-divisional Magistrate.		Sub-divisional Magistrate subject to overall control of District Magistrate [s. 23(1)].

2. Subordination of Judicial Magistrate.—

1. All Judicial Magistrates (including an Additional Chief Judicial Magistrate) shall be subordinate to the Chief Judicial Magistrate. It is to be noted that there is no provision corresponding to s. 19(2), as regards Additional Chief Judicial Magistrate. In the result,—

(a) What business shall be allocated to each Judicial Magistrate shall be determined by rules or special orders made by the Chief Judicial Magistrate, under s. 15(2).

(b) The Chief Judicial Magistrate may transfer a case to a Judicial Magistrate from his own file [s. 192(1)], and may either recall that case or transfer it to some other Magistrate, under s. 410 [*old* s. 528(2)]. [54]

3. Jurisdiction of the Chief Judicial Magistrate.—

The Chief Judicial Magistrate can take cognizance of any offence committed in any part of the district in which he has the jurisdiction. [55]

2. But there will be no subordination for the purposes of appeal or revision, all judicial Magistrates being inferior to the Sessions Judge for either purpose [s s. 374(3)(a); 397(1), *Expl.*].

3. The power of a superior Magistrate, under *old* s. 202, to direct a subordinate Magistrate, to make further inquiry on a complaint, has been abolished. [56] Under the *new* s. 202(1), such direction may be given only to a police officer or 'other person', but not a Magistrate, the reason given for the change being that when the case has finally to be heard and decided by the delegating Judicial Magistrate, there is no justification for delegating the preliminary function to another Judicial authority. [57]

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54 But he shall have no power of revision over other Judicial Magistrates [s. 397(1)] as the District Magistrate had, under *old* s. 435(1).

55 *Mahesh v. State,* 1985 Crlj 301 Raj FB .

56 41st Rep. of the Commission. Vol. I, para 16.10.

57 See Notes on Clauses on the Bill of 1970 [Com I-5, p vii], rejecting the proposal of the Commission to the contrary [41st Rep, Vol. I, para 2.31, p. 25].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 16
Courts of Metropolitan Magistrates.

(1) In every metropolitan area, there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area.

STATE AMENDMENT

Uttar Pradesh. — *The following amendments were made by U.P. Act No. 1 of 1984, S. 4 (w.e.f. 1-5-1984).*

S. 16(4). —In s. 16 after sub-section (3) following sub-section shall be inserted:—

"(4) Where the Office of the Chief Metropolitan Magistrate is vacant or he is incapacitated by illness, absence or otherwise for the performance of his duties, the senior-most among the Additional Chief Metropolitan Magistrates and other Metropolitan Magistrates present at the place, shall dispose of the urgent work of the Chief Metropolitan Magistrate."

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1. Scope of s. 16.—

This section corresponds to s. 18 of the *old* Code. There will be no Benches of Metropolitan Magistrates, *old* s. 19 having been omitted. [58]

2. Sub-section (3) : Local jurisdiction of Metropolitan Magistrates.—

This sub-section [replacing *old* s. 20] extends the jurisdiction of *all* Metropolitan Magistrates, including the Chief and the Additional Chief Metropolitan Magistrates, to the whole of the 'metropolitan area' to which has been appointed under sub-section (1), even though the area may be sub-divided for administrative convenience. [59] Hence, there is no question that it will extend to any jail [60] or port, [61] if any, as may be situated within such area. Within the territorial limits as above, the jurisdiction of Metropolitan Magistrates shall be concurrent, so that when a complaint is dismissed by one Magistrate, it cannot be revived by another such Magistrate, on the same facts. [62]

As to subordination of such Magistrates to the Chief or Additional Chief Metropolitan Magistrate [*see* under s. 19,*post*].

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58 41st Rep. of the Commission. Vol. I, para 16.10.

59 *Sevantilal* *v.* *State,* AIR 1969 Guj 63 (para 4).

60 Cf. The *Calcutta High Court Jurisdictional Limits Act, 1919* .

61 *Ganpat* *v.* *Good,* (1919) 47 Cal 147 .

62 *Girish* , 24 Cal 528.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 17
Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate.

(1) The High Court shall in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

1. Scope of s. 17.—

This section corresponds to s. 18(1), (4) of the *old* Code, with the change that appointments will now be made by the High Court instead of the State Government.

2. Powers of the Additional Chief Metropolitan Magistrate.—

1. While under s. 18(4) of the *old* Code, this depended on the notification of the State Government, the present sub-section empowers the High Court to define the extent of the powers of the Additional Chief Metropolitan Magistrate, and also to define the extent of his subordination, if any, to the Chief Metropolitan Magistrate [s. 19(2),*post*].

2. But, irrespective of such directions of the High Court, allocation of business to the Additional Chief Metropolitan Magistrate, shall be within the competence of the Chief Metropolitan Magistrate [s. 19(3),*post*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 18
Special Metropolitan Magistrates.

(1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate, in respect to particular cases or to particular classes of cases, [63] [* * *] in any metropolitan area within its local jurisdiction :

Provided **that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.**

(2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

64

[(3) The High Court or the State Government, as the case may be, may empower any Special Metropolitan Magistrate to exercise, in any local area outside the metropolitan area, the powers of a Judicial Magistrate of the first class.]

STATE AMENDMENTS

Andhra Pradesh. — *Following Amendments were made by A.P. Act 2 of 1992, S. 3.*

S. 18(2). —In s. 18 in sub-section (2) for the words "not exceeding one year at a time" the words "not exceeding two years at a time" shall be substituted.

Following proviso was added by A.P. Act 2 of 1992, S. 3.

In s. 18 sub-section (2), proviso shall be added, namely:—

" *Provided* that a person who is holding the office of Special Metropolitan Magistrate at the commencement of the *Code of Criminal Procedure* (Andhra Pradesh Amendment) Act, 1992, and has not completed sixty-five years of age shall continue to hold office for a term of two years from the date of his appointment."

Maharashtra. — *The following amendments were made by Maharashtra Act No. 23 of 1976,*

S. 3 (w.e.f. 9-6-1976) .

S. 18(1). —In s. 18 of the said Code, in sub-section (1) for the words "in any Metropolitan area" the words "in one or more Metropolitan areas" shall be substituted.

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1. Scope of s. 18.—

This section adapts *old* s. 14 for application to Metropolitan Magistrates.

The provisions of this section are similar to those of s. 13,*ante* , as regards Special Judicial Magistrates. Like the latter, a Special Metropolitan Magistrate can be vested with powers of a Magistrate of the second class, and his appointment cannot exceed a term of one year at a time.

2. Sub-section (1) : 'Any person who holds or has held any post under the Government.—

These words have been struck down as unconstitutional by a Division Bench of the Madras High Court [65] [*see* under Art. 13(1), *ante*].

3. Constitutional validity of s. 18(1). —

The Constiutional of the s. 18(1) of the Code has been challenged before the Supreme Court on the ground that it enables the High Court on the recommendation of the Central or State Government to appoint a Special Metropolitan Magistrate from among the person who holds or has held a post under the Government. But the Supreme Court did not accept the challenge that it violates *Article 14 of the Constitution* . The Madras High Court Judgment in *Narayanaswamy v. State of Tamil Nadu (supra*) has been overruled. [66]

4. Sub-section (3).—

Just as under s. 13, the High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate outside his local jurisdiction, so under s. 18(3), the High Court or the State Government may empower a Special Metropolitan Magistrate to exercise the powers of Judicial Magistrate of the First Class, outside his metropolitan area.

63 The words "or to cases generally" omitted by Act No. 45 of 1978, S. 6(i) (w.e.f. 18-12-1978).

64 Sub-s. (3) subs. by Act No. 45 of 1978, S. 6(ii) (w.e.f. 18-12-1978).

65 *Narayanaswamy v. State of T.N.,* (1984) Crlj 1583 (paras 6-7) Mad.

66 *Kadra Pahadiya v. State of Bihar,* (1997) 4 SCC 287 : 1997 SCC (Cri) 553 : 1997 Crlj 2232 : AIR 1997 SC 3750 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 19
Subordination of Metropolitan Magistrates.

(1) The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

(3) The Chief Metropolitan Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate.

1. Change made by the new Code.—

Section 19 roughly corresponds to s. 21(2) of the *old* Code, with important changes:

(a) Under the *new* Code all Metropolitan Magistrates, other than the Additional Chief Metropolitan Magistrate, shall be fully subordinate to the Chief Metropolitan Magistrate (subject, of course, to the general control of the Session Judge), by virtue of sub-section (1) of this section, instead of depending on the declaration of the State Government [under *old s. 2*1(2)].

(b) So far as the Additional Chief Presidency Magistrate is concerned, such subordination or the extent thereof will be defined by the High Court, under sub-section (2) of this section, instead of by the State Government [*old* s. 21(2)].

2. Sub-section (1) : Subordination of Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate.—

There was no provision for the subordination of the Chief and Additional Chief Presidency Magistrate to any Sessions Judge, under the *old* Code. Nor was there any such recommendation in the Report of the Commission or any provision to this effect in the Bills of 1970 and 1972.

The first part of sub-section (1) of the present section, making the Chief and the Additional Chief Metropolitan Magistrates subordinate to the Sessions Judge, appears to have been made in course of passage of the Bill in the Rajya Sabha, in order to place all Judicial Magistrates whether within or outside the Metropolitan areas [cf. s. 15(1)], equally under the subordination of the Sessions Judge. This is consistent with the fact that there shall be a Sessions Judge in a Metropolitan area as well [s s. 7(1), 9(1)], and the fact that both Judicial Magistrates and Metropolitan Magistrates will be recruited by the High Court from the same sources [Art s. 236- 237 of the *Constitution*].

3. Subordination of Metropolitan Magistrates other than the Additional Chief Metropolitan Magistrate.—

Since under the *new* Code, such Magistrates are subordinate to the Chief Metropolitan Magistrate, no reference to any notification by the State Government shall be necessary to come to the following conclusions:

(i) The Chief Metropolitan Magistrate shall be competent to transfer a case from one Metropolitan Magistrate to another Metropolitan Magistrate. [67]

(ii) He can withdraw a case made over to a Metropolitan Magistrate by the Chief Additional Metropolitan Magistrate. [68]

4. Subordination of Metropolitan Magistrates to Additional Chief Metropolitan Magistrate.—

When an Additional Chief Metropolitan Magistrate is vested with all the powers of the Chief Metropolitan Magistrate under the direction issued by the High Court under s. 17(2), he can send a case to a Metropolitan Magistrate, under s. 202. [69]

5. Sub-section (2) : Subordination of Additional Chief Metropolitan Magistrate.—

While s. 15(1) makes the Additional Chief Judicial Magistrate subordinate to the Chief Judicial Magistrate (subject to the general control of the Sessions Judge), the present sub-section makes the Additional Chief Metropolitan Magistrate subject to the Chief Metropolitan Magistrate only to the extent that the High Court may declare (this provision is a relic of *old* s. 21(2), under which this power to declare belonged to the State Government). [70]

Of course, so far as allocation of business to the Additional Chief Metropolitan Magistrate is concerned, the power belongs to the Chief Metropolitan Magistrate by virtue of sub-section (3) of this section. [*See* under s.

15(2),*ante*].

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67 *Nageswar* , (1899) 1 Bom LR 347 .

68 *Mohini* *v.* *Punam,* (1924) 51 Cal 820 826.

69 *Kanayalal* *v.* *Kanmull,* AIR 1934 Cal 45 .

70 By Noti. No. 6787 J, dated 23-10-1923, the Govt. of Bengal declared the Additional Chief Presidency Magistrate to be subordinate to the Chief Presidency Magistrate, for all purposes.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
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S. 20
Executive Magistrates.

(1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have [71] [such] of the powers of a District Magistrate under this Code or under any other law for the time being in force, [72] [as may be directed by the State Government.]

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-divisional Magistrate.

[73]

[(4-A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.]

(5) Nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

STATE AMENDMENT

Uttar Pradesh. — *The following amendments were made by U.P. Act 1 of 1984, S. 5 (w.e.f. 1-5-1984).*

S. 20(6). —In s. 20 of the said Code, after sub-section (5) following sub-section shall be inserted:—

"(6) the State Government may delegate its powers under sub-section (4) to the District Magistrate."

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1. Legislative Changes.—

Sub-section (4A) has been inserted by *Criminal Procedure Code* (Amendment) Act, 2005 which has come into force was the effect from 23.06.2006. Notes on this Clause 2 reads as follows:

> "Clause 2 seeks to insert sub-section (4A) to s. 20 to enable the State Government to delegate its power to the District Magistrate for the purposes of placing the Executive Magistrates in charge of a sub-division."

Prior to this amendment only State of Uttar Pradesh by the inserting sub-section (6) to s. 20 of the Central Act conferred similar powers to the District Magistrate which came into force with effect from 01.05.1984.

2. Scope of Section 20.—

This section adapts the provisions of s. 10 for application to Executive Magistrates.

3. Sub-section (1) : District Magistrate.—

1. There shall be only one person in a district to be the District Magistrate appointed under sub-section (1). The fact that the additional District Magistrate may have all the powers of a District Magistrate [sub-section (2)], does not make him a 'District Magistrate', [74] unless he is appointed the District Magistrate under sub-section (1). [75]

2. The words 'every district' imply that there cannot be one District Magistrate for two or more districts. [76]

4. Executive Magistrates in Metropolitan areas.—

There will be both Judicial and Executive Magistrate in a metropolitan areas, as in a district outside such area: (a) the Judicial Magistrates will be called simply as Metropolitan Magistrates [s. 16]; while (b) the Executive Magistrates in a metropolitan area shall be called District, Additional District, Sub-divisional or Special Executive Magistrates, as in the districts [s s. 20-21].

5. Sub-section (2) : Additional District Magistrate.—

1. The words "as the State Government may direct", occurring at the end of *old* s. 10(2), have been omitted from s. 20(2). But that does not make any difference, because it is the State Government which will appoint an Additional District Magistrate and confer upon him *all or any* of the powers vested in a District Magistrate by this Code or any other law.

2. Though powers belonging to a District Magistrate under the Code or under any other law may be conferred upon an additional District Magistrate, where a law provides that a certain power can be exercised by or delegated only to 'the District Magistrate.' An Additional District Magistrate cannot exercise such power, so long as he is not appointed a 'District Magistrate', *e.g.* , powers under s. 29 of the Defence of India Act, 1962. [77]

3. Of course, the case would be otherwise where the law provides that the power may be exercised by the District Magistrate or any officer authorised by him, *e.g.* , s. 3 of the U.P. (Temporary) Control of Rent & Eviction Act, 1947. [78]

4. Where the Sessions Judge directed that some money should be delivered to the accused on the latter furnishing a security bond 'to the satisfaction of the District Magistrate', there was no reason to suppose that the Sessions Judge nominated the District Magistrate as a *persona designata* and that the Additional District Magistrate could not accept the bond. [79]

5. Additional District Magistrates appointed under s. 20(2) by the State Government are Executive Magistrates to exercise the power of the Additional District Magistrate and can exercise the power of the District Magistrate under s. 16 of the Telegraph Act read with Section 51 of the Indian *Electricity Act* , 1910. [80]

The State Government has first to appoint a person as Executive Magistrate and then only he can be appointed as Additional District Magistrate or District Magistrate. So, the State Government has power to appoint the Commissioner of Police of Brihan Mumbai which is a Metropolitan area as an Executive Magistrate and then to appoint him as Additional District Magistrate who shall have the powers of the District Magistrate for the purpose of s s. 18 and 20 of the Suppression of Immoral Traffic Act, 1956. [81] In a case, the Additional District Magistrate, exercising powers as District Magistrate, passed orders u/ *Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act* (54 of 2002). When the matter was challenged under Art. 226, it was held by the Calcutta High Court that s. 20(2) of the Code specifically empowers the State Government to appoint an Executive Magistrate as an Additional District Magistrate and empower him to exercise the powers of District Magistrate. Thus, simply because the officer's designation is Additional District Magistrate, he was held to be not incompetent to exercise powers of District Magistrate under s. 4 of Act 54 of 2002.[82]

6. As to subordination of Additional District Magistrate, *see* under s. 23(1),*post* .

6. Statutory functions vested in the 'District Magistrate'.—

The question whether an Additional District Magistrate could exercise a power which has been vested by a statute in the 'District Magistrate' appears to have been answered differently, according to the nature of the function. [83]

(a) On the one hand, it has been held that since an Additional District Magistrate was not 'the District magistrate' he could not, even when vested with all the powers of a District Magistrate, make an order

of detention under R. 30(1)(b) of the Defence of India Rules, 1962, [84] or an order to requisition property under s. 29 of the Defence of India Act, 1962 which was 'drastic' in nature. [85] Section 10(2) of the *old* Code itself does not vest an Additional District Magistrate with all the powers of a District Magistrate. [86]

(b) On the other hand, where an Additional District Magistrate was vested with "all the powers of a District Magistrate under any law for the time being in force", it was held that he was competent to grant permission for a suit for ejectment of a tenant under the U.P. (Temporary) Control of Rent & Eviction Act, 1947, where the power was conferred upon the District Magistrate, *not as a persona designatea* . [87]

(c) An Additional District Magistrate vested with the power of the District Magistrate is empowered to issue an order under *s. 144 Crpc* .[88]

7. Sub-section (3) : Temporary arrangement in vacancy of office of District Magistrate.—

This sub-section corresponds to s. 11 of the *old* Code.

8. Sub-section (4) : Sub-divisional Magistrate.—

These words 'in charge' made it clear that there shall be only *one* Sub-divisional Magistrate in the sub-division. If a second officer is also appointed a Sub-divisional Magistrate or vested with the latter's powers, an order (*e.g.* , under s. 145), made by the second Magistrate shall be without jurisdiction. [89]

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71 Subs. for the words "all or any" by Act No. 45 of 1978, S. 7(a) (w.e.f. 18-12-1978).

72 Ins. by Act No. 45 of 1978, S. 7(b) (w.e.f. 18-12-1978).

73 Ins. by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 2. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

74 *Ajaib Singh v. Gurbachan,* AIR 1965 SC 1619 1622 : (1965) 2 SCR 845 : (1965) 2 Crlj 553 ; *Hari Chand v. Batala Engineering Co.,* AIR 1969 SC 483 [*LNIND 1968 SC 288*](para 11) : (1969) 2 SCR 201 [*LNIND 1968 SC 288*] : 1969 Crlj 803 .

75 *Hari Chand v. Batala Engineering Co.,* AIR 1969 SC 483 [*LNIND 1968 SC 288*](para 11) : (1969) 2 SCR 201 [

LNIND 1968 SC 288] :
1969 Crlj 803 .

76 *Arumugha* , (1931) 54 Mad 943FB .

77 *Ajaib Singh v. Gurbachan,*
AIR 1965 SC 1619 1622 : (1965) 2 SCR 845 :
(1965) 2 Crlj 553 .

78 *Central Talkies v. Dwarka Prasad,*
AIR 1961 SC 606 [
LNIND 1961 SC 20]:
(1961) 3 SCR 495 [
LNIND 1961 SC 20] :
(1961) 1 Crlj 740 .

79 *Debabrata v. State,*
AIR 1969 SC 189 [
LNIND 1968 SC 156](para 5).

80 *K.P. Mathai v. K.S.E. Board, Trivandrum,*
AIR 1996 Ker 186 [
LNIND 1995 KER 225](DB) .

81 *A.N. Roy v. Suresh Sham Singh,*
AIR 2006 SC 2677 [
LNIND 2006 SC 464]:
(2006) 5 SCC 745 [
LNIND 2006 SC 464] :
(2006) 3 SCC 75 (Cri) :
2006 Crlj 3614 .

82 *Harun Ali Mallick v. State of West Bengal,*
AIR 2011 Cal 45 [
LNIND 2010 CAL 506].

83 *Debarbata v. State,*
AIR 1969 SC 189 [
LNIND 1968 SC 156](para 5).

84 *Ajaib Singh v. Gurbachan,*
AIR 1965 SC 1619 1622 : (1965) 2 SCR 845 :
(1965) 2 Crlj 553 .

85 *Hari Chand v. Batala Engineering Co.,*
AIR 1969 SC 483 [
LNIND 1968 SC 288](para 11) :
(1969) 2 SCR 201 [
LNIND 1968 SC 288] :
1969 Crlj 803 .

86 *Central Talkies v. Dwarka Prasad,*
AIR 1961 SC 606
LNIND 1961 SC 20
(1961) 3 SCR 495
LNIND 1961 SC 20
(1961) 1 Crlj 740

87 *Central Talkies v. Dwarka Prasad,*
AIR 1961 SC 606
LNIND 1961 SC 20
(1961) 3 SCR 495
LNIND 1961 SC 20
(1961) 1 Crlj 740

88 *State of Karnataka v. Praveen Bhai Tugadia,*
AIR 2004 SC 2081
LNIND 2004 SC 416
(2004) 4 SCC 684
LNIND 2004 SC 416
2004 SCC (Cri) 1387
LNIND 2004 SC 556
2004 Crlj 1825
(2004) 2 KLT 342
LNIND 2004 SC 416

89 *Gajadharlal v. Suganchand,*
AIR 1953 MP 184

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 21
Special Executive Magistrates.

The State Government may appoint, for such term as it may think fit, Executive Magistrates, to be known as Special Executive Magistrates, for particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the powers as are conferrable under this Code on Executive Magistrates, as it may deem fit.

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1. Special Executive Magistrate.—

1. The 37th Report of the Commission (paras 117-18) recommended the creation of a class of Special Executive Magistrates, but the 41st Rep. (para 2.25) disapproved of this view on the ground that the functions of the Executive Magistrates under the *new* Code were going to be so limited that it would not warrant the creation of a separate class for assigning *particular* functions or areas. But the instant provision, following s. 14A, as proposed by the 37th Rep. (p. 154), appears to have been inserted by the Joint Committee on the Bill of 1970 [Rep. p. 328].

2. The Supreme Court has held that a Special Executive magistrate is basically an Executive Magistrate, appointed for some special area or purposes. Hence, he is entitled to exercise those powers which can be exercised by any Executive Magistrate *without* any special empowerment, *e.g.* , under s s. 107-110, 129, 145, 147. By reason of s. 21, he may *also* exercise the powers under s s. 133, 143 and 144, if so special empowered. [90]

90 *State of Maharashtra v. Khan,* :
(1991) 1 SCJ 82 :
(1991) 1 SCC 550 :
(1991) 1 Crimes 120 .

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CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 22
Local Jurisdiction of Executive Magistrates.

(1) Subject to the control of the State Government, the District Magistrate may, from time to time, define the local limits of the areas within which the Executive Magistrates may exercise all or any of the powers with which they may be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

1. Scope of Section 22.—

This section adapts *old* s. 12 for application to Executive Magistrates. Sub-section (2) makes it clear that unless limited by an order under sub-section (1), the *local* jurisdiction of every Executive Magistrate would extend throughout the district with respect to which he had been appointed under s. 20(1). [91] (*See also* under s. 14,*ante* .) Hence, a Sub-divisional Magistrate would be competent to initiate any try a proceeding under s. 145, relating to land situated within the jurisdiction of another subdivision of his district. [92]

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91 *Prasanta* *v.* *State,* [AIR 1952 Cal 91 *LNIND 1951 CAL 70*].

92 *Parichhan* *v.* *Heman,* AIR 1961 Pat 94 .

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CHAPTER II
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S. 23
Subordination of Executive Magistrates.

(1) All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate.

1. Subordination of Executive Magistrates.—

1. The present section speaks of the administrative subordination of Executive Magistrates. It means that—

(a) The District Magistrate may make rules or give special orders, consistent with the Code, as to the distribution of business among the Executive Magistrates subordinate to him [s. 23(2)].

(b) Subject to the control of the State Government, the District Magistrate may define the local limits of the areas within which the Executive Magistrate may exercise all or any of the powers with which they may be invested under the Code [s. 22(1)].

(c) The District Magistrate may—(i) make over, for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him; (ii) withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him and dispose of such proceeding himself or refer it for disposal to any other Magistrate [s. 411].

2. Whether the Executive Magistrates would be subject to judicial subordination to Superior Courts for purposes of appeal or revision has to be answered on different considerations. Thus,—

   (i) While exercising the power to make a complaint under s. 340(1) [*old* s. 476] for offences against the administration of justice, *e.g.* , forgery or perjury, an Executive Magistrate would be a 'Court' under s. 340(4), read with s. 195, and would, therefore, be subordinate to the Court of Session, for purposes of appeal, under s. 195(4) [*old* s. 195(3)]. [1]

   (ii) It follows that an Executive Magistrate (when act ing as a 'Criminal Court') would be regarded as subordinate to a Session Court or the High Court for the purpose of revision, under s. 397 [*old* s. 435], [2] *e.g.* , in respect of an order under s. 144; [3] an order under s. 145(1) or (4); [4] an order of transfer of disposal of a case under s. 411 [*old* s. 528]. [5]

3. The District Magistrate or the Sub-divisional Magistrate shall have no power of revision over Subordinate Executive Magistrates [s. 397(1)], which they had under the *old* Code [*old* s. 435(1)], nor any power of appeal which they had under *old* ss. 406(A)(c) or 515 [*see* ss. 373(ii); 449(i), *post*].

2. Subordination of Additional District Magistrate.—

1. Under the *old* Code, all Magistrates, including an Additional District Magistrate, were subordinate to the District Magistrate [*old* s. 17(1)], and, particularly, for the purposes of the sections specified in *old* ss. 10(2); 515. [6]

The foregoing provisions have been omitted from the *new* Code as regards an Additional Magistrate, and, by the words 'other than the District Magistrate' in s. 23(1), it has been made clear that an Additional District Magistrate shall not be 'subordinate' to the District Magistrate for any purpose, other than the mentioned in sub-section (2) of s. 23, namely, the allocation of business.

2. But even though the Additional District Magistrate may not be under the general control of the District Magistrate and may be vested with all the powers of a District Magistrate, under s. 20(2), he will neither be the District Magistrate nor equal to him in rank, so long as he is not appointed *the* District Magistrate, under s. 20(1). [7]

An Additional District Magistrate is not 'subordinate' to the High Court, for purposes of s. 195(4). [8]

3. Appeal.—

It is also to be noted that as regards appeal from an order made by an Executive Magistrate under *new* s. 447 [*old* s. 514], it has been provided in *new* s. 449(i) that an appeal from such order made by *any* Magistrate shall lie to the Sessions Judge. [9] The District Magistrate having lost the appellate power which he had under *old* s. 515[10] or s. 406A(c), no question can not be possibly raised as to whether an Additional District Magistrate

would be subordinate to the District Magistrate for this purpose. [11]

4. Sub-section (2) : Allocation of business to Executive Magistrates, including the Additional District Magistrate.—

It has been already stated that this provision makes the Additional District Magistrate subordinate to the District Magistrate in the matter of allocation of business. By virtue of the provision, cases may be transferred to or withdrawn from an Additional District Magistrate by the District Magistrate, [12] even though the Additional District Magistrate is not 'inferior' to the District Magistrate for purposes of appeal or revision.

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1 *Masand v. State of Maharashtra,* (1970) Crlj 399 (402); *Bharat v. Brindaban,* (1964) Cut 515.

2 Cf. *Nagaji v. Dhondiram,* AIR 1967 Bom 41 [LNIND 1965 BOM 70] (1968) 70 Bom LR 588 [ ]; on appeal, ; *Sundi* , AIR 1956 VP 39 [under *Section 26, Police Act, 1861*]; *Bathula* , AIR 1959 AP 129 [LNIND 1958 AP 122] [ ][under Section 87, Madras Hindu Religious *Charitable Endowments Act* , 1951].

3 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 [LNIND 1961 SC 14] (1961) 3 SCR 423 [LNIND 1961 SC 14] (1961) 2 Crlj 16 [ ](890, para 23) : [ ] : .

4 *Ram Chandra v. State of U.P.,* AIR 1966 SC 1888 [LNIND 1966 SC 136] 1966 Crlj 1514 [ ](1890 para 4) : 1966 Supp SCR 393 : .

5 *Subhan v. Gajanan,* AIR 1943 Nag 236 238 .

6 Cf. *Gaffar* , (1951) 3 Assam 560.

7 *Ajaib Singh v. Gurbachan,* AIR 1956 SC 1619 .

8 Cf. *Santokh v. Ishar,* (1973) SCD 611 [LNIND 1973 SC 160] [ ] (para 12); *Kuldip v. State of Punjab,*

(1956) SCR 125 [LNIND 1956 SC 14].

9 See also s. 373 [old s. 406A(c)].

10 Cf. *Bholanath v. State,* AIR 1967 Cal 440 441.

11 As arose in *Hyder v. State,* AIR 1971 Orissa 91 93.

12 *Jaikrit v. Sohan Raj,* AIR 1959 Raj 63 [LNIND 1957 RAJ 228].

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CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

[13] S. 24
Public Prosecutors.

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors, for the purpose of conducting any case or class of cases in any district or local area.

(3) For every district, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided **that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.**

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare a panel of names of persons, who are, in his opinion, fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where, in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided **that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate, under sub-section (4).**

[14] **[*Explanation*.—For the purposes of this sub-section,—**

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.]

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

[15] **[*Provided* that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]**

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate.]

STATE AMENDMENTS

Bihar. — *The following amendments were made by Bihar Act No. 16 of 1984, S. 2.*

S. 24(6). —In s. 24 for sub-section (6) substitute following and deemed always to have been substituted:—

"(6) Notwithstanding anything contained in sub-section (5) where in a State there exists a regular cadre of prosecuting officers, the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from among the persons constituting such cadre."

Haryana. — *The following amendments were made by Haryana Act No. 14 of 1985, S. 2.*

S. 24(6). —In its application to the State of Haryana to sub-section (6) of s.

section 24 of the Code of Criminal Procedure, 1973 , the following Explanation shall be added:—

" ***Explanation.*** —For the purpose of sub-section (6), the persons constituting the Haryana State Prosecution Legal Service (Group A) or Haryana State Prosecution Legal Service (Group B), shall be deemed to be a regular cadre of prosecuting officers."

Karnataka. — *The following amendments were made by Karnataka Act No. 20 of 1982, S. 2 (w.e.f. 3-9-1981).*

S. 24. —In its application to the State of Karnataka, in S. 24 in sub-section (1):—

(i) words and punctuation mark "or the State Government shall", omitted.

(ii) for the words "appoint Public Prosecutor," substitute the words "or the State Government shall appoint a Public Prosecutor".

Madhya Pradesh. — *The following amendments were made by M.P. Act, 21 of 1995, Section 3—In Section 24 of the Principal Act —*

(i) **S. 24(6).** —In sub-section (6), for the words, brackets and figure "Notwithstanding anything contained in sub-section (5)", the words, brackets, letter and figures "Notwithstanding anything contained in sub-section (5), but subject to the provisions of sub-section (6-A)" shall be substituted and shall be deemed to have been substituted with effect from 18th December, 1978;

(ii) **S. 24(6-A).** —After sub-section (6), the following sub-section shall be inserted and shall be deemed to have been inserted with effect from 18th December, 1978, namely:—

(6-A) Notwithstanding anything contained in sub-section (6), the State Government may appoint a person who has been in practice as an advocate for not less than seven years as the Public Prosecutor or Additional Public Prosecutor for the district and it shall not be necessary to appoint the Public Prosecutor or Additional Public Prosecutor for the district from among the persons constituting the Cadre of Prosecuting Officers in the State of Madhya Pradesh and the provisions of sub-sections (4) and (5) shall apply to the appointment of a Public Prosecutor or Additional Public Prosecutor under this sub-section;

(iii) **S. 24(7).** —In sub-section (7), after the words, brackets and figure "sub-section (6)" the words, brackets, figure and letter "or sub-section (6-A)" shall be inserted and shall be deemed to have been inserted with effect from 18th December, 1978; and

(iv) In sub-section (9), for the words, brackets and figure, "sub-section (7)", the words, brackets, figures and letter "sub-section (6-A) and sub-section (7)" shall be substituted and shall be deemed to have been substituted with effect from 18th December, 1978.

Maharashtra. — *The following amendments were made by Maharashtra Act No. 34 of 1981, S. 2 (w.e.f. 26-5-1981)* .

S. 24. —In s. 24 in its application to the State of Maharashtra:—

(a) in sub-section (1), the words "after consultation with the High Court", shall be deleted;

(b) in sub-section (4), for the words "in consultation with the Sessions Judge," the words "with the approval of the State Government," shall be substituted.

Rajasthan. — *The following amendments were made by Rajasthan Act No. 1 of 1981, S. 2 (w.e.f. 10-12-1980)* .

S. 24(6). —Sub-section (6) of s. 24 in its application to the State of Rajasthan shall be deemed always to have been substituted by the following:—

"(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular cadre of Prosecuting Officers, the State Government may also appoint a Public Prosecutor or an Additional Public Prosecutor from among the persons constituting such cadre."

Tamil Nadu. — *The following amendments were made by Tamil Nadu Act No. 42 of 1980, S. 2 (w.e.f. 1-12-1980).*

S. 24(6). —(a) in sub-section (6), after the expression "sub-section (5)", the following shall be inserted, namely:—

"but subject to the provisions of sub-section (6-A)";

S. 24(6A). —(b) after sub-section (6), the following sub-section shall be inserted, namely:—

"(6-A) Notwithstanding anything contained in sub-section (6), the State Government may appoint a person who has been in practice as an advocate for not less than seven years, as the Public Prosecutor or Additional Public Prosecutor for the district and it shall not be necessary to appoint the Public Prosecutor or Additional Public Prosecutor for the district from among the persons constituting the cadre of Prosecuting Officers in the State of Tamil Nadu and the provisions of sub-sections (4) and (5) shall apply to the appointment of a Public Prosecutor or Additional Public Prosecutor under this sub-section";

S. 24(7). —(c) in sub-section (7), after the expression "sub-section (6)", the expression "or sub-section (6-A)" shall be inserted.

Uttar Pradesh. —

(1) *The following amendments were made by U.P. Act No. 33 of 1978, S. 2 (w.e.f. 9-10-1978).*

S. 24(1). —In its application to the State of Uttar Pradesh in S. 24(1),

(i) after the words "Public Prosecutor", words, "and one or more Additional Public Prosecutors" shall be inserted and be deemed always to have been so inserted.

S. 24(7). —(ii) After sub-section (6), sub-section (7) inserted, and deemed always to been so inserted, as follows:—

"(7) For the purposes of sub-sections (5) and (6), the period during which a person has been in practice as a pleader, or has rendered service as a Public Prosecutor, Additional Public Prosecutor or Assistant Public Prosecutor shall be deemed to be the period during which such person has been in practice as an advocate."

(2) The following amendments were made by U.P. Act 18 of 1991, S. 2 (w.e.f. 16-2-1991).

S. 24. —In s. 24

(a) in sub-section (1), the words "after consultation with the High Court," shall be *omitted* ;

(b) sub-sections (4), (5) and (6) shall be *omitted* .

(c) in sub-section (7), the words "or sub-section (6)" shall be *omitted* .

West Bengal. — *The following amendments were made by W.B. Act 26 of 1990, S. 3 (w.e.f. 1-3-1991).*

S. 24(6). —

(1) In sub-section (6) of s. 24 for the words "shall appoint a Public Prosecutor or an Additional Public Prosecutor only", the words "may also appoint a Public Prosecutor or an Additional Public Prosecutor" shall be substituted.

(2) In sub-section (6), the proviso shall be omitted by W.B. Act 25 of 1992, s. 3.

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1. Amendments.—

This section has been substituted by Act 45 of 1978, with the changes indicated by italics, as follows:

(i) In sub-section (1), the change is that in additional to the Public Prosecutor, *Additional Public Prosecutors* may be appointed for the same business, in the *High Court* .

(ii) Sub-section (2), which is *new* , empowers the *Central Government* to appoint one or more Public Prosecutors to conduct its cases in any *district or local area* .

(iii) Existing sub-section (2), has been renumbered as sub-section (3) and a *Proviso* has been added, empowering the State Government to extend the jurisdiction of a Public Prosecutor or Additional Public Prosecutors for a district to *another district* as well.

(iv) Existing sub-section (3) has been renumbered as sub-section (4), without any change; similarly, existing sub-section (4) has been renumbered as sub-section (5) without change.

(v) Sub-section (6) has been *added* , as a rider controlling the preceding sub-section. In some districts, there is a ‘regular Cadre of Prosecuting Officers’. In such a district, no appointment of a Public Prosecutor or Additional Public Prosecutor shall be made out of the panel made by the District Magistrate, so long as a suitable person is available from that *Cadre* .

(vi) Clause 3 of *Code of Criminal Procedure* Code (Amendment) Act, 2005 seeks to amend sub-section (6) of s. 24 to clarify the expressions ‘regular Cadre of Prosecuting Officer’ and ‘Prosecuting Officer’ by incorporating as Explanation and the said Explanation so inserted shall be deemed to have been effected with effect from 18th day of December, 1978 *i.e.* the date on which the

Code of Criminal Procedure (Amendment) Act, 1978 has come into force.

(vii) Existing sub-section (5) has been renumbered as sub-section (7), including within its fold persons appointed from the Cadre as well.

(viii) Existing sub-section (6) has been renumbered as sub-section (8) without change.

(ix) An explanation has been introduced to sub-section (6) as substituted by the Amendment Act of 1978 (Act 45 of 1978) by the Cr.P.C (Amendment) Act, 2005 (25 of 2005) to define regular cadre of "prosecuting Officer" and "prosecuting Officer" for the purpose of said sub-section. It has come into force with effect from 08-12-1978, the date when the Act 45 of 1978 has been brought into force.

(x) A proviso has been inserted to sub-section (8) by *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) providing for the first time giving powers to the Court to permit a victim as defined in s. 2 (wa) of the Code to engage an advocate of his choice to assist the prosecution under sub-section (8). This has come into force with effect from 31-12-2009.

2. Sub-section (1) : Public Prosecutor for High Court.—

Though the Ordinary Original Criminal jurisdiction of the High Court has been abolished by the *new* Code, it has provided for the appointment of a Public Prosecutor for the High Court for conducting all cases and appeals before the High Court, under the Code, so that the general provisions of the Code may be applicable to such Public Prosecutor as well, as far as possible.

3. Procedure for appointment of the Public Prosecutor of the High Court.—

In view of the provisions of Chapter-V of the Legal Remembrancer's Manual of U.P., the State Government of U.P. is under obligation to connect the Advocate General of the State and the High Court before appointing the Public Prosecutor for the High Court. [16]

Under the provisions of s. 24 of the Code, no appointment of Legal Remembrancer of the Government of West Bengal can be made as the *ex officio* Public Prosecutor of the High Court. [17]

4. Status of Advocate-General.—

1. Unless appointed as a Public Prosecutor under s. 24(1), the Advocate-General cannot merely by virtue of his office, act as a Public Prosecutor before the High Court, [18] not direct another person to act as such, under s. 24, read with s. 2(u), *ante* . [19]

2. Hence, where the Advocate-General himself had not been appointed Public Prosecutor under s. 24(1), the High Court may refuse leave to appeal under s. 378(3) [*post*], the appeal having been filed by the Additional Advocate-General acting under the direction of the Advocate-General or even of the State Government itself. [20]

5. Sub-sections (3) and (4) : Appointment of a Public Prosecutor of a District.—

Consultation of the District Magistrate with the Sessions Judge for appointment of the Public Prosecutor or Additional Public Prosecutor in the District is mandatory. When the District and Sessions Judge is absent, the consultation with the Third Additional District and Sessions Judge in charge of the District in preparation of panel for appointment of the Additional Public Prosecutor cannot be faulted. [21]

In the matter of appointment/renewal of appointment of the District Government Counsel consultation with the District and Sessions Judge is mandatory. In case of conflict of opinion between the District Judge and the District Magistrate, the opinion of the District Judge would ordinarily prevail. [22]

Preparation of the panel by the Additional District Magistrate and the appointment of an Additional Public Prosecutor of the District from such panel is invalid [23] . The procedure adopted by the District and Sessions Judge for collection of bio-data of the Advocates for assessing their suitability for appointment of the Public Prosecutor of the District and to ascertain their willingness to such appointment to facilitate the District Magistrate to prepare the panel cannot be held to be illegal. [24]

6. Renewal of term of the Public Prosecutor of the District.—

For renewal of the term of the public Prosecutor of the District. The same procedure has to be adopted as for new appointment. Therefore, a panel has to be prepared by the District Magistrate in consultation with the District and Sessions Judge and such consultation must be real. When it was brought to the notice of the Supreme Court that in the matter of selection of the Public Prosecutor, the mandatory provisions of sub-section (4) of s. 24 have not been complied with, the Supreme Court set aside the appointment and issued necessary direction to the District Magistrate to perform the statutory duty afresh. [25]

7. Removal of Public Prosecutor, not upheld.—

When a Public Prosecutor has been removed and the State Government has failed to establish any misconduct on the part of the Public Prosecutor in conducting the cases and it was taken on extraneous consideration, the Kerala High Court set aside the order removing the Public Prosecutor. [26]

8. Appointment of Public Prosecutor.—

1. A person is a ‘Public Prosecutor’, according to the definition in s. 2(u), only if he is appointed as such under s. 24, or is ‘acting’ under the directions of a Public Prosecutor so appointed.

2. Under s. 24, the appointment of a Public Prosecutor for the High Court and a Public Prosecutor for every district has been made mandatory. [27]

3. A condition for such appointment is that in the case of a Public Prosecutor of the High Court, the Government must consult the High Court [sub-section (1)]; and in the case of a district, the Sessions Judge must be consulted in making the panel out of which only the appointment can be made [sub-sections (3)-(4)].

4. The Pubic Prosecutor including a Special Public Prosecutor, can be appointed by the State Government and not by the District Magistrate. [28]

5. A Special Public Prosecutor so appointed by the State Government is also a Public Prosecutor. [29]

6. Unless the Advocate has put in minimum length of practice for seven years, he cannot be appointed as Public Prosecutor. [30]

7. Even when there is no regular cadre of prosecuting officers as envisaged in s. 24(6) of the Code in the State the Assistant Public Prosecutor cannot insist on being appointed as Public Prosecutor. [31]

8. In view of sub-section (6) read with the Explanation to that sub-section, when there is regular Cadre of prosecution officer in the State, a public prosecutor cannot be appointed directly but the public prosecutor of the district has to be filled up by promotion from the Assistant Public Prosecutor. [32]

In a case relating to the Fodder Scam in Bihar, where the State Government changed the Public Prosecutor, the petitioner filed a writ petition under Art. 32 for a writ of mandamus. It was held by the Supreme Court (per majority) that the appointment of Public Prosecutor is the prerogative of the State Government in power and the court has no role to play. It was observed that if the petitioners had any grievance regarding removal of the Public Prosecutor, they should have submitted the same before the Special Judge or the High Court. It was held that on facts, the contention of the petitioners that the prosecutor was purposely changed to give benefits to respondents is not borne out by the material on record. [33]

9. Functions of the Public Prosecutor.—

1. The functions of a Public Prosecutor under the *new* Code are:

   (i) Conduct of every trial before a Court of Session [s. 225 : *old s. 2*70].

   (ii) He may be placed in charge of prosecution in a case before any Court [s. 301: *old* s. 493].

   (iii) He may appear and conduct prosecution in any case before a Magistrate inquiring into or trying a case, without any written authority or permission of the Magistrate [s s. 301(1), 302(1) : *old* ss. 493, 495(1)].

   (iv) His certificate is required for trial of approver [s. 308(1) : *old* s. 339(1)].

   (v) Power to withdraw from prosecution [s. 321 : *old* s. 494], subject to the *new* Proviso inserted in s. 321, which requires the permission of the Central Government in certain cases relating to the Union, where the Public Prosecutor concerned was not appointed by the Central Government. Another change is that only the Public Prosecutor who is in charge of a case, can exercise this power of withdrawal. [34]

   (vi) To appeal against acquittal, if directed by the State Government [s. 378(1): [35] *old* s. 417(1)].

2. But he cannot act or plead unless put in charge of a case [s. 301]. [36]

3. The Public Prosecutor is an officer of the Court and responsible to the Court. Hence he must act independently in the discharge of his functions, [37] and in the interests of the administration of justice. [38]

4. No Public Prosecutor, of any category, can appear against the State in any criminal proceeding, including complaint cases. [39]

5. Public Prosecutor holds certainly a public office of trust under the State. It is an office of responsibility more important than others, because a Public Prosecutor is not only required to prosecute the cases with detachment on the one hand but with a vigour on the other. He is empowered to withdraw the prosecution of the case under the direction of the State Government. [40]

6. He is an important officer of the State Government and is appointed by the Government under the Code. He is not a part of investigating agency. He is an independent statutory authority. [41]

7. It is as much the duty of the Public Prosecutor to the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. A Public Prosecutor who does not act fairly and acts more like a defence Counsel for the defence is a liability to the fair judicial system and the court should not play into the hands of such prosecuting agencies showing an indifferent or adopting an attitude of total indifference. [42]

8. A Public Prosecutor is appointed under s. 24 of the Code for conducting the prosecution; appeal or other proceedings in the Court. He is to deal with a different field in the administration of justice and he is not involved in investigation. It is not the scheme of *Cr.P.C.* for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing report in the Court.[43]

But if the Investigating Officer on the request of the defacto complainant seeks the opinion of the Public Prosecutor before filing a charge sheet against the accused and a charge sheet is filed, the accused cannot pray for quashing the charge sheet alleging that it is against the dictum of the Supreme Court in *R. Sarala v. T.S. Velu, (Supra*). [44]

9. Even when the Public Prosecutor presented the prosecution case with vehemence and vengeances no prejudice could be caused to the accused. It cannot be pleaded by the defence that he is inimically disposed of towards the accused. But such practice has been deprecated by the Supreme Court and it has been advised that the Public Prosecutor should not resort to such tactics except for very good reasons. [45]

10. Sub-sections (3)-(5).—

Additional Public Prosecutor .—There is no valid ‘panel’ where only one of three included therein is eligible. [46]

The Additional Public Prosecutor appointed under s. 24 of the Act is not a public servant and cannot be prosecuted under the Prevention and *Corruption Act, 1988* . [47]

11. Renewal of term of Public Prosecutor or Additional Public Prosecutor.

There is no provision for extension or renewal of the term of the Public Prosecutors, after the expiry of the term. But after the expiry of the period of appointment, it requires the same statutory exercise under s. 24(4) in which either new persons are appointed or those who have been working as Public Prosecutor or Additional Public Prosecutor by the State Government are appointed for a fresh term. For such purpose, a panel is to be prepared by the District Magistrate as required by sub-section (4) of s. 24, after making effective consultation with the District and Sessions Judge. [48]

12. Sub-section (6).—

The ‘regular cadre of Prosecuting Officers’ in this sub-section comprises a service with P.P. at the Top. If the cadre does not go up to the P.P. at the top (as in Kerala & the U.P.), the State Government would not be bound

to appoint a P.P. or Additional P.P. only from among the persons of such cadre. [49]

13. Sub-section (8) : Special Public Prosecutor.—

1. While the appointment under sub-section (3) is a general one, the appointment under sub-section (8) is for the purposes of a single case or a specified class of cases. [50]

2. The power of appointment of Special Prosecutors can be exercised by the Central Government and the State Government for the purpose of any case or any class of cases, having requisite qualification. Such powers can also be exercised by the State Government of the transferee Court, where the session case on transfer from another State is pending. [51]

3. Where a Special Public Prosecutor appointed by a previous Government never took charge of a case, the appointment of another person as Special Public Prosecutor, without cancelling the previous appointment may be improper but not illegal, and act s done by the latter would be validated under the *de facto* doctrine. [52]

4. A Special public Prosecutor may be appointed only for a specific purpose, namely, for withdrawal of a case, provided he is put in charge of the case. [53]

5. 'Advocate' in sub-sections (7)-(9) means an Advocate enrolled as such under the *Advocates Act, 1961* [54] and would not include judicial service. [55]

6. There is no bar to a private complainant's lawyer being appointed Special P.P. [56]

7. A Special Public Prosecutor is not to be appointed in ordinary circumstances. A Special Public Prosecutor would be appointed only when the public interest demands it and not to mitigate the grievances of a private person, such as, a close relative of the deceased. [57]

8. Only because the father of the victim in a murder trial against a police officer has sought for appointment of a Special Public Prosecutor to conduct the case, but the State Government considering the seriousness of the matter directed the District Magistrate to entrust the case with the District Government Pleader, the High Court did not interfere when the State Government took interest in the case and entrusted the prosecution to the District Government Pleader himself to conduct the case. [58]

9. When in a criminal case under s. 498A I.P.C. against the petitioner filed by his wife and pending in the Court of Judicial Magistrate, on the suggestion of the complainant party the government appointed the Respondent No. 3 as Special Public Prosecutor in the case when the case was to be conducted by the Assistant Public Prosecutor. The High Court set aside such order when the appointment was not supported by any special reason. [59]

10. When the Respondent No. 3 was appointed by the State Government on the suggestion made by the Joint Commissioner of Police (Crime) in a sensitive case involving notorious gangster and pertaining to illegal smuggling and concealment of arms and explosives by keeping in view his experience in such matters and his name was approved by various authorities of the State Government including the Remembrancer of Legal Affairs and approved by them, the appointment has been upheld as all aspects provided in Rule 18(2) of the Maharashtra Law Officers (Appointment, Conditions of Revenue and Remuneration) Rules were considered substantially. [60]

11. When in double murder case the State Government on the prayer of the close relatives of the victim appointed the respondent No. 3 as Special Prosecutor for that murder case after deliberations at various levels. The High Court in a writ petition filed by the respondent No. 1, a relative of the accused persons should not have interfered with that order. The Supreme Court has upheld the appointment by the State Government. [61]

12. In view of the proviso to sub-section (8) inserted by the *Criminal Procedure Code* (Amendment) Act, 2008 (5 of 2009) which comes into force with effect from 31-12-2009, the Court may permit an advocate engaged by the victim to assist the Special Public Prosecutor appointed under sub-section (8) of s. 24 of the Code.

14. Remuneration of Special Public Prosecutor.—

The State Government has right to pay higher remuneration or give additional facility to the Special Public Prosecutor, so appointed.

15. Special Public Prosecutor not sub-ordinate to the Public Prosecutor.—

A Special Public Prosecutor appointed under sub-section (8) of s. 24 is not sub-ordinate to the Public Prosecutor and he has no obligation to conduct the prosecution under the supervision of the Public Prosecutor of the District. [62]

16. Regular Cadre of Prosecuting Officer.—

Sub-section (6) of s. 24 of the Code provides that when there is a regular cadre of prosecuting officers, the Public Prosecutor or Additional Public Prosecutor shall be appointed from that Cadre. But there is no obligation in s. 24 on any State Government to create a regular cadre of prosecuting officers. When there is no such cadre, the appointment of the Public Prosecutor or Additional Public Prosecutor need not necessarily be made from the category of Assistant Public Prosecutor governed by the Government Law Officers, (Appointment and Conditions of Service and Conduct of Cases) Rules 1978. [63]

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13 S. 24 substituted by Act No. 45 of 1978, S. 8 (w.e.f. 18-12-1978).

14 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 3 (w.r.e.f. 18-12-1978).

15 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 3 (w.e.f. 31-12-2009).

16 *Vijay Shankar Misra, v. State of U.P.,* 1999 Crlj 521 All DB .

17 *Superintendent, Legal Affairs v. Prafulla Majhi,* 1977 Crlj 853 .

18 *State of Kerala v. Krishnan,* (1982) Crlj 301 (Ker) DB .

19 *State of Kerala v. Krishnan,* (1982) Crlj 301 (Ker) DB .

20 *State of Kerala v. Krishnan,* (1982) Crlj 301 (Ker) DB .

21 *Harpal Singh v. State of U.P.,* AIR 1993 SC 2436 [*LNIND 1993 SC 487*] (1993) 3 SCC 552 [*LNIND 1993 SC 487*] 1993 Crlj 938 .

22 *G.K. Bajpayee v. State of U.P.,* AIR 2005 All 65 [*LNIND 2006 AP 831*] (DB) .

23 *S. Ram Prasad v. Government of A.P.,* 1999 Crlj 2852 AP .

24 *K.S. Narayanan Nair* v *State of Kerala,* 1997 Crlj 1653 Ker .

25 *Vijaya Shankar Mishra v. State of U.P.,* 1999 Crlj 521 . (All).

26 *P.V. Anthony v. State of Kerala,* 1989 Crlj 2482 .

27 *In re., Supdt. of Legal Affairs* , (1977) CHN 166 (paras 5-6).

28 *R.N. Tiwari v. State of M.P.,* 1990 Crlj 2468 (MP) (DB).

29 *P.V. Anthony v. State of Kerala,* 1989 Crlj 2482 Ker .

30 *Rajendra Shankar v. State of U.P.,* 1979 Crlj 243 All DB .

31 *K.J. John v. State of Kerala,* 1990 Crlj 1777 : AIR 1990 SC 1902 [*LNIND 1990 SC 329*]: (1990) 4 SCC 191 [*LNIND 1990 SC 329*].

32 *Pratap Narayan Gop v. State of Jharkhand,* : (1552) Jhar (Jhar). 2008 Crlj 1550 2008 (1) JCR 491

33 *Rajiv Ranjan Singh v. Union of India,* : (cri) . (2006) 6 SCC 613 (2006) 3 SCC 125

34 Adopting the view of the Supreme Court in *State of Punjab v. Surjit,* [ ]: (1967) 2 SCR : ; *Shoonamdon v. State of Bihar,* [ ](para 17) : [ ] : AIR 1967 SC 1214 *LNIND 1967 SC 6* 1969 Crlj 1084 AIR 1983 SC 194 *LNIND 1982 SC 205* (1983) 1 SCC 438 *LNIND 1982 SC 205* 1983 Crlj 348 .

35 *State of Rajashan v. Manbhar,* [ ]. (1981) 2 SCC 525 *LNIND 1981 SC 148*

36 Adopting the view of the Supreme Court in *State of Punjab v. Surjit,* [ ]: (1967) 2 SCR : ; *Shoonamdon v. State of Bihar,* [ ](para 17) : [ ] : AIR 1967 SC 1214 *LNIND 1967 SC 6* 1969 Crlj 1084 AIR 1983 SC 194 *LNIND 1982 SC 205* (1983) 1 SCC 438 *LNIND 1982 SC 205* 1983 Crlj 348 .

37 *Rajendra v. State,* : (1980) 3 SCC 435 : ; *State of Bihar v. Ram Naresh,* [ ]; *Subhash v. State,* [ ]: [ ] : AIR 1980 SC 1510 1516 1980 Crlj 1084 AIR 1957 SC 389 *LNIND 1957 SC 9* AIR 1980 SC 423 *LNIND 1979 SC 455* (1980) 2 SCC 155 *LNIND 1979 SC 455* 1980 Crlj 324 .

38 *Balwant v. State of Bihar,* : (1977) 4 SCC 448 : ; *Amarinder Singh v. Parkash Singh Badal,* [ ] : AIR 1977 SC 2265 2266 1977 Crlj 1935 (2009) 6 SCC 260 *LNIND 2009 SC 1286* (2009) 2 SCC 971 (Cri) .

39 *Sud v. Gudimani,* (paras 5, 13, 17) Del; *Sunil Kumar Pal v. Phota Sheikh,* (para 9) : : 1985 SCC (Cr) 18. (1981) Crlj 1779 AIR 1984 SC 1591 (1984) 4 SCC 533

40 *Vijay Shankar Mishra v. State of U.P.,* 1999 Crlj 521 All ; *Srilekha Vidwarthi v. State of U.P.,* [(1991) 1 SCC 212 *LNIND 1990 SC 565*] : [AIR 1991 SC 537 *LNIND 1990 SC 565*].

41 *Hitendra Vishnu Thakur v. State of Maharashtra,* [AIR 1994 SC 2623 *LNIND 1994 SC 572*]: [(1994) 4 SCC 602 *LNIND 1994 SC 572*] : 1995 Crlj 517 .

42 *Zahira Habibullah H. Sheikh v. State of Gujarat,* [(2004) 4 SCC 158 *LNIND 2004 SC 471*] : [2004 SCC (Cri) 999 *LNIND 2004 SC 471*] : 2004 Crlj 2050 : [AIR 2004 SC 3114 *LNIND 2004 SC 471*].

43 *M.C. Mehta (Taj Corridor Scam) v. Union of India,* [AIR 2007 SC 1087 *LNIND 2006 SC 1046*]: [(2007) 1 SCC 110 *LNIND 2006 SC 1046*] : (2007) 1 SCC 264 (Cri) : [(2007) 1 Crimes 375 *LNIND 2006 SC 1046*]; *R. Sarala* v *T.S. Velu,* [(2000) 4 SCC 459 *LNIND 2000 SC 657*] : [2000 SCC (Cri) 823 *LNIND 2000 SC 657*] : [AIR 2000 SC 1731 *LNIND 2000 SC 657*]: 2000 Crlj 2453 followed.

44 *Md. Rafeeq Dr. v. State of A.P.,* 2007 Crlj 2641 AP .

45 *V.R.M. Rao v. State of A.P.,* [(2004) 4 SCC 427 *LNIND 2004 SC 405*] : [2004 SCC (Cri) 1289 *LNIND 2004 SC 405*] : [AIR 2004 SC 3221 *LNIND 2004 SC 405*]: 2004 Crlj 2829 .

46 *Ramchandra v. Jagadhodhara,* (1986) Crlj 1820 (para 12) Mad.

47 *State v. Suresh,* 2008 Crlj NOC 292Bom .

48 *Harpal v. State of U.P.,* [AIR 1993 SC 2436 LNIND 1993 SC 487]: [(1993) 3 SCC 552 LNIND 1993 SC 487] : 1993 Crlj 3140 .

49 *John v. State of Kerala,* (paras 20-21) : [(1990) Crlj 1777 AIR 1990 SC 1902 LNIND 1990 SC 329]: [(1990) 4 SCC 191 LNIND 1990 SC 329].

50 *Sheonandan v. State of Bihar,* [AIR 1983 SC 194 LNIND 1982 SC 205](para 50) : [(1983) 1 SCC 438 LNIND 1982 SC 205] : 1983 Crlj 348 .

51 *Jayendra Saraswati Swamigal v. State of T.N.,* [AIR 2008 SC 2997 LNIND 2008 SC 1487]: [(2008) 10 SCC 180 LNIND 2008 SC 1487] : : 2009 Crlj 3877 (2008) 3 KLT 639 .

52 *Sheonandan v. State of Bihar,* [AIR 1983 SC 194 LNIND 1982 SC 205](para 50) : [(1983) 1 SCC 438 LNIND 1982 SC 205] : 1983 Crlj 348 .

53 *Sheonandan v. State of Bihar,* [AIR 1983 SC 194 LNIND 1982 SC 205](para 50) : [(1983) 1 SCC 438 LNIND 1982 SC 205] : 1983 Crlj 348 .

54 *Rajendra v. State of U.P.,* (1979) Crlj 243 (247) All (DB) .

55 *Mallikarjuna v. State of A.P.,* (1978) Crlj 1354 (1357)(DB) .

56 *Vijay v. State of Maharashtra,* (1986) Crlj 2093 (paras 13-16) Bom (DB); contra *Babu v. State of Kerala,* (1984) Crlj 499 .

57 *Abdul Khadar v. Government of Kerala,* (1992) 2 Ker LT 948 .

58 *Mery Joosa Mrs. v. State of Kerala,* 1997 Crlj 467 Ker .

59 *Rajendra Nigam, v. State of M.P.,* 1998 Crlj 998 .

60 *A.S. Shirshat v. State of Maharashtra,* 2007 Crlj 548 Bom .

61 *State of Maharashtra v. Prakash Prahlad Patil,* AIR 2010 SC 463 [LNIND 2009 SC 890](*Division Bench of Bombay High Court in Prakash Prahlad Patil v. State of Maharashtra,* 2008 (NOC) 1147 : 2008 (5) AIRBOMR 189(Bom-DB) set aside).

62 *Ajay Kumar v. State,* 1986 Crlj 932 : ILR (1985) 2 Del 40 [LNIND 1985 DEL 234].

63 *Joshy Nambud Kaur v. State of Kerala,* 2007 Crlj NOC 937Ker .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

S. 25
Assistant Public Prosecutors.

(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

64

[(1A) The Central Government may appoint one or more Assistant Public Prosecutors for the purpose of conducting any case or class of cases in the Courts of Magistrates.]

(2) Save as otherwise provided in sub-section (3), no police officer shall be eligible to be appointed as an Assistant Public Prosecutor.

(3) Where no Assistant Public Prosecutor is available **65** **for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case :**

Provided **that a police officer shall not be so appointed—**

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector.

STATE AMENDMENTS

Orissa. — *The following amendments were made by Orissa Act 6 of 1995, Section 2 (w.e.f. 10.3.1995).*

S. 25(2). —In *Section 25 of the Code of Criminal Procedure, 1973* (2 of 1974), to sub-section (2) of the following proviso shall be inserted namely:—

" *Provided* that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through Police Officers."

Uttar Pradesh. — *The following amendments were made by U.P. Act No. 16 of 1976, S. 5.*

S. 25(2). —In its application to the State of Uttar Pradesh to S. 25(2) a proviso added and be deemed always to have been so added:—

" *Provided* that nothing in this sub-section shall be construed to prohibit the State Government from exercising its control over Assistant Public Prosecutor through police officers."

West Bengal. — *The following amendments were made by W.B. Act 17 of 1985 S. 3.*

S. 25(3). —In its application to the State of West Bengal, for sub-section (3) of Section 25 following sub-section shall be substituted:—

"(3) Where no Assistant Public Prosecutor is available for the purposes of any particular case, any advocate may be appointed to be the Assistant Public Prosecutor in charge of that case,—

(a) where the case is before the Court of a Judicial Magistrate in any area in a subdivision wherein the headquarters of the District Magistrate are situated, by the District Magistrate; or

(b) where the case is before the Court of a Judicial Magistrate in any area in a subdivision, other than the sub-division referred to in Clause (a), wherein the headquarters of the Sub-divisional Magistrate are situated, by the Sub-divisional Magistrate; or

(c) where the case is before the Court of a Judicial Magistrate in any area, other than the area referred to in Clauses (a) and (b), by a local officer (other than a police officer) specially authorised by the District Magistrate in this behalf.

Explanation .—For the purposes of this sub-section,—

(i) "advocate" shall have the same meaning as in the *Advocates Act, 1961* ;

(ii) "local officer" shall mean an officer of the State Government in any area, other than the area referred to in Clauses (a) and (b)."

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1. Sub-section (1) : Qualifications for appointment as Asstt. Public Prosecutor.—

1. While in s. 24(7)- (8) qualifications for appointment as Public Prosecutor or Additional Public Prosecutor have been laid down, in sub-sections (1)-(2) of s. 25, no qualifications have been specified for being appointed as Assistant Public Prosecutor, Hence, anybody, including the employee of a municipal corporation, may be appointed Assistant Public Prosecutor. He need not be a law graduate. [66]

(2) As sub-sec. (3) says, even a Police Office may be appointed Assistant Public Prosecutor, subject to the limitations specified in that sub-section. But while the appointment under sub-sec. (1) is for the purpose of conducting the generality of cases, the appointment under sub-section (3) is only for the purposes of a particular case. [67]

2. Sub-section (1A).—

While sub-section (1) empowers the State Government to appoint Assistant Public Prosecutors for Magistrates Courts, the *new* sub-section (1A) gives corresponding power to the Central Government, so that they may not be dependent on the State Government for conducting prosecution of Central Government cases.

3. Sub-section (3) : Scope of.—

1. This sub-section is in the nature of an exception to sub-section (1). [68] While sub-section (1) relates to appointments to be made for the generality of cases before the Courts of Magistrates, the power conferred by sub-section (3) : (i) cannot be exercised for making general appointments, but it is to be confined to the conduct of a *particular* case; [69] (ii) can be exercised only where no Assistant Public Prosecutor, appointed under sub-section (1) is available for conducting that particular case; (iii) can be exercised by the District Magistrate, while the power under sub-section (1) belongs to the State Government.

2. Because of the mandate of speedy trial in *Art. 21 of the Constitution* , the Chief Judicial Magistrate may direct the appointment of a Prosecutor for a particular case, if the State Government refuses to make requisite appointment for administrative or financial reasons. [70]

4. 'Any other person.'—

These words show that any person may be allowed to conduct the prosecution (subject to the *Proviso*) irrespective of his appointment as a 'Public Prosecutor'. [71]

5. Bar against Police Officers being appointed Assistant Public Prosecutors for conducting prosecutions before Courts of Magistrates. —

Under *old* s. 492(2), *any* person including a Public Officer (not below the rank specified by the State Government) could be appointed to act as Public Prosecutor in charge of a particular case, where the Public Prosecutor was not available—the power to appoint being left to the District Magistrate or the Sub-Divisional Magistrate.

That provision is replaced by the present section of the *new* Code, under which there will be a regular team of

Assistant Public Prosecutors appointed by the State Government, to conduct cases before Magistrates, who must *not* be Police Officers [sub-section (2)]. By sub-section (3) the power of the District Magistrate to appoint an Assistant Public Prosecutor for the purposes of a *particular* case has been retained, to meet contingencies when as Assistant Public Prosecutor may not be available,—with this reservation that no Police Officer who has taken any part in the investigation of the offence should be so appointed. [72] Barring such persons, a superior Police Officer, not below the rank of Inspector, may be appointed, for this purpose, under the *Proviso* .

This *Proviso* thus represents a concession made by the Commission [41st Rep. Vol. I, para 38(3)] to make an adjustment with the existing practice, which the hope that it will be resorted to "less and less in future years",—leaving the conduct of the prosecution to qualified legal practitioners, appointed under sub-sections (1)-(2).

6. Challenge to appointment.—

An appointment under s. 25 cannot be challenged as invalid on any ground under s. 482 of the Code. The remedy, if any, lies under *Art. 226 of the Constitution* . [73]

7. Wholetime Government Servant.—

An Assistant Public Prosecutor is a whole time Government servant. He cannot defend an accused in a criminal case. [74]

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64 Sub-s. (1A) inserted by Act No. 45 of 1978, S. 9 (w.e.f. 18-12-1978).

65 Cf. *Nagaji v. Dhondiram,* AIR 1967 Bom 41 [LNIND 1965 BOM 70]; on appeal, (1968) 70 Bom LR 588; *Sundi* , AIR 1956 VP 39 [under *Section 26, Police Act, 1861*]; *Bathula* , AIR 1959 AP 129 [LNIND 1958 AP 122][under Section 87, Madras Hindu Religious *Charitable Endowments Act* , 1951].

66 *Tirupathi v. Govt. of A.P.,* (1983) Crlj 1243 (para 9) AP.

67 *Tirupathi v. Govt. of A.P.,* (1983) Crlj 1243 (para 9) AP; *Jaipal v. State of U.P.,* (1976) Crlj 32 (All) ; *Baban v. Samba Murthy,* (1980) Crlj 248 AP.

68 Inserted by Act 45 of 1978.

69 *Jaipal* *v.* *State of U.P.,* (1976) Crlj 32 (All) ; *Baban v. Samba Murthy,* (1980) Crlj 248 AP .

70 *Sunny* *v.* *State of Kerala,* (1986) Crlj 1517 (paras 19-20) Ker (DB).

71 *Panchu Gopal* *v.* *State,* AIR 1968 Cal 38 43 [*LNIND 1967 CAL 69*].

72 *Jaipal* *v.* *State of U.P.,* (1976) Crlj 32 (All) ; *Baban v. Samba Murthy,* (1980) Crlj 248 AP .

73 *Shankar* *v.* *Mustafer,* (1983) Crlj 30 (para 10) AP.

74 *Kannupan* *v.* *Abbas,* 1986 Crlj 1022 Mad .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER II
CONSTITUTION OF CRIMINAL COURTS AND OFFICES

[75] S. 25-A.
Directorate of Prosecution

(1) The State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit.

(2) A person shall be eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment shall be made with the concurrence of the Chief Justice of the High Court.

(3) The Head of the Directorate of Prosecution shall be the Director of Prosecution, who shall function under the administrative control of the Head of the Home Department in the State.

(4) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(5) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1), or as the case may be, sub-section (8), of section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

(6) Every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3), or as the case may be, sub-section (8), of section 24 to conduct cases in District Courts and every Assistant Public Prosecutor appointed under sub-section (1) of section 25 shall be subordinate to the Deputy Director of Prosecution.

(7) The powers and functions of the Director of Prosecution and the Deputy Directors of Prosecution and the areas for which each of the Deputy Directors of Prosecution have been appointed shall be such as the State Government may, by notification, specify.

(8) The provisions of this section shall not apply to the Advocate General for the State while performing the functions of a Public Prosecutor.]

STATE AMENDMENTS

Karnataka. — *The following amendments were made by Karnataka Act 39 of 2012, Section 2 (w.e.f. 24-10-2012).*

S. 25A. —In its application to Karnataka in section 25A,—

(a) for sub-section (2), the following shall be substituted, namely:—

"(2) The post of Director of prosecution and Government litigations, or a Deputy Director of Prosecution and other cadres shall be filed in accordance with the Cadre and Recruitment Rules framed under the Karnataka State Civil Services Act, 1978 (Karnataka Act 14 of 1990)."

(b) for sub-section (5), the following shall be substituted, namely:—

"(5) Every Public Prosecutor, Additional Public Prosecutor appointed by the State Government from the cadre of Prosecutors recruited under the recruitment rules framed by the Government under the Karnataka State Civil Services Act, 1978 shall be subordinate to the Director of Prosecution and Government litigations and every Public Prosecutor, Additional Prosecutor and Special Prosecutor appointed under sub-section (8) of section 24 shall be subordinate to the Advocate General."

(c) In sub-section (6), for the words "Deputy Director of Prosecution" the words "Director of Prosecution" shall be substituted.

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1. Legislative history.—

Clause 4 of the Criminal Procedure (Amendment) Bill, 2005 enacted as *s. 4 of the Code of Criminal Procedure* (Amendment) Act, 2005 seeks to insert a new s. 25A empowering the State Government to establish the Directorate of Public Prosecution. The Director of Public Prosecution shall function under the administrative control of the Home Department in the State.

2. Directorate of Prosecution.—

The State Government has been empowered under s. 25A of the Code to establish a Directorate of Prosecution consisting of the Director of Prosecution and as many Deputy Directors of the Prosecution as the State Government thinks it proper to appoint.

3. Eligibility of appointment of the Director and Deputy Director of Prosecution.—

A person shall be eligible to be appointed as the Director of Prosecution or a Deputy Director of Prosecution only if he has been in practice as an advocate for not less than ten years. Such appointment shall only be with the concurrence of the Chief Justice of the High Court. As the eligibility criteria is practice as an Advocate not less than ten years, thus eligibility criteria is higher than that of the Public Prosecutor, Additional Public Prosecutor of Special Public Prosecutor appointed under s. 24 of the Code

4. The position of Director of Prosecution.—

(a) The Director of Prosecution is the head of the Directorate of Prosecution and he shall function under the administrative control of the Head of the Home Department in the State.

(b) Every Deputy Director of Prosecution shall be subordinate to the Director of Prosecution.

(c) Every Public Prosecutor, Additional Public Prosecutor appointed under s. 24(1) of the Code and every Special Public Prosecutor appointed under s. 24 (8) of the Code to conduct cases in the High Court shall be subordinate to the Director of Prosecution.

5. The Position of Deputy Director of Prosecution.—

Every Public Prosecutor, Additional Public Prosecutor appointed by the State Government under sub-section (3) or any Special Public Prosecutor appointed under s. 24 (8) of the Code shall be subordinate to the Deputy Director of Prosecution.

6. Position of the Advocate-General of the State.—

An Advocate-General of the State does not act as Public Prosecutor in respect of any case unless he is appointed as such by the State Government under s. 24 of the Code. [76] However, even if the Advocate-General is not appointed to act as a Public Prosecutor in respect of any case by the State Government, he does not thereby come under the subordination of the Director of Prosecution appointed under s. 25A of the Code.

7. Government may lay down conditions other than essential qualifications for the post of Director and Deputy Director.—

Essential qualification is provided in the section itself. But the State Government is not debarred from laying down necessary conditions other than that prescribed by s. 25A. Therefore, the Government notification providing that the preference will be given to the candidate having experience as prosecution lawyer is not invalid because it does not change the basic qualifications laid down in s. 25A. [77]

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75 New Section 25-A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 4. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

76 *T.A. Rajendran v. Ayyappan,* 1986 Crlj 1287 Ker .

77 *Ranjit Deb Nath v. State,* Gau : [2008 Crlj 250 (2007) 4 GLT 438 *LNIND 2007 GAU 264*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 26

Courts by which offences are triable.

Subject to the other provisions of this Code—

(a) any offence under the *Indian Penal Code (45 of 1860)* may be tried by—

(i) the High Court, or

(ii) the Court of Session, or

(iii) any other Court by which such offence is shown in the First Schedule to be triable:

[[1] *Provided* that any [2] [offence under section 376, section 376A, section 376B, section 376C, *section 376D* or *section 376E* of the *Indian Penal Code (45 of 1860)*] shall be tried as far as practicable by a Court presided over by a woman.]

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by—

(i) the High Court, or

(ii) any other Court by which such offence is shown in the First Schedule to be triable.

STATE AMENDMENTS

Uttar Pradesh. — *The following amendments were made by U.P. Act 1 of 1984, S. 6 (w.e.f. 1-5-1984).*

S. 26. —In s. 26 for Clause (b) the following clause shall be substituted :—

"(b) any offence under any other law may be tried—

"(i) when any Court is mentioned in this behalf in such law, by such Court, or by any Court superior in rank to such Court, and

(ii) when no Court is so mentioned, by any Court by which such offence is shown in the First Schedule to be triable, or by any Court superior in rank to such Court."

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1. Scope of s. 26.—

1. This section combines *old* ss. 28-29, changing the reference to the 2nd Sch., which is replaced by the First Sch. In the *new* Code. While the hierarchy of Criminal Courts is dealt with in s. 6, the present section lays down the respective punishing powers of those Courts.

2. While the words 'subject to the other provisions of this Code', were repeated in *old* s. 28 as well as sub-sections (1)-(2) of s. 29, such repetition has been avoided by combining all the parts of *old* ss. 28-29 in *new* s. 26 and placing the words 'subject to the provisions of this Code' at the beginning of the whole, so that the reservation shall apply to both Cls. (a) and (b) of s. 26, Hence, it cannot be concluded that the application of the special law has been made independent of the other relevant provisions of the Code.

Proviso added to clause (a) of this section by the *Code of Criminal Procedure* (Amendment) Act, 2008 has been amended further *vide* the *Criminal Law (Amendment) Act, 2013* . The amended section lays down that an offence under s. 376,s. 376A, s. 376B, s. 376C, s. 376D or *s. 376E of the Indian Penal Code (45 of 1860)* shall be tried as far as practicable by a Court presided over by a woman.

2. S s. 26 and 29.—

While s. 26 deals with the jurisdictions of the various Courts, s. 29 imposes a limit on the sentences which different classes of Magistrates may pass. s. 29 has nothing to do with jurisdiction. [3]

3. Cl. (a) : 'Subject to the other provisions of the Code'.—

1. These opening words of the section mean that though a High Court or a Court of Session has jurisdiction to try any offence under the *Penal Code* , this must be read subject to any special provision of the Code itself relating to such jurisdiction, *e.g.* ,—

   (a) A Sessions Court cannot take cognizance of a case, unless it is committed to it by a competent Magistrate, except as otherwise provided by the Code [s. 193].

   (b) Under the *new* Code, the High Court cannot try any offence under its Original Criminal jurisdiction. [4] s. 26 of the *new* Code, therefore, refers only to the *Extraordinary* Criminal jurisdiction [5] of the High Court, or the jurisdiction to try cases brought before itself by transfer [s. 407(1)(iv), *post*].

2. The jurisdiction conferred upon the High Court and the Court of Session by the present clause, is a general one and is not dependent upon anything in the First Schedule. Thus, even though, according to the First Sch., an offence is triable by a Magistrate, the Magistrate should commit it for trial to the Session Court, under s. 323 [*old* s. 347] where it appears to the Magistrate at any stage of the proceeding before him that the case 'ought' to be tried by the Court of Session, [6] *e.g.* , on account of the gravity or public importance of the case. [7] So, it is therefore clear that the Sessions Judge has power to try any offence under the *Indian Penal Code* .[8] For the same reason, where a case has been properly committed to the Court of Session, it can convict the accused of lesser offence, which was triable by a Magistrate. In short, the provision as to other Courts does not limit the jurisdiction of the High Court of Session.

3. While Cl. (a)(i)-(ii) deals with the jurisdiction of the High Court and the Court of Session to try offences under the I.P.C., that jurisdiction would be ousted [under the first part of Cl. (b)], as regards offences under *other* laws, when such special law mentions a Court, other than the High Court or the Court of Session, for the trial of such offence. [9]

4. When an accused charged with an offence punishable under s. 212 I.P.C. triable by a Magistrate has been committed by the Magistrate to the Court of Session to be tried with other accused, there is no legal bar in the case being tried by the Sessions Judge in view of s. 26 read with *s. 193 Cr.P.C.* [10]

5. Cross cases to avoid conflicting judgements should be heard by the same Court. In such a case, a case pending before the Magistrate would be transferred before the Sessions Judge when the cross-case is being tried. [11]

4. 'Trial'.—

See pp. 23-24, *ante* .

5. Cl. (b) : Offences under laws other than the I.P.C.—

While Cl. (a) deals with offences under the *Indian Penal Code* , Cl. (b) [corresponding to *old* s. 29] deals with offences under special laws, *i.e.* , Acts other than the I.P.C. This clause has two parts, corresponding to the two sub-sections of s. 29, the combination of which has not been conducive to a better

understanding:

(i) The first part deals with the case where the special law not only creates an offence, but also mentions a Court for its trial; in such a case, the offence will be triable by that particular Court which is mentioned in the special law and not by any of the Courts mentioned in clause (a) of s. 26 of the Code. [12]

(ii) The second part deals with the case where the special law merely creates as offence without mentioning by which Court it shall be triable; in such a case, it may be tried either by the High Court or any other Court which is specified in Part II of the First Schedule, *post* .

6. Exclusion of jurisdiction of Criminal Courts under the Code by special law.—

1. This sub-section [*old* s. 29(1)] excludes the jurisdiction of the Courts under the Code for trying an offence under a special law, when such law (including *intra vires* Rules [13]) mentions a particular Court for the trial of such offence, [14] *e.g.* , *Section 8 of the Child Marriage Restraint Act, 1929* ;[15] s. 15(1) of the U.P. Private Forests Act, 1948; *Section 52, Prisons Act* , [16] *Section 15(1) of the Protection of Civil Rights Act, 1955* .[17]

2. This exclusion is peremptory, so that no Court, other than that specified by the special law, can have jurisdiction to try such case, [18] and the exclusion extends to Courts which are even superior to the Court which is specified in the special law. [19] A Trial by any other Court of such a case would be *void* , [20] because s. 461(1) [*old* s. 530(p)] would be attracted by reason of the words 'subject to the other provisions of this Code' at the beginning of s. 26.

3. But where a special law simply mentions a particular Court only for some specific purpose and not to exclude the jurisdiction of the ordinary Courts under the Code, the latter shall not lose their jurisdiction as determined by the First Schedule of the Code . [21] Such, for instance, is the provision in *Section 21 of the Prevention of Food Adulteration Act, 1954* , or the provision in s. 20(2) of the same Act which excludes the jurisdiction of inferior Courts but not that of Courts superior to the Court mentioned therein.[22]

4. Nor would the jurisdiction of a Criminal Court under the Code be excluded where the Court specified by the special law has no jurisdiction. [23]

5. Where the jurisdiction of a Court of Session is excluded by provision in some special law, a commitment to the Sessions Court by a Magistrate for the trial of such offence shall also be invalid. [24]

7. 'When no Court is so mentioned'.—

1. Where a special law creates an offence but mentions no Court for trial thereof, such offence may be tried by (a) the High Court, or (b) any other Court, subject to the competence to pass the sentence, as shown in Part II of the First Schedule. [25]

2. But as to the High Court, the special procedure for taking cognizance upon commitment or information by the Advocate-General, as provided by *old* s. 194[26] has

been omitted from the *new* Code, in pursuance of the recommendations of the Commission. [27] Of course, the word 'may' indicates that it is a merely enabling provision and that the High Court is not obliged to try every such case. [28]

3. Even where the special law creating an offence does not mention any Court for the trial the jurisdiction of the ordinary Courts may be excluded if a Special Judicial Magistrate or a Special Metropolitan Magistrate is appointed, under s. 13 or 18 [*old* s. 14], to try cases under a special Act [29] or particular cases.

The importance of the provision relating to Special Magistrate has, however, been minimised by the *new* Code, by confining their power to Second Class, denying them First Class power, which they could have under *old* s. 14.

8. Jurisdiction where some of the offences charged are triable by a Magistrate, but some others are triable exclusively by the Court of Session.—

In such a case, if the case has been registered in a Magistrate's Court, the Magistrate should commit the *entire* case to the Court of Session and cannot split up that part which he had jurisdiction to try. [30]

9. Offence under Section 113(2) of the Companies Act, 1956.—

Even after the Company Law Board has been vested with the power to issue direction for giving the certificate, the default for non-issue of certificate being a criminal liability, the Magistrate continues to exercise the jurisdiction for trying an accused for an offence under *Section 113(2) of the Companies Act* . [31]

10. Proviso to sub-clause (iii) of Clause (a).—

By the *Code of Criminal Procedure* Amendment Act, 2008 (5 of 2009) w.e.f. 31-12-2009, proviso has been inserted to sub-clause (iii) to Clause (a) to s. 26. Notes on Clauses state as follows :

" Section 26 relates to Courts by which offences are triable. A proviso has been inserted to Clause (a) of the said Section as to provide that any offence under s. 376 and *s. 376A* to *376D* of the *Indian Penal Code* shall be tried as far as practicable by a Court presided over by a woman."

1 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 4 (w.e.f. 31-12-2009).

2 Substituted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 11 for the words "offence under Section 376 and *Sections 376A* to *376D* of the *Indian Penal Code* " (w.e.f. 3-2-2013).

3 *Ravindra v. Union of India,* (1984) Crlj 1321 (para 9) All.

4 41st Rep. of the Commission, Vol. I, para 6.

5 14th Rep. of the Commission, Vol. II, p. 1201; *Asoke v. State,* (1976) CHN 625 (paras 6, 8).

6 *Kayemullah* , (1897) 24 Cal 429 .

7 *Krishnaji* , (1929) Bom 611.

8 *Sudhir v. State of M.P.,* AIR 2001 SC 826 [*LNIND 2001 SC 294*]: (2001) 2 SCC 688 [*LNIND 2001 SC 294*] : 2001 SCC (Cri) 387 [*LNIND 2001 SC 294*] : 2001 Crlj 1072 .

9 *Adbul* , AIR 1928 Mad 585 [*LNIND 1927 MAD 227*].

10 *Sujith v. State of Kerala,* 2008 Crlj 824 (835)DB : (2007) 4 Ker LT 987 (Ker) .

11 *Vijay Kumar Rathore v. State of Maharashtra,* 2007 Crlj 129 : (2006) 3 Cur Crr 395(Bom) .

12 *Supdt. of Legal Affairs v. Agarwala,* (1976) CHN 6 (para 9); *Ranjit v. State of W.B.,* (1986) Crlj 1847 (para 8) Cal.

13 *State of Kerela* , in the matter of, AIR 1969 Ker 111 (paras 5-6).

14 *Supdt. of Legal Affairs v. Agarwala,* (1976) CHN 6 (para 9); *Ranjit v. State of W.B.,* (1986) Crlj 1847 (para 8) Cal.

15 *State of Gujarat v. Fulsingh,* AIR 1971 Guj 1 [*LNIND 1969 GUJ 94*].

16 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 1675 : (1964) 7 SCR 435 : (1964) 2 Crimes 606 .

17 *Shanmugha v. State,* (1983) Crlj 115 (para 9) Mad.

18 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 1675 : (1964) 7 SCR 435 : (1964) 2 Crimes 606 .

19 *Chota* , (1909) 32 Mad 303.

20 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 1675 : (1964) 7 SCR 435 : (1964) 2 Crimes 606 .

21 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 1675 : (1964) 7 SCR 435 : (1964) 2 Crimes 606 .

22 *State of Gujarat v. Fulsingh,* AIR 1971 Guj 1 [*LNIND 1969 GUJ 94*].

23 *Bhim Sen v. State of U.P.,* AIR 1955 SC 435 [*LNIND 1955 SC 22*]: (1955) 1 SCR 1444 [*LNIND 1955 SC 22*] : 1955 Crlj 1010 .

24 Cf. *Sasadhar* , 61 CWN 522.

25 Cf. *Sasadhar* , 61 CWN 522.

26 Cf. *Harish v. Kavindra,* AIR 1936 All 830 (FB) .

27 41st Rep., paras 15.86; 15.89.

28 Cf. *Harish* *v.* *Kavindra,* AIR 1936 All 830 (FB) .

29 *Bhurekhan* , in re, AIR 1967 MP 94 95 .

30 *State* *v.* *Shyamal,* (1983) Crlj 40 (para 1) Cal.

31 *Natvarlal* *v.* *N.N.* *Jain,* 1998 Crlj 2159 Guj .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 27

Jurisdiction in the case of juveniles.

Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

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1. Scope of Section 27.—

This section corresponds to s. 29B of the *old* Code with the following changes [32] —

(a) Under this section the age-limit is 'under sixteen years' while under the old section it was fifteen years.

(b) Under the *old* Code, apart from the District Magistrate, the Chief Presidency Magistrate was also mentioned. The *new* section mentions only the Chief Judicial Magistrate and omits the corresponding Court of Chief Metropolitan Magistrate. This omission, however, would not cause any material change in view of the omnibus provision in s. 29(4),*post* , that the Court of a Chief Metropolitan Magistrate shall have all the powers of the Court of a Chief Judicial Magistrate.

(c) A reference to the *Reformatory Schools Act, 1897* [33] has been substituted by a reference to the Children Act, 1960. [34] Section 5 of the latter Act provides for the *constitution* of a Children's Court. In the absence of such Court having been constituted in any particular area, the power of such Court shall be exercised by the District Magistrate, Sub-Divisional Magistrate of a Magistrate of the First Class.

The words ‘treatment, training and rehabilitation of youthful offenders’ appear to have been adopted from the long title of the Children Act, 1960, which is—

"An Act for the care, protection, maintenance, welfare, *training* , education and *rehabilitation* of neglected or delinquent children and for the trial of delinquent children in the Union Territories."

The *Reformatory Schools Act, 1897* , would fall within this category inasmuch as its long title and Preamble make provision for "dealing with youthful offenders". If that be so, no change in the law is indicated by the omission of a reference to the *Reformatory Schools Act, 1897* . The State Borstal Acts, such as the Bengal Borstal Schools Act (Act 1 of 1928), would also presumably come under the expression.

The various Courts having jurisdiction under *new* s. 27, therefore, are—

(i) The Chief Judicial Magistrate; (ii) The Chief Metropolitan Magistrate; (iii) Courts specially empowered under the Children Act, 1960, and Acts of that category.

2. ‘May be tried’.—

These word show that the section is only permissive. [35] It means that when a juvenile offender (under s. 16) is charged with an offence punishable with any sentence other than death or imprisonment, it may be tried either under the ordinary law, [36] by Magistrates empowered by s. 29, read with the First Schedule, or by a Magistrate mentioned in the present section may try the offence, even though, according to the First Schedule, the offence was triable only by a Court of Session. [37] If the case is brought before any other Magistrate, he may proceed under s. 325(1) [*old* s. 349(2)], if he is not competent to punish the offender adequately because of the limits of his sentencing power under s. 29.

The object of empowering Courts inferior to the Court of Session to try juvenile offenders as explained in the Statement of Objects and Reasons to the Amending Bill of 1923 (Act 18 of 1923) which introduced s. 29B, was to save juvenile offenders from the prolonged detention involved in a sessions trial, in view of the fact that "the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court".

3. ‘Offence not punishable with death or imprisonment of life’.—

An offence punishable with death or life imprisonment shall *not* be triable by a juvenile Court, but must be tried by the Court of Session having local jurisdiction, unless a special law provides otherwise. [38]

4. Joint trial of juvenile offender with adult accused by Court of Session.—

There has been a controversy as to what should be the procedure adopted by a Court of Session where the accused before it for an offence punishable with death or imprisonment for life include an adult as well as a juvenile.

Some special Acts expressly prohibit the joint trial of the categories of offenders in such a case. A Full Bench of the Madhya Pradesh High Court [39] has held that the proper procedure in such a case should be that the adult and juvenile offenders should be tried separately, one after the other, but judgment should not be pronounced in either case, *till both the trials are over* .

But, under the West Bengal Children Act, 1959, the trial of a juvenile offender by any Court other than the Juvenile Court would be without jurisdiction. [40] Hence, when the Magistrate finds that the accused persons included adult as well as a 'child', the Magistrate would send the child to the Juvenile Court for trial instead of to the Court of Session along with the adult accused. This view is in accord with the Supreme Court decision in *Gopinath v. State of W.B.* [41]

5. S. 27 and Special Acts.—

S. 27 of the Code is not 'a specific provision to the contrary' within the meaning of s. 5 of the Code. On the other hand, in s. 27 itself there is no expression such as 'notwithstanding anything contained in any Children Act .....' Hence, when a child, coming under the Haryana Children Act, 1974 committed an offence, that offence should be tried not under the Code but under the provisions of the Haryana Act, which were not repugnant to anything in the Code. [42]

Juvenile Justice Act, 1986, now replaced by *Juvenile Justice (Care and Protection of Children) Act, 2000* is a complete Code in itself and has overriding effect on all Central and State Legislatures on the trial of offences committed by the children on any criminal charge. *Section 27 Cr.P.C.* is not inconsistent with s. 6 of the Juvenile Justice (Care and Protection) Act, 2000. However, the words "notwithstanding anything contained in any other law for the time being in force" in s. 6(1) of the Act has overridden the provisions of s. 27 of the Code.[43]

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32 Changes made as recommended by the Joint Committee on the Bill of 1970 (Com 1.5), p. viii (on Cl. 27).

33 Cf. *Jalal* , AIR 1934 Bom 211 .

34 Changes made as recommended by the Joint Committee on the Bill of 1970 (Com 1.5), p. viii (on Cl 27).

35 *Natvarlal* , (1941) 42 Crlj 722 .

36 *Onkernath* *v.* *Emp.,*
AIR 1936 All 575 .

37 *Natvarlal* ,
(1941) 42 Crlj 722 ; *Onkernath v. Emp.,*
AIR 1936 All 575 .

38 *Session* *Judge* *v.* *Perumal,*
(1974) Crlj 261 (para 14) Mad (FB).

39 *Devsingh* *v.* *State* *of* *M.P.,*
(1978) Crlj 585 (paras 13, 14, 33, 34) MP (FB).

40 *Robin* *v.* *State,*
(1986) Crlj 381 (para 4) Cal.

41 *Gopinath* *Ghosh* *v.* *State* *of* *W.B.,*
AIR 1984 SC 237 [
LNIND 1983 SC 331](para 11) :
(1984) 1 SCR 803 [
LNIND 1983 SC 331] : 1984 Supp SCC 228 :
1984 Crlj 168 .

42 *Raghubir* *v.* *State* *of* *Haryana,*
(1981) Crlj 1497 SC ; *Rohtas v. State of Haryana,*
AIR 1979 SC 1839 [
LNIND 1979 SC 310]:
(1979) 4 SCC 229 [
LNIND 1979 SC 310] :
1979 Crlj 1365 .

43 *State* *of* *Karnataka* *v.* *Harshad,*
2005 Crlj 2357 Kant :
ILR 2005 Kar 1572 [
LNIND 2005 KANT 93](DB) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 28

Sentences which High Courts and Sessions Judges may pass.

(1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

1. Scope of s s. 28-29.—

S. 28 reproduces *old* s. 31 without any change, while s. 29 reproduces *old* s. 32, with enhancement of the powers of Magistrates, which will be explained under that section.

These two sections lay down the maximum limits of sentences which can be passed by each of the Criminal Courts enumerated in s. 6 (including the Executive Magistrates) [p. 57, *ante*].

These limits should not be confused with the maximum punishments which may be awarded for the various offences under the substantive law contained in the I.P.C., or other special laws. The present sections of the *new* Code demarcate the limits of the sentence which the Courts of different categories are empowered to impose upon an accused convicted of an offence, though the maximum penalty sanctioned by the law for such offence might be higher. In other words, while the substantive law lays down the outer limit of punishment with reference to each offence, the present sections set forth the inner limit with reference to each Court, which it

cannot transgress. Thus, under the First Schedule, col. 6, any Judicial Magistrate has jurisdiction *to try* an offence under s. 241, I.PC., which is punishable with imprisonment up to 2 years; but when this offence is tried by a Second Class Magistrate, he cannot award a sentence exceeding 1 year's imprisonment, by reason of s. 28(3) of this Code. This is the limit of a Second Class Magistrate's jurisdiction *to punish* for any offence whatever. The limit of this jurisdiction cannot be transgressed with reference to any provision of the I.P.C., such as s. 65 or 75, I.PC. [44] A sentence which exceeds any of the limits imposed by ss. 28-30 of this Code is illegal. [45]

It would be convenient to tabulate, at once, the maximum sentences which the different Courts are empowered to pass, under s s. 28-29 (the italicised words indicate the changes which have been made by the *new* Code). It will be seen that the quantity of sentence varies with the magnitude of the offence, according to the I.P.C., as tabulated in the First Schedule to this Code and the power to deal with them adequately is graded according to the status of the different Courts.

TABLE OF POWERS OF COURTS

The maximum sentences which the different classes of Courts can pass are as follows:

	Court		*Maximum sentence*
(a)	High Court		Any sentence authorised by law [*s. 28(1)*].
(b)	Sessions Judge or Additional Sessions Judge		Any sentence authorised by law, but any sentence of death passed by such Judge shall be subject to confirmation by the High Court [*s. 28(2)*].
(c)	Assistant Sessions Judge		Any sentence authorised by law other than a sentence of death, imprisonment for life or imprisonment for a term exceeding ten years [*s. 28(3)*].
(d)	Chief Judicial Magistrate and Chief Metropolitan Magistrate		*Any sentence authorised by law other than a sentence of death, imprisonment for life or for a term exceeding seven years* [*s. 29(1), (4)*].
(e)	Metropolitan Magistrate or Magistrate of the first-class		Imprisonment for a term not exceeding three years; fine not exceeding Rs. *5,000* [*s. 29(2)*].
(f)	Magistrate of the Second		Imprisonment for a term not

	Class, and Special Judicial Magistrate		exceeding *one year;* fine not exceeding Rs. *1,000* [*ss. 29(3)b; 13(1)*].

2. 'Sentence'.—

1. Sentence is the punishment which the Court imposes when it finds an accused guilty of the offence with which he is charged. The general rule is that a conviction for an offence is followed by a sentence. This rule is subject to statutory exceptions under—

(i) S. 360 of the Code [*old* s. 563].

(ii) S
s. 3-4 of the
Probation of Offenders Act, 1958 .

(iii) Children Act, 1960.

(iv) Juvenile Justice Act, 1986.

(v) Juvenile Justice (Care the Probation) Act, 2000.

These provisions empower the Court to make an order for release on probation, admonition and the like, in place of punishment, in the case of a youthful offender and the like, and s. 361,*post* , provides that if a Court wants to pass a sentence instead of proceeding according to the provisions of the foregoing statutes where they are applicable, the Court must record its reasons for not having applied these exceptional provisions.

2. Subject to such statutory exceptions as aforesaid, where the finding of the Court is one of guilt, it is *bound* to pass *some* sentence, even though it be a nominal one. The *IPC* or the *CrPC* does not prescribe any *minimum* punishment to be awarded for any offence. [46]

The quantum of the sentence, as will be shown under the next section, is one for the discretion of the Court, [47] to be exercised with reference to all the circumstances of the case. Merely because he has power under this Code to impose a sentence up to the *maximum* specified, or the offence in question is punishable with a higher punishment, it is not bound to impose the *maximum* sentence within its jurisdiction, in every case, [48] or upon every offender convicted of a particular offence, [49] though, of course, subject to these, a Court should seek to conform to the general rule that, other things equal, the same offence should receive the same punishment; [50] and that there should be a proportion between the offence and the penalty. [51]

3. As s s. 28-29 make it clear, no Court is competent to award a sentence or punishment which is not authorised by law, *e.g.* debarring a medical practitioner from his profession, upon his conviction for the offence under

s. 376 or *417* , *IPC* , [52] however depraved his morals might be.

3. Power of appellate Court.—

The powers of the different classes of Courts as specified in s. 28 and the following sections indicate the sentences which can be imposed by each of these Courts while sitting as a trial Court. While exercising appellate powers, the appellate Court can only pass a sentence which could have been imposed by the lower Court for the relevant offence, and not the higher sentence which the superior Court could have imposed had it tried the accused for the offence, as a trial Court. [53]

Similarly while exercising revisional power, the High Court cannot impose any sentence higher then that could be imposed by the trial Court. [54]

4. Sub-section (1) : Power of High Court.—

The importance of this provisions has been reduced by reason of the abolition of the Ordinary Original Jurisdiction of the High Court to try cases as a trial Court. The cases which the High Court may still try as an original Court have already been explained under s. 26, p. 117, *ante* . In any such case, there is no limit imposed by the Code upon the High Court to pass the maximum sentence with which an offence is punishable under the substantive law, *e.g.* , death, imprisonment for life or the like.

But, as has been just seen, when the High Court or any other appellate Court exercises power of appeal, it can pass a sentence only up to the maximum which could have been imposed by the trial Court, under s. 28 or 29, as the case may be.

5. Sub-section (2) : Powers of Sessions Judge and Additional Sessions Judge.—

The power of a Sessions Judge and an Additional Sessions Judge is co-extensive:

(a) Both may pass any sentence authorised by law;

(b) But in the case of a sentence of death passed by either of them, the sentence cannot be executed unless it is submitted to and confirmed by the High Court under Chap. XXVIII,—s s. 366-371 [*old* Chap. XXVII,—s s. 374-380].

6. 'Any sentence authorised by law'.—

As has been already stated, the different sentences which can be imposed upon the accused are laid down in the substantive law which deal with the offence of which he has been convicted,—the *Indian Penal Code* (Chap. III on 'punishments'—ss. 53-75) or a special law which creates the offence and makes it punishable.

7. Sentence of death.—

Of the sentences authorised by the *IPC* , the Code of 1973 has made it an exceptional sentence, to be awarded in extraordinary circumstances, [55] giving the reasons therefor, under s. 354(3),*post* . See under that provision, for the case-law.

8. Sentences abolished by law.—

Some of the punishments originally prescribed by the *Indian Penal Code* have since been abolished by legislation in view of universal condemnation of inhuman or cruel punishment,*e.g.* —

(a) *Transportation* was substituted by imprisonment for life, [56] by the Criminal Procedure Amendment Act (26 of 1955).

(b) *Forfeiture of property* as a general penalty in cases to serious offences punishable with death, transportation or imprisonment, has been confined to three specified offences only, *viz.* , under s s. 126, 127 and 169 of the I.P.C.—by Act 16 of 1921.

(c) *Whipping* , which was introduced by special Acts (*e.g.* , Whipping Act 6 of 1864), has been abolished by the Abolition of Whipping Act, 1955.

(d) *Solitary Confinement* .—Ss. 73-74 of the I.P.C. empowered the Court to direct solitary confinement in cases punishable with rigorous imprisonment. But this has been omitted from the *new Criminal Procedure Code* , in accordance with the recommendations of the Report of the Joint Committee on the Bill of 1970 (p. viii).

The sentences which may still be awarded in a trial under the *Cr.P.C.* will be dealt with under s. 29, together with the principle governing them, respectively.

9. Principles governing sentence.—

See elaborate discussion under s. 29,*post* .

‘ *Subject to confirmation by the High Court* ’.—Sub-sections (1) and (2) *provide* that a Sessions Judge or an Additional Sessions Judge have co-equal sentencing power with the High Court except in one respect, namely, that if a Sessions Judge passes a sentence of death, it shall not be executed until it is *confirmed* by the High Court in the manner provided in Chap. XXVIII. For this purpose, such Sessions Judge must submit the proceedings in which the death sentence has been passed, to the High Court, under s. 366 [*old* s. 374].

10. Execution, suspension, remission and commutation of sentence.—

See under Chap. XXXII, *post* .

11. Sub-section (3) : Powers of Assistant Sessions Judge.—

Since an Assistant Sessions Judge cannot impose a sentence of death or imprisonment for life or for a term exceeding 10 years, and the only possible punishment for murder, under s. 302, I.P.C., is death or imprisonment for life, a case of murder should not be transferred to an Assistant Sessions Judge. If, on examining the order of commitment, the Sessions Judge finds any possibility that murder has been committed, he must try the case himself or transfer it to an Additional Sessions Judge, if one is available. [57] Conversely, if an Assistant Sessions Judge finds that a case of this nature has been inadvertently transferred to him, he should at once return the case to the transferring authority for orders. [58]

12. Appeal.—

The table on next page will show the respective forums for appeals from the various categories of Criminal Courts.

13. Revision.—

Under s. 397(1), the High Court has power of revision over all Executive and Judicial Magistrates, and Courts of Session; the Sessions Judge has revisional authority over Assistant Sessions Judge, all Executive and Judicial Magistrates.

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44 *Chajjulal v. State of Rajasthan,* AIR 1967 SC 1809 .

45 *Baba v. Emp.,* AIR 1924 Nag 37 .

46 Cf. *Harmohan* , AIR 1943 Cal 25 . But there are certain special Acts which prescribe a minimum sentence, e.g., *Section 16(1) of the Prevention of Food Adulteration Act, 1954* [*Ram v. State,* AIR 1969 All 109 [*LNIND 1967 ALL 143*](para 13)]. The Court cannot award any sentence below this minimum unless the case comes under any of the clauses to the Proviso to s. 16(1) [*Ibrahim v. Food Inspector,* (1969) II SCW 304 (para 7)].

47 *Adamji Umar Dalal v. State of Bombay,* 1952 SCR 172 (177) : AIR 1952 SC 14 : 1953 Crlj 542.

48 *Jainarain* *v.* *Emp.,*
AIR 1944 Pat 16 .

49 *Emp.* *v.* *Usman,*
AIR 1947 Bom 409 .

50 *Udhoram* , 33 Crlj 990 (992).

51 *Adamji Umar Dalal v. State of Bombay,*
1952 SCR 172 (177) :
AIR 1952 SC 14 : 1953 Crlj 542.

52 *Mukherji* *v.* *State,*
AIR 1969 All 489 [
LNIND 1968 ALL 2](para 109).

53 *Jagat* *v.* *State of M.P.,*
(1966) 2 SCR 322 [
LNIND 1965 SC 268] 326.

54 *State* *v.* *Drupati,*
AIR 1965 Bom 6 [
LNIND 1963 BOM 61]:
(1965) 1 Crlj 15 .

55 *Hardayal* *v.* *State of U.P.,*
AIR 1976 SC 2055 : (1976) 2 SCC 812 :
1976 Crlj 1578 ; *Raisul v. State of U.P.,*
AIR 1977 SC 1822 : (1976) 4 SCC 301 :
1977 Crlj 1555 ; *Gulab Chand Sharma v. Saraswati Devi,*
AIR 1977 SC 242 : (1977) 2 SCC 71; *Bachan Singh v. State of Punjab,*
AIR 1980 SC 898 [
LNIND 1980 SC 261]:
(1980) 2 SCC 684 [
LNIND 1980 SC 261] :
1980 Crlj 636 .

56 *State of M.P* . v. *Ratan Singh* ,
AIR 1976 SC 1552 [
LNIND 1976 SC 215]:
(1976) 3 SCC 470 [
LNIND 1976 SC 215] :
1976 Crlj 1192 .

57 *Bhola* *v.* *Emp.,*
AIR 1944 Pat 92 96 .

58 *Bhola* *v.* *Emp.,*
AIR 1944 Pat 92 96 .

S. 29
Sentences which Magistrates may pass.

(1) The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, or of fine not exceeding [59] [ten thousand rupees], or of both.

(3) The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, or of fine not exceeding [60] [five thousand rupees], or of both.

(4) The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, the powers of the Court of a Magistrate of the first class.

STATE AMENDMENTS

Maharashtra.—*The following amendments were made by Maharashtra Act 27 of 2007 (w.e.f. 1-12-2007).*

S. 29.—In its application to the State of Maharashtra, in Section 29 —

(a) in sub-section (2) for the words “ten thousand rupees” the words “fifty thousand rupees” shall be *substituted*.

(b) in sub-section (3) for the words “five thousand rupees” the words “ten thousand rupees” shall be *substituted*.

Punjab.—*The following amendments were made by Punjab Amendment Act, 1983 (22 of 1983) vide President's Act No. 1 of 1984.*

S. 29-A.—In its application to the State of Punjab in relation to the "specified offences" as defined in S. 2(b) of *Code of Criminal Procedure* after S. 29, S. 29A inserted as under:—

"29A. Sentences which Executive Magistrate may pass.—An Executive Magistrate may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees, or of both."

Union Territory of Chandigarh.—In its application to the Union Territory of Chandigarh, in relation to the "specified offences" under *S. 2(b) of the Code of Criminal Procedure* (Punjab Amendment) Act, 1983 (Punj. Act 22 of 1983), the provisions of the Code to apply to that territory subject to modifications undermentioned. These modifications to remain in force for one year w.e.f. 27-7-1984.

S. 29A.—After S. 29, insert as under—

"29A. Sentences which Executive Magistrates may give.—An Executive Magistrate may pass a sentence of imprisonment for a term not exceeding three years or of fine not exceeding five thousand rupees, or of both."

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1. Scope of s. 29 .—

Under the old Code in s. 32, the maximum power of sentence of a Magistrate was imprisonment for two years. s. 29 as originally stood enhanced, the power of the Judicial Magistrate, First Class to impose sentence of imprisonment of three years and of fine not exceeding five thousand rupees. By virtue of the amendment of s. 29 by the *Code of Criminal Procedure* (Amendment) Act, 2005 with effect from 23.06.2006, the sentence of fine has been enhanced from five thousand rupees to ten thousand rupees. Similarly, the power of the Judicial Magistrate, Second Class to award sentence of imprisonment was enhanced to two years and a fine not exceeding one thousand rupees by original s. 29 . By virtue of *Code of Criminal Procedure* (Amendment) Act, 2005 with effect from 23.06.2006, the maximum sentence of fine has been enhanced to five thousand rupees.

2. *Code of Criminal Procedure* (Amendment) Act, 2005.—

Amendment Act of 2005 which has come into force with effect from 23.06.2006 has enhanced the power of the Judicial Magistrate, First and Second Class to award the sentence of fine from five thousand rupees to ten thousand rupees and from one thousand rupees to five thousand rupees respectively. This amendment has been made keeping in view the depreciation of valuation of rupee since 1973 and also to make the provisions more deterrent.

(b) *Old* ss. 37-38 which empowered the State Government to confer additional powers on particular Magistrate, have been omitted; under the *new* Code, each Magistrate, on his appointment, shall be vested with the powers specified in s. 29 and other relevant section of the Code. The distinction between 'ordinary' and additional powers has been abolished.

(c) Third class Magistrates have been abolished.[61]

Trial Court			*Appellate Court*	
1.	High Court		(a)	From conviction in extraordinary criminal jurisdiction,—Supreme Court, under s. 374(1).
			(b)	From conviction and sentence to death in cases withdrawn to itself—Supreme Court, under Art. 134(1)(b) of the Constitution; in other cases, Supreme Court under the Supreme Court (Enlargement of Jurisdiction) Act.
			(c)	Other cases, on certificate, under Art. 134(1)(c); or leave of the Supreme Court, under Art. 136 of the Constitution. Subject to exceptions in ss. 375(b), 376(a).
2.	Sessions Judge and Additional Sessions Judge			High Court, from conviction and sentence of imprisonment over 7 years [s. 374(2)]. Subject to exception in ss. 375(b), 378(b).
3.	Assistant Sessions Judge			Sessions Judge [s. 374(3)]. Subject to exception in ss. 375(b), 376(b).
4.	Any Judicial or Metropolitan Magistrate			Sessions Judge, from conviction; sentence under s. 325; order under s. 360 [s. 374(3)]. Subject to exception in s. 375(b), 376(b)-(d).

3. Powers of Judicial Magistrates.—

1. As stated earlier, the powers belonging to Magistrates under the *old* Code have been divided into two categories, so that certain exclusive powers are assigned to Judicial and Executive Magistrates respectively. The expressions 'Magistrates of the First Class' or 'Second Class' refer to Judicial Magistrates [s. 3, pp. 38-42, *ante*], for, under s. 6(ii) - (iii) [p. 57, *ante*], it is only Judicial Magistrates who will have this nomenclature, while Executive Magistrates shall have no powers of adjudication of any class. The expression 'Metropolitan Magistrates' also refers to Judicial Magistrates of the First class, functioning in a Metropolitan areas [s. 29(4)].
2. The functions of Judicial Magistrates, under the *new* Code may be classified under the following heads—

(i) *Prevention of Offences.*— The power to require security for keeping the peace on conviction [s. 106(1)]; in other specified cases [ss. 108-110, 117]; to imprison in default of security [s. 122(1)].

(ii) *Order for maintenance of wives, children and parents, unable to maintain themselves.—See* ss. 125-128, *post*.

(iii) *Powers in relation to investigation.*—Power to order a Police Officer to investigate a non-cognizable case [s. 155(2)]; or a cognizable offence of which he has taken cognizance under s. 190 [s. 156(3)]; to hold investigation or preliminary inquiry on receipt of record of Police Officer under s. 157 [s. 159]; to record confessions and statements made in course of investigation [s. 164]; to receive records of search and arrest made by the police [ss. 165-167] and to authorise detention of arrested person pending investigation [s. 167(2)]; to stop investigation where it is not concluded within 6 months [s. 167(5)]; to receive accused for trial with police report [ss. 170, 173].

(iv) *Power to take cognizance of offences.*—There cannot be a trial of any offence unless it has been taken cognizance of by a Judicial Magistrate [ss. 190-199]. Broadly speaking, a Magistrate who has no power to try a case or commit it for trial is not competent to take, cognizance.

(v) *Power to commit a case for trial by a Court of Session*.—When the offence of which the Magistrate has taken cognizance of is exclusively triable by a Court of Session, he must commit the case to that Court of trial [s. 209].

(vi) *Power to try a case.*—Cases other than those exclusively triable by a Court of Session are triable by Judicial Magistrates [ss. 26(1)(iii), (b)(ii); 27], under different procedures, according to the gravity of the offence—(a) warrant [Chap. XIX], (b) summons [Chap. XX], and (c) summary [Chap. XXI] procedures. Whether an offence is triable by a Magistrate of the First or Second class, is to be determined with reference to the First Schedule. The expression 'any Magistrate', in col. 6 of the First Schedule, against certain offences, *e.g.*, s s. 461-462 , *IPC* , means a Judicial Magistrate either of the First or the Second Class,—Executive Magistrates having no power of trial, under the *new* Code.

3. The present section enumerates the maximum punishing powers of Judicial Magistrates of different categories in trials held by them. This limit cannot be transgressed, so that if a Magistrate passes a sentence in excess of the maximum limit imposed upon him by the present section, the sentence shall be void.[62] There are, however, some special laws, *e.g.*, *s. 21 of the Prevention of Food Adulteration Act, 1954* , which empower a Magistrate to pass a sentence higher than that specified in the present section of the Code.[63]

Even if there is *non obstante* clause provided in *s. 142 of the Negotiable Instruments Act* , it is not intended to expand the powers of Judicial Magistrate, First Class beyond what is fixed in Chapter-III of the Code.[64]

[As to powers of Executive Magistrates, *see* pp. 60-62, *ante*].

Power of a Chief Judicial and a Chief Metropolitan Magistrate.—Apart from the powers summarised *above*, which belong to all Judicial Magistrates, there are certain special powers vested in a Chief Judicial Magistrate, by various provisions of the Code. By reason of sub-section (4) of the present section, and s. 3(1)(d), p. 39, *ante*, these powers may be exercised by the Chief Judicial Magistrate as well. These special powers of a Chief Judicial Magistrate, *inter alia*, are—

(i) To define local jurisdiction of Judicial Magistrates [s. 14(1)].

(ii) To control and supervise the work of other Judicial Magistrates who are all subordinate to him [s. 15(1)], and to distribute business among them [s. 15(2)].

(iii) To determine claims or objections to property attached under s. 83(2) or to make it over for disposal to any other Judicial Magistrate [s. 84(2) - (3)].

(iv) To require Postal authority to deliver Postal articles necessary for investigation etc. [s. 92], to grant warrant to search for such articles [s. 93(3)].

(v) To release person imprisoned for failure to give security [s. 123(1)].

(vi) To make over to a subordinate Magistrate for trial any case of which he has taken cognizance [s. 193(1)], or to transfer a case from any Magistrate who has taken cognizance of it to another Magistrate, on application of the accused [s. 19].

(vii) To receive from another Court or Magistrate, a commission for the examination of a witness within his jurisdiction [s. 285(1)].

(viii) To receive a case from another Magistrate who is of opinion, upon the evidence that the case should be tried by the Chief Judicial Magistrate [s. 392(1)], or when the trying Magistrate finds that he cannot pass a sentence sufficiently severe [s. 325(1)].

(ix) To withdraw or recall any case which he has made over to any subordinate Magistrate [s. 410(1)].

4. Abolition of specially empowered Magistrate.—

S. 30 of the *old* Code provided for the conferment of higher powers on selected Magistrates of the First Class, so that they could relieve the Court of Session of the burden of trying the more serious offences, punishable with imprisonment for a term up to 7 years while a First Class Magistrate was now otherwise competent to impose a sentence exceeding 2 years. It was also conducive to a speedier disposal because the specially empowered Magistrate was to try such cases by the warrant procedure. The constitutionality of vesting some of the First Class Magistrates with higher power was challenged as discriminatory under *Art. 14 of the Constitution* , but was upheld by the Supreme Court.[65]

The 37th Report of the Commission (paras 150-54) recommended the retention of this provisions, but the 41st Report recommended its abolition on the ground that the Chief Judicial and The Chief Metropolitan Magistrates would be available to award sentences up to seven years' imprisonment [s. 29(1)(4)], who were more experienced than other First Class Magistrates (paras 3.7-3.10).

Old s. 30 of the Code has, accordingly, been omitted from the *new* Code. Under the *new* Code, therefore, the burden of the Sessions Judge to try offences punishable with imprisonment between 3 and 7 years shall be reduced by the Chief Judicial and Metropolitan Magistrates,[66] apart from the Assistant Sessions Judges [s. 28(3)].

5. Procedure to be adopted where the Magistrate finds that the offence is such that a sentence higher than that which he is competent to impose should be awarded.—

The provision in *old s. 3*49 has been made more comprehensive to embrace all Judicial Magistrates, who should, in such a case, forward the case to the Chief Judicial Magistrate, for disposal [s. 325, *post*].

In such a case the Magistrate cannot commit the case for trial to the Court of Session, as under *old s. 2*06(1),[67]

because under the *new* Code, commitment to the Court of Session can be made only where the case is *exclusively* triable by the Court of Session [ss. 208-209].

6. Sub-section (2) : Magistrate of the First Class.—

1. This sub-section corresponds to *old s. 3*2(1) with the following changes:[68]

   (a) Solitary confinement has been abolished;[69]

   (b) The power to impose a sentence of imprisonment has been raised from two to *three* years.

   (c) The maximum limit of fine has been enhanced from two to *five* thousand rupees.

7. Sub-section (4) : Powers of Metropolitan Magistrate.—

As has been stated earlier, the Metropolitan Magistrates are the counterpart of Judicial Magistrates, functioning in a 'metropolitan area'. The *new* Code, as it has eventually come out of the Legislature, places the Metropolitan Magistrates on the same footing as Judicial Magistrates, except in a few matters. In the *old* Code, there were substantial difference between Magistrates within the Presidency-towns and Magistrates outside the Presidency-towns. Almost all of these have been removed by the *new* Code as will appear from below:

(i) *Sentencing power.*—Though under the *old* Code, all Metropolitan Magistrates had the same powers as those of a Magistrate of the First Class [s. 32(1)(a)], the *new* Code not only maintains this position, by the present sub-section, but also confers upon the Chief Metropolitan Magistrate the same higher power which has been conferred upon the Chief Judicial Magistrate, by sub-section (1) to the present section, in pursuance of the recommendations of Commission.[70]

(ii) *Mode of recording evidence.*—For expediting the procedure, a Presidency-Magistrate had the privilege of recording the substance only of the evidence in the form of a memorandum [*old* s. 362(2A)], and not to frame a charge [*old* s. 362(4)]. One of the reasons which promoted the earlier Reports of the Commission to recommend the continuance of Presidency-Magistrates in Metropolitan areas was this expedition in the disposal of cases. But the 41st Report eventually recommended the omission of s. 362 altogether [Vol. I, para 25.21], placing Metropolitan Magistrates on the same footing as other Judicial Magistrates, but the privilege of a Presidency Magistrate as regards the examination of the accused [*old* s. 364(4)] has been retained in *new* s. 281(1) in respect of Metropolitan Magistrates.

(iii) *Compensation for groundless arrest.*—Under *old* s. 553, a Presidency Magistrate had the exclusive power to award compensation to a person who had been wrongly arrested by the police at the instance of another person.

This power has been extended to all Magistrates, by s. 358 of the *new* Code,[71] which has raised the limit of compensation up to Rs. 100.

(iv) *Power to award compensation in case of abducted woman.*—This power, which was confined to a Presidency Magistrate or the District Magistrate, under *old* s. 552, has been extended to all Magistrates of the first class.[72]

(v) *Power to require attendance of Prisoners.*—The special provision in *old* s. 542 as regards Presidency Magistrates has been extended to all Criminal Courts, in the *new* Chap. XXII [ss. 266-272].[73]

(vi) *Appeal*.—Under *old* s. 411, appeal from conviction by a Presidency-Magistrate lay to the High Court, while appeal from conviction by any other Magistrate would lie to the Court of Session, *old* s. 408.

Under s. 374(3)(a) of the *new* Code, appeal from Judicial as well as Metropolitan Magistrate lies to the Court of Session.

The distinctions which are retained by the *new* Code are—

(i) *Old* s. 432(2) empowered a Presidency-Magistrate, excluding other Magistrates,—to refer to the High Court a question of law arising in the hearing in a pending case. This power remains with a Metropolitan Magistrate, under s. 395(2) of the *new* Code,—the suggestion of extending this privilege to Judicial Magistrates having been turned down by the Commission.[74]

(ii) As regards the limit of non-appealable sentence,—under *old* s. 411, no appeal lay against conviction by a Presidency Magistrate where the sentence was imprisonment up to 6 months or fine up to Rs. 200, while in the case of any Magistrate of the first class, this bar of appeal was only up to a sentence of Rs. 50 [*old* s. 413].

This differentiation has been maintained by s. 376(b) - (c) of the *new* Code, with the change that the upper limit in the case of a Metropolitan Magistrate has been raised to 3 months' imprisonment, while in the case of a Judicial Magistrate, the limit of fine has been raised to Rs. 100.

8. Principles to be observed in awarding sentence.—

1. Sections 28 and 29 authorise the Courts to pass 'any sentence authorised by law', subject to the maximum limits specified. The determination of a nature or quantum of punishment within the limits imposed by the law is thus left to the discretion of the Court. Being a matter of discretion, no hard and fast rule can, accordingly, be laid down as to the right measure of punishment[75] and each case must depend on its own facts,[76] but several general principles have been laid down from time to time as to how this discretion is to be exercised. The discretion has to be exercised along well-known judicial lines.[77]

2. If exercised judicially, there will be no interference by a superior Court with the sentence passed by the trial Court.[78]

3. In determining the punishment, the Court has to bear in mind all the attending circumstances.[79]

(a) the nature of the offence,[80] *i.e.*, its magnitude or seriousness;

(b) the necessity of proportion between an offence and the penalty;[81]

(c) the circumstances in which the offence was committed, the degree of deliberation shown by the offender,[82] the provocation received by him;[83]

(d) in the case of a violent crime, the age and antecedents of the offender;[84] but in the case of heinous crimes, age alone would not be an adequate ground for a lesser offence;[85]

(e) whether there are any *extenuating* circumstances which can be said to *mitigate* the enormity of the crime;[86]

(f) whether the accused is a hardened criminal or has committed a solitary offence;[87]

(g) station in life of the offender;[88]

(h) effect of the crime upon the offender and the chances of his correction;[89]

(i) nature of the injury of the victim or the society;[90]

(j) the circumstance of protracted proceedings in the trial Court before the charge could be framed, causing harassment and expense to the accused.[91]

4. Subject to the foregoing considerations, the sentence should be adequate to bring home to the guilty the consciousness that the offence committed by him was against his own interest as well as the interest of the society of which he is a member.[92]

9. Circumstances which are not material in determining sentence.—

(i) The question of sentence is to be determined, not with reference to the volume or character of the evidence adduced in support of the prosecution case but with reference to all the circumstances of the case, particularly, to the extenuating circumstances, if any.[93] In other words, the nature of the proof can only bear upon the question of conviction but has nothing to do with the question of punishment.[94]

(ii) The question whether the sentence imposed will involve a right of appeal or not is irrelevant in passing such sentence as the gravity of the offence and the other circumstances (stated above) warrant.[1]

(iii) In the absence of extenuating circumstances, there cannot be any justification for the Court to impose the lesser of two sentences provided by law.[2]

(iv) Nor should the Court be influenced by extraneous considerations, such as the political views of any party;[3] religious or communal feelings;[4] that the accused is a legal practitioner[5] or a man of position.[6]

10. In case of previous convictions.—

1. Persistent offenders are to be dealt with more severely than first offenders, and not only the accused but also the public should be adequately discouraged from adopting a criminal career.[7]
2. Even in the case of previous convictions, several factors have to be considered with reference to the facts of each case, *e.g.*—

(i) the number of past convictions;[8]

(ii) the interval of time which has elapsed between one conviction and another, particularly since the last conviction;[9]

(iii) the nature of the offences previously proved;[10]

(iv) the nature of the offence for which he is to be punished. A severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions.[11]

11. Cases where deterrent sentence justified.—

1. A deterrent sentence means a sentence which is severe enough to deter the accused from repeating his offence, as well as other potential offenders to commit the same crime. Even though a deterrent sentence may be higher than the sentence which would have been awarded for the offence under normal circumstances, it has been justified in the interests of the protection of society, *e.g.*, during a wave of crimes when a particular type of offence is off-repeated.
2. A deterrent sentence is justified;[12]

(i) Where the offence—

(a) is the result of deliberation and planning;

(b) is committed for the sake of personal gain at the expense of the innocent;

(c) is a menace to the safety, health or moral well-being of the community, *e.g.*, a brutal attack prompted by superstition (such as suspicion of sorcery),[13] corruption or criminal breach of trust or offence against the administration of justice committed by a public servant,[14] or a person of responsible position;[15] reckless defamatory comments made by a powerful Press, without the least justification;[16] adulteration of drugs of food;[17] black-marketing;[18] economic offences;[19]

(d) is difficult to detect or trace.[20]

(ii) When there is a wave of imitative crimes sweeping over the State.[21]

(iii) Where a highly organised association of persons engineer series of offences.[22]

(iv) Where the offender was himself a public servant charged with the maintenance of law and order.[23]

3. In particular—

(i) In the absence of mitigating circumstances, the sentence for the offence of *dacoity* should, as a rule, be deterrent.[24]

(ii) In cases of *illicit distillation of liquor*, a deterrent sentence should be imposed because such cases are not easy to detect, cause a loss of revenue to the Government and a menace to the health and morals of the community.[25]

(iii) In cases of anti-social acts of a very serious nature like sale or manufacture of spurious drugs, severe punishment is called for.[26]

On the other hand—

(a) Unlike those acts which are universally acknowledged to be of a criminal nature, an act which has only recently been made an offence or which is not unlawful in other parts of the country, deserves leniency except in the case of persistent offenders.[27]

(b) Extreme penalty may not be awarded where there are no chances of the crime to be repeated;[28] or there is a possibility of rehabilitation.[29]

(c) The object of awarding sentence is to protect the society and deter the criminal.[30]

12. Punishment to respond to society's cry for justice for the criminal.—

The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with which crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'.[31]

13. Particular Offences

A. Criminal Conspiracy.—

1. Where a number of persons jointly commit an offence in furtherance of a common intention, but it is possible to determine who inflicted blows which were fatal and who took a lesser part, it is a sound exercise of judicial discretion to discriminate in the matter of punishment as between the several accused, and the extreme penalty cannot be equally awarded to a person who hit on the thumb as on the person who hit on the head.[32]

2. Where, however, it is not possible to determine who dealt the fatal blow, a judicial mind can legitimately decide to award the lesser penalty in *all* the cases.[33]

B. Dacoity.—

1. In cases of decoity, where long terms of imprisonment are imposed, it would, in general, be inappropriate to impose an additional sentence of fine, because that would cause hardship and suffering to the members of the family of the dacoits who may not be at fault and would be left without any means of livelihood pending the return of the men from Jail.[34]

2. On the other hand, a sentence of fine only would be illegal, in view of *s. 395, IPC* .[35]

C. Murder.—

(A) Prior to the Amendment Act of 1955, *s. 367(5) of the Crpc* required the Court to record the reason if it awarded a punishment other than death penalty in a case where the offence was punishable with death. From this, it was understood that the sentence of death was the normal penalty for murder and imprisonment for life was the exception which had to be justified by some reason.[36]

(B) The Amendment Act of 1955 repealed sub-section (5) of s. 367, as a result of which it was no longer obligatory upon a Judge to record the reasons if a sentence other than that of death was imposed for the offence of murder.[37]

(C) New Code.—New sub-section (3) of s. 354 puts the law just the other way, namely, that when the Court passes a sentence *of death*, it must record 'the special reasons for such sentence'. This indicates that a sentence of death should be *exceptional*,[38] *e.g.* where it is perpetrated with marked brutality.[39] This change in the law is in response to the *new* trends in penology[40] brought about by a universal recognition of human rights during the last two decades. The *new* sub-section also makes it obligatory for the Court to state its reasons where a sentence of imprisonment for life or for a term of years is imposed. The object of this condition of stating reasons was explained by the Commission in its 35th Rep. (paras 820-22) and affirmed by its 41st Rep. (para 26.10), thus:

"This would be a good safeguard to ensure that the lower Courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt....It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is of death), or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life)."

Broadly speaking, a sentence of death should *not* be imposed—

(i) Where the circumstances under which the life of the victim was taken and the part played by the accused[41] are not clear, a lesser sentence should be imposed, because the accused is entitled to the benefit of doubt even in the matter of sentence.[42]

(ii) Where the accused suffers a disability on account of age, or starvation or where he has acted under psychic or socio-economic compulsion or at the instigation of another.[43]

(iii) Where the accused acted under grave provocation,[44] or the act was not premeditated.[45]

(iv) Where out of several shots fired by several persons, the shot which was fired by the appellant was not, of itself, sufficient to cause the death.[46]

14. Commutation of death sentence to imprisonment.—

Under s. 386(b)(iii), *post*, an appellate Court has the power to alter the nature and extent of the sentence. Hence, it can substitute a sentence of imprisonment for life for death even in cases of murder, or otherwise to reduce the sentence,[47] in view of the circumstances, if any, which would have induced the trial Court to make such substitution, as well as other circumstances relating to the judicial process, *e.g.*, the fact that a long time has elapsed since the date of sentence passed by the trial Court which has caused prolonged agony to the accused,[48],[49] that the Judges were divided on the question of sentence;[50] that the accused was a man of irresistible impulse;[51] that there was some provocation by the deceased;[52] that the accused, a young man, had acted under the instigation of elders who had been acquitted on the benefit of doubt;[53] where the accused's responsibility for the fatal shot, out of an assembly of assailants, was not certain.[54]

15. Some principles relating to the different kinds of Sentence

(i) *Imprisonment.*—Where the law permits a sentence of fine as an alternative to imprisonment, there is no need for imprisonment, unless there is an element of criminality in the offence, apart from the breach of the law;[55] or the offence is such that a deterrent sentence is called for, *e.g.*, offences against the national economy;[56] gold smuggling[57] and the like.

(ii) *Imprisonment for life.*—Imprisonment for life means imprisonment for the remaining period of the life of the accused.[58] The reference to 20 years in s. 57, I.P.C., is only for the purpose of calculating fractions of the term of imprisonment under certain sections of the I.P.C., *e.g.*, ss. 116, 511. Neither s. 57, I.P.C., nor any other provision of law warrants the conclusion that a sentence of imprisonment for life is to be automatically treated as one for a term of imprisonment. But the appropriate Government has the power to commute or remit the sentence of imprisonment for life to a definite term under the provisions of s. 55, I.P.C., and s s. 432-435 , *CrPC* [*old* ss. 401-402-A].

(iii) *Imprisonment till rising of Court.*—Imprisonment till rising of the Court is not illegal but may be passed (because the I.P.C. does not fix any *minimum* sentence of imprisonment) in very exceptional cases, *e.g.,* in technical offences or where there are strong extenuating circumstances.[59] The day on which sentence is passed counts as one day,[60] so that where an accused is sentenced to one day's imprisonment, no warrant for his detention in jail for such term can be issued.[61]

(iv) *Fine.*—In the case of imposing a sentence of the fine, the Court has to consider not only the character and magnitude of the offence, but also the pecuniary circumstances of the accused person,[62] because to impose a fine which is beyond his means to pay really means that he is sentenced to imprisonment (for default in payment of fine would result in imprisonment), under the cloak of fine.[63] On the other hand, in the case of an affluent person, the fine should not be too light[64] to encourage the offender to think that he can purchase his ransom.

In case of ill-gotten wealth[65] or evasion of tax,[66] or violation of the

Essential Commodities Act ,[67] fine may be deterrent.

In the case of a statutory offence, the purposes for which the statute was passed must not be overlooked in assessing the quantum of fine.[68]

On the other hand—

(a) Where a substantial term of imprisonment has been awarded, excessive fine should not accompany it, except in exceptional cases.[69]

(b) But where a sentence of *both* imprisonment and fine are obligatory for the offence, under the substantive law, the Court cannot impose only a token fine in addition to imprisonment; the quantum of fine must bear a reasonable relationship to the enormity of the crime.[70]

(c) Where the substantive law prescribes a sentence of imprisonment and fine, *in the alternative*, a sentence of fine alone would meet the ends of justice where the offence is technical;[71] or there was a *bona fide* mistake due to which the offence was committed.[72]

(d) Except in the case of a continuing offence,[73] a sentence of a daily fine would be illegal.[74]

(e) When a person is convicted of murder, a sentence of fine is inapposite, even in addition to imprisonment.[75]

(f) Sentence of a joint fine on two accused is not legal.[76]

(g) Even though under s. 138(1) of the Negotiable Instrument Act, 1881 provides for imposition of fine twice the amount of the cheque but it is always subject to the maximum limit of powers of the Magistrate/Judge concerned who is imposing a sentence of fine. So, the Magistrate cannot impose a fine of Rs. 1,35,000/- on the accused.[77]

16. Time for payment of fine.—

Since a sentence, as a rule, becomes enforceable immediately upon the delivery of the judgment,[78] the fine must be paid by the accused immediately, in default of which the Court may levy the fine by issuing a warrant under s. 491 [*old* s. 386], unless the Court allows some time to put in the money.[79] As to payment of fine in case of a sentence of fine only, with a term of imprisonment in default, *see* under s. 30, *post*.

17. Scope of appeal.—

1. The determination of the right measure of punishment being a matter of discretion, an appellate Court should not interfere unless there are exceptional grounds, disclosed on the face of the judgment,[80] *e.g.*, when the trial Court he proceeded on a wrong principle;[81] or has not exercised discretion judicially;[82] or the case presents unusual features; or where the sentence is unjust or harsh in the facts and circumstances of the case.[83]

2. In determining the sentence to be imposed in a particular case where the accused is found guilty, the Court should bear the following principles in mind—

(a) In cannot be awarded as a matter of routine or according to any rule of practice.[84] It must be proportionate to the nature and gravity of the offence, having regard to the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, the antecedents of the accused up to the time of the sentence, his age and character.[85]

(b) The extreme penalty should not, as a rule, be awarded where the Judges are divided as to the sentence.[86]

(c) On the other hand it should not be extremely lenient, but should be adequate enough to bring home to the offender that the offence committed by him was against his own interests as well as the interests of the society.[87]

3. In an appeal under Art. 136, the Supreme Court would interfere if there is a serious imbalance between the different competing theories about punishment,— reformatory, deterrent and retributive;[88] or the sentence is unduly harsh or lenient;[89] or the failure to impose a proper sentence may result in a miscarriage of justice.[90]

18. Appeal from sentence only.—

1. When the appeal is from a conviction, the sentence is obviously open for modification by the Appellate Court, even though it may not interfere with the conviction [s. 386(iii)], except that in this case, the Court cannot enhance the sentence.

2. The accused may also appeal against the sentence only,[91] without challenging the conviction, in which case, he will not be heard on any other point [s. 384(3)], and the Court may dispose of the appeal as to sentence even without calling for the record [*Proviso* to s. 385(2)].

3. Only appeal from sentence lies in cases of conviction on plea of guilty, under s. 375.

4. In granting special leave to appeal, under *Art. 136 of the Constitution* , the Supreme Court may restrict the appeal to the question of sentence only.[92]

5. Under *new* s. 377, the State may file on appeal for the enhancement of the sentence, on the ground of its inadequacy, in which case, however, the power of the appellate Court would not be confined to the sentence only [s. 386(c)].

19. Reduction of sentence.—

A. The question of sentence being one of discretion, the appellate Court would not, ordinarily, disturb the sentence, where the discretion has been judicially exercised, but, under s. 386(b)(iii) [*old* s. 423(1)(b)], the Court may reduce the sentence, on grounds which may be broadly stated as follows:

(i) The age and sex of the accused.[93]

(ii) Where the sentence is harsh or unjust on the facts and circumstances of the case.[1]

(iii) Where the wrong has since been undone and the accused has already undergone long imprisonment owing to delay in the disposal of the proceedings.[2]

But delay is no ground for mitigation or reduction of the sentence where the accused himself is responsible for it, *e.g.*, where he absconded for a long period to avoid the trial.[3]

(iv) Where the offence is a statutory offence,[4] but not where the statute prescribes a minimum sentence.[5]

(v) Where the sentences on several persons guilty of the same offence, under identical circumstances, are grossly unequal.[6]

B. On the other hand, a superior Court would *not* readily reduce the sentences—

(i) Where the offence was deliberate and prompted by a motive.[7]

(ii) Where the offence is of an extremely anti-social character.[8]

(iii) Where the circumstances under which the offence was committed by the appellant were not, in fact, different from those under which the co-accused committed the offence and has been punished with the same sentence.[9]

20. Enhancement of sentence.—

1. The general rule is that an Appellate Court cannot enhance the sentence [s. 386(b)(iii), *old* s. 323(1)(b)(3)], in an appeal from conviction.

2. But the Legislature modified this rule by introducing *old* s. 423(1A) in case of an appeal to the High Court. This provision has been retained in s. 377(1) in the *new* Code, making it clear that the State may appeal for enhancement of the sentence *only to the High Court*,[10] and that in such appeal, the High Court cannot make an order for enhancement without giving the accused an opportunity of showing cause against such enhancement.

3. But under the *new* Code, the power to enhance the sentence, in *revision,* can be exercised not only by the High Court [s. 401(1)], but also by the Sessions Judge, who has been given [s. 399(1)], as a Court of revision, all the powers, which the High Court can exercise in revision, under s. 401(1).[11]

4. It has been made clear in the second *proviso* to s. 386 that while enhancing the sentence, the Appellate or Revisional Court cannot inflict a sentence which trial Court could not have inflicted for that offence.

5. the superior Court would *not* be justified in enhancing the sentence where the trial Court imposes substantial punishment.[12] Interference is called for only when it is manifestly inadequate,[13] or where the trial Court has failed to consider the relevant facts.[14] When the Court so interferes, it must for very strong reasons which must be disclosed on the face of its judgment. The Supreme Court would set aside the judgment of the High Court when it enhances the sentence without recording adequate reasons for such enhancement.[15]

6. The Court would be justified in enhancing the sentence—

(i) Where the acts done by the accused are atrocious and gruesome, *e.g.*, throwing acid on a person causing loss of both eyes.[16]

(ii) Where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.[17]

21. Appeal from enhancement.—

1. The Supreme Court would not interfere with an enhancement of sentence where the High Court has considered all relevant circumstances and there is nothing to mitigate the extreme penalty for a brutal crime.[18]

2. On the other hand, the Supreme Court would interfere where the High Court failed to notice a number of relevant circumstances considered by the trial Court.[19]

22. Sentencing power of Appellate Court.—

It has now been expressly provided in *Proviso* 2 to s. 386, *post*, that however high the status of the Appellate Court be, while sitting in appeal from a criminal case, it cannot pass a sentence higher than what the trial Court could inflict for the offence under consideration, as laid down in s. 29.[20]

23. Ss. 29 and 325.—

The maximum limit as to the quantum of sentence each class of Magistrate is competent to pass is laid down in the several sub-sections of s. 29 . If a Magistrate finds that the accused is guilty but that he deserves a punishment more severe than what he is competent to award under s. 29, he should forward the case, under s. 325 (*post*) to the Chief Judicial Magistrate to whom he is subordinate, who may then pass the proper judgment, sentence or order. The subordinate Magistrate cannot, in such a case commit the case to the Court of Sessions, because a case may be committed only if it is exclusively triable by the Court of Session.[21]

24. Special Acts.—

In the absence of any special provision,[22] s. 29 extends to offences under special Acts. Hence, the Sessions Court and not the Chief Judicial Magistrate has the power to try the offence under
s. 27(a) of the Drugs and Cosmetics Act, 1940 , as amended in 1964.[23]

59 Substituted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 5 . for 'five thousand rupees'. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

60 Substituted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 5 . for 'one thousand rupees'. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

61 41st Rep. of the Commission, Vol. I, paras 2.7; 3.12.

62 *Ramchandar v. Ganesh,* AIR 1933 Bom 58 59 ; *David*, 6 Bom LR 548.

63 *State of U.P. v. Khushi Ram,* AIR 1960 SC 905 906 : 1960 Crlj 1378 : (1960) 3 SCR 427 [*LNIND 1960 SC 104*].

64 *Pankajbhai Nagibhai Patel v. State of Gujarat,* AIR 2001 SC 567 [*LNIND 2001 SC 122*]: (2001) 2 SCC 595 [*LNIND 2001 SC 122*] : 2001 Crlj 950 .

65 *Budhan v. State of Bihar,* AIR 1955 SC 191 [*LNIND 1954 SC 166*]: (1955) 1 SCC 1045 .

66 *Vide* Notes on Clauses on the 1970 Bill [XLI of 1970], p. 440; 41st Rep. of the Commission Vol. I, pp. 31-32.

67 Cf. *Kayemullah*, (1897) 24 Cal 429 ; *Balbir v. State,* AIR 1959 Punj 98 100 .

68 As recommended by the 41st Rep. of the Commission, para 3.12.

69 As recommended by the Joint Committee on the Bill of 1970 [Com. 1.5, p. viii].

70 41st Rep. of the Commission, Vol. I, paras 3.9; 3.12.

71 As recommended by the 41st Rep. of the Commission, Vol. I, para 46.16.

72 *Ibid*, para 7.9.

73 As recommended by the 41st Rep. of the Commission, Vol. I, paras 37.4; 37.6.

74 41st Rep. of the Commission, Vol. I, para 32.3.

75 *Adamji Umal Dalar v. State of Bombay,* (1952) SCR 172 : (177) : AIR 1952 SC 14 : 1953 Crlj 542.

76 *Kapur Chand v. State of Bombay,* (1959) SCR 250 : AIR 1958 SC 993 : 1958 Crlj 1558.

77 *Sarjug Rai v. State of Bihar,* AIR 1958 SC 127 130 : 1958 SCR 768 : 1958 Crlj 268 .

78 *Mathri v. State of Punjab,* AIR 1964 SC 986 [*LNIND 1963 SC 292*](para 25) : (1964) 5 SCR 916 [*LNIND 1963 SC 292*] : (1964) 2 Crimes 57 ; *Bhalchanda v. State of Maharashtra,* (1968) MPLJ 371 (SC); *Vijay v. State of Punjab,* AIR 1974 SC 687 689 : (1974) 3 SCC 769 : 1974 Crlj 615 .

79 *Modi Ram v. State of M.P.,* AIR 1972 SC 2438 : (1972) 2 SCC 630.

80 *State of U.P. v. Suman,* (1972) 3 SCC 201 [*LNIND 1972 SC 20*] (para 37).

81 *Adamji Umar Dalal v. State of Bombay,* (1952) SCR 172 : (177) : AIR 1952 SC 14 : 1953 Crlj 542.

82 *Ghurphekan v. State of U.P.,* (1972) 3 SCC 361 (para 5); *Nisa v. State of Orissa,* AIR 1954 SC 279 : 1954 Crlj 743.

83 *Modi Ram v. State of M.P.,* AIR 1972 SC 2438 : (1992) 2 SCC 630 ; *State of U.P. v. Suman,* (1972) 3 SCC 201 [*LNIND 1972 SC 20*] (para 37).

84 *State of U.P. v. Suman,* (1972) 3 SCC 201 [*LNIND 1972 SC 20*] (para 37).

85 *Pal Singh v. State of Punjab,* (1969) 3 SCC 196 (para 5); *Dharampal v. State of U.P.,* (1970) 1 SCC 429 .

86 *Thebar v. State of Madras,* AIR 1957 SC 614 620 : 1957 SCR 981 : 1957 Crlj 1000 .

87 *Modi Ram v. State of M.P.,* AIR 1972 SC 2438 : (1972) 2 SCC 630.

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92 *Modi v. State of M.P.,* AIR 1972 SC 2438 2439 : (1972) 2 SCC 630 : 1972 Crlj 1521 .

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4 *Ayub* *v.* *State,* AIR 1962 All 141 [LNIND 1961 ALL 32].

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11 *Narayana*, in re., (1968) Crlj 410 .

12 *Dulla* *v.* *State,* AIR 1958 All 198 204 .

13 *Dasrath* *v.* *State* *of* *Orissa,* AIR 1955 SC 583 : 1955 Crlj 1297.

14 *Ramanlal v. State of Bombay,* AIR 1960 SC 961 : 1960 Crlj 1380 ; *Narayan v. State of Punjab,* AIR 1955 SC 322 : 1955 Crlj 871 ; *Ram Das v. State of W.B.,* AIR 1954 SC 711 .

15 *Ranchhod Lal v. State of M.P.* , (1964) SC [Cr AIR218-21/64 dated 27-11-1964]; *Abdul Aziz v. State of Maharashtra,* AIR 1963 SC 1470 [*LNIND 1963 SC 26*]: (1964) 1 SCR 830 [*LNIND 1963 SC 26*] : (1963) 2 Crimes 403 .

16 *Sahib Singh v. State of U.P.,* AIR 1965 SC 145 [*LNIND 1965 SC 15*].

17 *Chimanlal v. State of Maharashtra,* AIR 1963 SC 665 [*LNIND 1962 SC 311*]: 1963 Supp (1) SCR 344 : (1963) 1 Crimes 631 .

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22 *Gajjan Singh v. State of M.P.,* AIR 1965 SC 1921 [*LNIND 1965 SC 171*](para 6) : (1965) 2 Crimes 822 .

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33 *Dalip* *Singh* *v.* *State* *of* *Punjab,*
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36 *Dukari* *v.* *Emp.,*
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37 Cf. *Ediga v. State of A.P.*, (1974) 1 SCWR 471 485.

38 But the constitutionality of the penalty of death has been upheld in *Jagmohan v. State of U.P.*, AIR 1973 SC 947 [*LNIND 1972 SC 477*].

39 *Chawala v. State of Haryana*, (1974) 1 SCWR 576 (584-85); *Kanauji v. State of U.P.*, (1971) 3 SCC 58 (para 16) : 1977 SCC (Cri) 622 ; *Bharat v. State of U.P.*, (1973) 3 SCC 950 .

40 *Chawala v. State of Haryana*, (1974) 1 SCWR 576 (584-85).

41 *Inder Singh v. State of Punjab* , (1952) SC [Cr AIR28/51].

42 *Chawala v. State of Haryana*, (1974) 1 SCWR 576 (584-85).

43 *Cf. Ediga v. State of A.P.*, (1974) 1 SCWR 471 485.

44 *Sultan v. State of Haryana*, (1972) 3 SCC 211 [*LNIND 1972 SC 9*] (para 8) : AIR 1972 SC 811 [*LNIND 1972 SC 9*]: 1972 SCC (Cri) 286 ; *Brahim Singh v. State of U.P.*, (1972) 3 SCC 388 : AIR 1972 SC 1229 : 1972 Crlj 763.

45 *Narayanan v. State of T.C.*, AIR 1956 SC 99 [*LNIND 1955 KER 138*].

46 *Kuttappan v. State of T.C.* , (1954) SC [Cr AIR94/53 dated 17-2-1954].

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68 *State of Jamnadas*, AIR 1962 Bom 234 235 ; *Ayub v. State,* AIR 1962 All 141 [*LNIND 1961 ALL 32*](para 14).

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70 *Narayan*, in. re., AIR 1965 MP 255 (para 15).

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74 *Ram Krishna*, (1920) 27 Cal 565 .

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77 *Breejesh v. Ram Prakash,* 2008 Crlj (NOC) 187.

78 Cf. *Arjun*, (1909) 34 Bom 326.

79 *Rukku*, AIR 1968 Mad 458 .

80 *Bed Raj v. State of U.P.,* (1955) 2 SCR 583 [LNIND 1955 SC 68] 589.

81 *State of Maharashtra v. George,* AIR 1965 SC 722 [LNIND 1964 SC 415]: (1965) 1 SCR 123 [LNIND 1964 SC 415] : (1965) 1 Crimes 641 .

82 *Mathri v. State of Punjab,* AIR 1964 SC 986 [LNIND 1963 SC 292]: (1964) 5 SCR 916 [LNIND 1963 SC 292] : (1964) 2 Crimes 57 ; *Manubhai Nandlal Amersey v. Popatlal Manilal Joshi,* AIR 1969 SC 734 [LNIND 1969 SC 2]: (1969) 1 SCC 372 [LNIND 1969 SC 2].

83 *Nabi Bux v. State of M.P.,* (1972) UJSC 194 ; *Surta v. State of Haryana,* AIR 1971 SC 803 .

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91 Cf. *Shiv Govind v. State of M.P.,* AIR 1972 SC 1823 : (1972) 3 SCC 399 : 1972 Crlj 1181.

92 Cf. *Francis v. State of Kerala* , (1947) SC [Cr. AIR133/73, dated 17-5-1974].

93 *Marthi v. State of Punjab,* AIR 1964 SC 986 [*LNIND 1963 SC 292*]: (1964) 5 SCR 916 [*LNIND 1963 SC 292*] : (1964) 2 Crimes 57.

1 *Ananta v. State,* AIR 1962 Cal 428 [*LNIND 1962 CAL 12*](paras 35, 59).

2 *Rama Shankar v. State of M.P.,* (1971) 3 SCC 905 (para 12); cf. *Ved Prakash v. Delhi Administration,* (1974) 1 SCWR 589 (para 4).

3 *Ananta v. State,* AIR 1962 Cal 428 [*LNIND 1962 CAL 12*](paras 35, 59).

4 *Surta v. State of Haryana,* AIR 1971 SC 803 : (1971) 3 SCC 180 : 1971 Crlj 668.

5 *Vijay v. State of Punjab,* (1974) 1 SCWR 757 (para 8).

6 *Rameshwar v. State of U.P.,* (1971) 3 SCC 924 : 1972 SCC (Cri) 172.

7 *Bhagwan v. State of U.P.,* (1971) 3 SCC 759 : AIR 1971 SC 429 : 1971 Crlj 413.

8 *Nafe Singh v. State of Haryana,* (1971) 3 SCC 934 : 1972 SCC (Cri) 182 986 .

9 *Kundan Singh v. State of Punjab,* (1971) 3 SCC 900 : 1972 SCC (Cri) 148 (para 13) .

10 The Rep. of the Joint Committee on the Bill of 1970, p. xxvii (on Cl. 386), rejecting the recommendation of the Commission (41st Rep, Vol. I, paras 31.39-40), that this power should be extended to the Sessions Judge as well.

11 *Vide* changes made in Cl 399(1) by the Joint Committee on the Bill of 1970, p. 154.

12 *Bed Raj v. State of U.P.,* (1955) 2 SCR 583 [*LNIND 1955 SC 68*] ; *Shiv Govind v. State of M.P.,* (1972) 3 SCC 399 (para 9).

13 *Bed Raj v. State of U.P.,* (1955) 2 SCR 583 [*LNIND 1955 SC 68*] ; *Shiv Govind v. State of M.P.,* (1972) 3 SCC 399 (para 9).

14 *Alamgir v. State of Bihar,* AIR 1959 SC 436 [*LNIND 1958 SC 145*]: 1959 Supp (1) SCR 464 : 1959 Crlj 527 .

15 *Bed Raj v. State of U.P.,* (1955) 2 SCR 583 [*LNIND 1955 SC 68*] ; *Shiv Govind v. State of M.P.,* (1972) 3 SCC 399 (para 9).

16 *Rasik v. State of Maharashtra* , (1965) SC [Cr AIR61/64, dated 15-1-1965].

17 *Dalip v. State of Punjab,* (1954) SCR 145 [*LNIND 1953 SC 61*] : AIR 1953 SC 364 [*LNIND 1953 SC 61*]: 1953 Crlj 1465 .

18 *Kodavandi v. State of Kerala,* (1972) 2 SCWR 911 (para 7); *Nabi Bux v. State of M.P.,* AIR 1972 SC 495 [*LNIND 1971 SC 566*]: (1972) 1 SCC 7 [*LNIND 1971 SC 566*] : 1972 Crlj 300 .

19 *Shiv Govind v. State of M.P.,*
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20 Cf. *Jagat Bahadur v. State of M.P.,*
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21 *Shivarajaveerappa v. State of Karnataka,*
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22 *State of U.P. v. Sabir Ali,*
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23 *Ravindra v. Union of India,*
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 30

Sentence of imprisonment in default of fine.

(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided **that the term—**

(a) is not in excess of the powers of the Magistrate under Section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29.

1. Scope of Section 30.—

This section corresponds to *old* s. 33, with drafting changes.

2. Analogous provisions.—

This section is to be read with ss. 64-69, I.P.C. which will be explained in their proper places hereafter.

3. Section 30, Crpc and Section 65, IPC .—

These two provisions must be harmonised. (a) The Magistrate's power to pass sentence is specially limited by *s. 30,Cr.P.C.* , but it must be so exercised as not to contravene the provisions of s. 65 of the I.P.C.[24]

(b) On the other hand, s. 65 only fixes a maximum period of imprisonment which can be awarded for default of payment of fine whenever any Court convicts. [25] A Magistrate, therefore, cannot exceed his power under s. 29 to award imprisonment simply by resorting to s. 65. [26]

4. Sub-section (1) : Imprisonment in default of fine.—

1. A sentence of imprisonment *in default of payment of fine* is not a punishment for the substantive offence for which the offender has been convicted by the Court, but is punishment for his failure to pay the fine imposed upon him by way of punishment for the substantive offence. [27]
2. The substantive law authorising the imposition of a sentence of imprisonment for non-payment of fine is to be found in s. 64 of the I.P.C. which says—

> "In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

3. Section 64 of the I.P.C. is applicable even where the law prescribes a penalty of fine only for the substantive offence, [28] and also where the substantive law is a special law, [29] so that in such cases, the Court may award a sentence of imprisonment in default of payment of the fine, [30] except where the special law lays down a special procedure for the recovery of fine. [31]
4. The foregoing power to award a sentence of imprisonment in default of payment of fine is subject to certain conditions and limitations laid down in s. 65- 67 of the I.PC. and in the present section of the *Criminal Procedure Code* [*old* s. 33].
5. Sub-section (1) of the present section simply refers to the substantive law under the *Penal Code* or some other law [32] which authorises a sentence of imprisonment in default of payment of fine. This section is attracted only where there is such authority for such a sentence. [33] Where the substantive sentence is one of fine only, the provision in *Proviso* (a) is to be read along with the conditions laid down in s. 67; where the substantive sentence is one of both imprisonment and fine, the limitation is *Proviso* (b) of this section is to be read along with s. 65 of the I.P.C. [34] (*see below*).

5. 'Fine'.—

This section is not applicable unless the money ordered to be paid by the Court is a 'fine', *i.e.* , payable to the State by an offender, by way of punishment for his offence. Hence, it is not applicable to the non-payment of—

(a) Compensation payable by the complainant to the accused, ordered under s. 250(1) of the Code, for default of which provision for imprisonment for a period not exceeding 30 days has been made in sub-section (3) thereof, though 'recoverable as fine'. [35]

(b) Excess charge and fare payable under *Section 113 of the Railways Act* , which is not fine, though 'recoverable as fine.'[36]

6. Sentence of imprisonment in default is additional to sentence of imprisonment for substantive offence.—

1. *Section 64 of the IPC* makes it clear that a sentence of imprisonment in default of payment of fine shall be for a term in excess of the term of imprisonment to which the Court may have sentenced him for the substantive offence.

2. If follows that the sentence of imprisonment in default of payment of fine must be *consecutive* to the substantive term of imprisonment [37] and must be undergone after the substantive term is over. [38] Where it is erroneously made concurrent, it would be corrected into a consecutive sentence by the Court of revision. [39]

3. It also follows that, the power of the Appellate Court regarding sentence being coextensive with that of the trial Court, an Appellate Court shall have no power to reduce a sentence of imprisonment in default of fine to the period of imprisonment already undergone for the substantive offence. [40]

4. Even in the absence of specific provision in the Act empowering a Court to order imprisonment in default of payment of fine such power is implicit and is possessed by the Court administering the criminal justice. [41]

7. S s. 30 and 262(2).—

Section 262(2) lays down a maximum of three months' imprisonment on conviction at a summary trial. That limit, however, relates to the sentence for the substantive offence, and does not control the power under s. 30, to impose additional imprisonment in lieu of fine. [42]

8. Proviso (b) : Where imprisonment has already been awarded as a substantive sentence.—

1. This condition may be explained with reference to the powers of a First Class Magistrate under the *new* Code: Supposing he sentences an accused person to imprisonment for 2 years *and* a fine of R s. 2,000. If the accused defaults in payment of the fine, the Magistrate cannot award an imprisonment in

lieu of the fine in excess of *nine* months, which is 1/4th of the maximum term of imprisonment (3 years) within his competence under s. 29(2). [43]

2. For computation of the 1/4th limit, the maximum term of imprisonment within the Magistrate's competence shall have to be determined with reference to the particular offence, read with s. 29. [44] In case of any inconsistency between the present provision and s. 65 of the I.P.C., the present provision shall prevail, as regards Magistrates. [45]

9. Section 30(1), Proviso (b) and S. 65, I.P.C.—

1. There being some overlapping between these two provisions, [46] it is useful to analyse the contents of both provisions, with their applicability.
2. Section 65 of the I.P.C. says—

> "The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine".

Section 65 applies where the offence is punishable with imprisonment and fine or either imprisonment or fine, but not where it is punishable with fine only. [47] The maximum term of imprisonment which may be awarded under this s. 1/4th of the term of imprisonment fixed *for the offence* . [48] Hence, when, on appeal, the Appellate Court convicts the accused of an offence other than that of which he was convicted, the 1/4th limit is to be computed with reference to the maximum term with which the substituted offence is punishable, so that the term of imprisonment in default of fine which had been awarded by the trial Court must be altered by the Appellate Court, if the substituted offence be substantively punishable with a lesser term of imprisonment. [49] On the other hand, where the accused is sentenced to imprisonment for several offences punishable with imprisonment, the maximum is to be computed with reference to the punishment fixed for *all* the offences. [50]

3. It is evident that while *s. 65 of the IPC* relates to all Courts, the present section of the *CrPC* governs specifically the powers of Magistrates. The result is that a Magistrate cannot pass a sentence in excess of his limit under s. 29, by invoking anything in s. 65, I.P.C.[51]
4. Under s. 65, I.P.C., the term of imprisonment in default of payment of fine shall not exceed 1/4th of the maximum term of imprisonment with which the substantive offence is punishable. The Proviso (b) to s. 30(1) of the Code, on the other hand, has a limited application and is attracted only where a Magistrate has, in fact, *awarded* a term of imprisonment for the substantive offence; in such a case, the term of imprisonment in default of fine must not exceed 1/4th of the maximum punishment which the Magistrate is competent to award, under s. 29,—read, of course, with the First Schedule which tabulates the maximum sentences which can be awarded for the different offences, as provided by the I.P.C.
5. It follows that in a case where the instant *Proviso* is applicable, s. 65 would also be attracted, so that the Magistrate must not exceed the limit imposed by s. 65, I.P.C., as well. [52] Thus, the maximum imprisonment for an offence under s. 143, I.P.C., being 6 months, under *s. 65, IPC* , the maximum term of imprisonment for default of payment of fine for this offence cannot be exceeded by any Court beyond 11/2 months; by invoking *s. 29(3) of the Cr.P.C.* , a Second Class Magistrate cannot,

therefore, impose any sentence of imprisonment for default of fine, in excess of 11/2 months, though 1/4th of his power of imprisonment under s. 29(3) would be 3 months.[53]

It is obvious that the two sections must be harmonised. This means that, while a Magistrate's powers are specifically limited by *s. 30 Criminal Procedure Code* , they must be so exercised as not to contravene s. 65, I.P.C.

As the sentence of one year's rigorous imprisonment in default of payment of fine passed by the Munsif Magistrate was in excess of his powers, the Supreme Court reduce the sentence of one year's rigorous imprisonment awarded in default of payment of fine to six months rigorous imprisonment. [54]

10. Time for payment of fine, whether the sentence is of fine only, with imprisonment in default.—

1. As stated earlier, the general rule is that a fine is to be paid immediately, and that in case of non-payment, the Court is to issue a warrant under s. 421 [*old* s. 386].

2. An exception is made in the case of a sentence of *fine only* with imprisonment in default of payment of fine, by s. 424 [*old* s. 388]. This section empowers the Court to grant instalments and also to suspend the sentence of imprisonment to facilitate such payment.

3. It is to be noted that under s. 70 of the I.P.C., where imprisonment is ordered in default of payment of a sentence of fine, the liability for payment of the fine is not discharged even after the accused undergoes the term of imprisonment, which has been held not to be a substitute of the sentence of fine, but only a punishment for contempt for non-payment of the fine, [55] which itself is considered as a debt. [56] The proviso to s. 421(1) of this Code [*old* s. 386(1), *Prov.*] controls the foregoing position by laying down that where the offender has undergone the whole of his term of imprisonment in default, a warrant for recovery of the fine shall not thereafter be issued under s. 421(1), except for special reasons to be recorded by the Court, unless it has made an order s. 357 [*old* s. 545], for the payment of expenses or compensation out of the fine, in which case no special reasons *need* be recorded.

4. On the other hand, the liability to undergo imprisonment in default of terminates only after the fine is levied or paid. Hence, it does not cause merely because the recovery of the fine has become barred by limitation. [57] It does not also terminate by way of abatement on the death of the accused. [58]

11. S. 30(2) and S. 29.—

This sub-section makes it clear that a sentence of imprisonment in default of payment of fine shall *not* affect the maximum term of imprisonment which a Magistrate has the power to impose, for the substantive offence under s. 29. In other words, a Magistrate can pass the maximum sentence of imprisonment which is within his power under s. 29, and *add* to it a sentence of imprisonment in default of payment of fine, subject of course, to the limits imposed by the I.P.C. and this Code, which may be recapitulated below.

12. Limits to a Magistrate's power to impose a sentence of imprisonment in lieu of fine.—

As has been already explained, these limits are to be found in the I.P.C., apart from the present section of the Code:

I. *Where the offence is punishable with fine only.* —(a) The imprisonment in default of fine must be *simple* ; (b) it must conform to the following scale [s. 67, I.P.C.] :

For a fine not exceeding Rs. 50 ....2 months;

For a fine from Rs. 51 to 100 ...4 months;

For a fine of R s. 101 and above ....6 months.

II. *Where the offence is punishable with imprisonment as well as fine.* —(a) The imprisonment may be simple or rigorous; but

(b) The imprisonment in default of fine shall not exceed 1/4 of the maximum term of imprisonment with which the *substantive offence is punishable* [s. 65, I.P.C.].

(c) Further, if in a particular case, the Magistrate *has* , in fact, *awarded* a term of imprisonment for the substantive offence, the term of imprisonment for default in payment of fine must not exceed 1/4 of the maximum punishment which he is competent to award for the offence, under s. 29, read with the First Schedule.

13. Special Acts.—

Even where a Special Act provides a special procedure for the recovery of fines, the application of the present section of the *Cr.P.C.* , read with ss. 40 and 67 of the I.P.C., is not excluded, in the absence of an express provision to that effect.[59]

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24 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 [*LNIND 1964 SC 100*]: (1964) 7 SCR 435 [*LNIND 1964 SC 100*] : (1964) 2 Crimes 606 .

25 *State of U.P. v. Sabir Ali,* AIR 1964 SC 1673 [LNIND 1964 SC 100]: (1964) 7 SCR 435 : (1964) 2 Crimes 606 .

26 *Chhajulal v. State of Rajasthan,* 1972 SC 1809 (paras 6, 11) : (1972) 3 SCC 411 : 1972 Crlj 1184 . [The actual decision in this case is now to be read subject to the enlarged powers of Magistrate under s. 29 of the new Code].

27 *Paras v. State,* AIR 1969 All 116 [LNIND 1967 ALL 76](para 3).

28 Cf. *Bashiruddin v. State of Bihar,* AIR 1957 SC 645 648 : 1957 SCR 1032 : 1957 Crlj 1023 . [Offence under s. 65(1) of the Bihar Wakfs Act, 1947]; *Sukdeo v. Calcutta Corpn.,* AIR 1953 Cal 41 [LNIND 1952 CAL 113][Calcutta Municipal Act].

29 Cf. *Bashiruddin v. State of Bihar,* AIR 1957 SC 645 648 : 1957 SCR 1032 : 1957 Crlj 1023 . [Offence under s. 65(1) of the Bihar Wakfs Act, 1947]; *Sukdeo v. Calcutta Corpn.,* AIR 1953 Cal 41 [LNIND 1952 CAL 113][Calcutta Municipal Act].

30 Cf. *Bashiruddin v. State of Bihar,* AIR 1957 SC 645 648 : 1957 SCR 1032 : 1957 Crlj 1023 . [Offence under s. 65(1) of the Bihar Wakfs Act, 1947]; *Sukdeo v. Calcutta Corpn.,* AIR 1953 Cal 41 [LNIND 1952 CAL 113][Calcutta Municipal Act].

31 *Dhoopa v. State,* AIR 1966 Raj 238 [LNIND 1964 RAJ 79](para 12).

32 Cf. *Bashiruddin v. State of Bihar,* AIR 1957 SC 645 648 : 1957 SCR 1032 : 1957 Crlj 1023 . [Offence under s. 65(1) of the Bihar Wakfs Act, 1947]; *Sukdeo v. Calcutta Corpn.,* AIR 1953 Cal 41 [LNIND 1952 CAL 113][Calcutta Municipal Act].

33 *Venkatasagadu* , (1887) 10 Mad 165(FB) .

34 *Emp. v. Asghar,* (1883) 6 All 61 .

35 *Ram* *Chandra* ,
AIR 1932 Pat 301 (FB) .

36 *Emp. v. Kutrappa,* 18 Bom 440.

37 *State* *v.* *Krishna,*
AIR 1953 TC 233 .

38 *Laxman v. State,* (1956) MBLR 148; *Bhedu v. Hari,*
AIR 1958 SC 35 .

39 *Anif* , in re.,
AIR 1925 Mad 993 .

40 *Laxman v. State,* (1956) MBLR 148; *Bhedu v. Hari,*
AIR 1958 SC 35 .

41 *Shanti* *Lal* *v.* *State,*
2008 Crlj 386 :
(2007) 11 SCC 243 [
LNIND 2007 SC 1171] :
(2007) 4 Crimes 369 .

42 *Ghulam* *v.* *Emp.,*
AIR 1943 Sind 124 .

43 Cf. *Chhajulal* *v.* *State of* *Rajasthan,*
AIR 1972 SC 1809 : (1972) 3 SCC 411 :
1972 Crlj 1184 .

44 Cf. *Chhajulal* *v.* *State of* *Rajasthan,*
AIR 1972 SC 1809 : (1972) 3 SCC 411 :
1972 Crlj 1184 .

45 Cf. *Chhajulal* *v.* *State of* *Rajasthan,*
AIR 1972 SC 1809 : (1972) 3 SCC 411 :
1972 Crlj 1184 .

46 Cf. *Chhajulal* *v.* *State of* *Rajasthan,*
AIR 1972 SC 1809 : (1972) 3 SCC 411 :
1972 Crlj 1184 .

47 *Yakoob* , (1898) 22 Mad 238.

48 *Ram Das* *v.* *State of* *U.P.,*
(1970) 2 SCC 740 [
LNIND 1970 SC 363] (para 5) :
AIR 1974 SC 1811 [
LNIND 1970 SC 363]:

1974 Crlj 1261 ; *Nanalal v. State,*
AIR 1969 Guj 389 (para 10).

49 *Ram Das v. State of U.P.,*
(1970) 2 SCC 740 [
LNIND 1970 SC 363] (para 5) :
AIR 1974 SC 1811 [
LNIND 1970 SC 363]:
1974 Crlj 1261 .

50 *Ram Das v. State of U.P.,*
(1970) 2 SCC 740 [
LNIND 1970 SC 363] (para 5) :
AIR 1974 SC 1811 [
LNIND 1970 SC 363]:
1974 Crlj 1261 .

51 *Yakoob* , (1898) 22 Mad 238.

52 *Gokul v. Sribodh,*
AIR 1941 Pat 48 .

53 *Gokul v. Sribodh,*
AIR 1941 Pat 48 .

54 *Chhajjulal v. State of Rajasthan,* (1973) UJSC 14(N) .

55 *Sagwa* ,
(1901) 23 All 497 .

56 *Sagwa* ,
(1901) 23 All 497 .

57 *Bandi Mallaiah v. State of A.P.,*
AIR 1980 SC 1160 (para 5) :
(1980) 3 SCC 136 :
1980 Crlj 914 .

58 *Harnam v. State of H.P.,*
AIR 1975 SC 236 [
LNIND 1974 SC 381]:
(1975) 3 SCC 343 [
LNIND 1974 SC 381] :
1975 Crlj 276 .

59 *Bashiruddin v. State of Bihar,*
AIR 1957 SC 645 [
LNIND 1957 SC 46](para 6) :
(1957) Crlj 1023 :
1957 SCR 1032 [
LNIND 1957 SC 46]; *Dhoopa v. State,*

AIR 1966 Raj 238 241 [
LNIND 1964 RAJ 79].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 31

Sentence in cases of conviction of several offences at one trial.

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of *Section 71 of the Indian Penal Code (45 of 1860)*, sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

***Provided* that—**

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

1. Scope of Section 31.—

This section corresponds to *old* s. 35, with verbal changes.

2. Analogous Provision.—

This section deals with a case where a person is convicted at *one* trial for two or more offence and sentenced to several punishments therefor. Whether such punishments shall run concurrently must be directed by the Court at the time of the conviction at that trial. [60] This does not mean that the appellate or the revisional [61] Court shall have no power in this behalf. [62] A similar occasion arises where a person, already undergoing a sentence of imprisonment, is sentenced to imprisonment on a *subsequent* conviction. Whether such subsequent sentence is to run concurrently with the previous sentence is to be directed, under s. 427(1) [*old* s. 397(1)], at the time when the subsequent sentence is passed, but not after the judgment is pronounced. [63]

3. Scope of sub-section (1) : Several punishments for several offences tried together.—

This sub-section has two parts:

(a) The first part says that where the accused is convicted of two or more offences at one trial the Court shall have the power to award punishment *each* of such offences, within the limit of that Court's competence [s. 29] and subject to s. 71, I.P.C., [64] and subject to the Provisios to the present section.

(b) The second part applies only where the sentence for one or more such several offences is imprisonment. In such a case, the sentence shall ordinarily be consecutive, one term of imprisonment following the other, but the Court is given the power to direct that the several sentences shall run *concurrently* . The power to direct that the sentences shall run concurrently refers only to sentences of imprisonment and has no application to sentences for *fine* ; every sentence of fine imposed by the Court shall be a separate liability. [65]

4. No application to imprisonment in default of fine, under s. 30(2).—

Section 64 of the I.P.C. makes it clear that when imprisonment is a awarded for non-payment of fine, such imprisonment must be in excess of any substantive sentence of imprisonment which may have been awarded for the offence for which the accused has been convicted. [66] Hence, a sentence of imprisonment in default of fine cannot be directed to run concurrently with a substantive sentence of imprisonment. [67]

2. In short, s. 31(1) authorises concurrent sentences only is cases of substantive sentences of imprisonment. Even several sentences of imprisonment in default of several sentences of fine cannot be ordered to run concurrently. [68]

5. Separate sentence for separate offence.—

1. Though the word used in sub-section (1) is 'may', it has been held that when a Court convicts an accused of several offences, there should be a separate sentence for each of such offences [subject to s. 71, I.PC.], because the law does not envisage conviction for an offence, without a sentence being imposed therein. [69] Another reason is that a separate sentence having been imposed in respect of each of the offences, if the conviction in respect of one offence is set aside the sentence in respect of that offence only would go. [70]

2. The question becomes of practical importance when the conviction of one of the offences for which a composite sentence had been passed by the trial Court is set aside on appeal or revision. There was a controversy on the point as to whether the superior Court, in such a case, impose a sentence for the conviction which is upheld by it. That controversy has been *set at rest* by the Supreme Court, [71] holding that even in the case of a composite sentence, the trial Court must have made separate findings on each of the offences, and when the conviction on such a finding is upheld by the appellate Court, the award of a sentence on the affirmance of such conviction is only a consequential order which the appellate Court is competent to make, under s. 386(e), *post* . Such an order would *not* be an enhancement of the sentence. [72]

3. Hence, the mere fact that the sentence is a composite one for several offences cannot of itself be a ground for reversing the judgment, in the absence of a failure of justice thereby, for the appellate Court itself can pass a suitable sentence in respect of the offences which it finds to have been proved. [73]

4. The offence of conspiracy to commit an offence is a separate offence punishable separately from the main offence. [74] Hence, an accused is liable to separate sentences under Section 167(81) of the Sea *Customs Act* , 1878 and under Section 120B(1), I.P.C. for conspiracy to commit the offence under the *Customs Act* . [75]

5. Normally, however, the Court should not award two separate punishments for the *same act* constituting two offences, *e.g.* , under s. 201, I.P.C. [76]

6. 'Two or more offences'.—

1. The word 'distinct' which qualified the word 'offence' in *old* s. 35, was omitted by the Amendment Act of 1923. [77] Hence, the present section would be applicable in case of conviction, at one trial, [78] of several offences which may or may *not* [79] be 'distinct' offences in any technical sense.

2. In order to attract this section, the several offences need not be offences under the I.P.C.,—they may be offences punishable under any law in force for the time being. [80]

7. 'Subject to Section 71 of the I.P.C.'.—

These words mean that though the present section empowers the Court to award separate sentences for conviction at one trial for different offences, that power must be read subject to the limitations [81] imposed by s. 71 of the I.P.C., which says—

"71. Where anything which is an offence is made up of parts, any of which parts it itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several act s, of which one or more than one would be itself or themselves constitute an offence, constitute, when combined, a difference, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

Illustrations

(a) *A* gives *Z* fifty strokes with a stick. Here *A* may have committed the offence of voluntarily causing hurt to *Z* by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while *A* is beating *Z* , *Y* interferes, and *A* intentionally strikes *Y* , here, as the blow given to *Y* is no part of the act whereby *A* voluntarily causes hurt to *Z* , *A* is liable to one punishment for voluntarily causing hurt to *Z* and to another for the blow given to *Y* ."

This section means :

(a) Offences consisting of different parts.—

1. Where an offence is made up of *parts* , each of which constitutes an offence, the offender *shall not be punished for more than one of such offences* , unless it is so expressly provided by the relevant statute.

2. This means that where in course of the *same* transaction, several offences are committed, by several acts each of which constitutes a separate offence, the Court cannot pass separate sentences for each such offence, but can pass only one sentence for any of those offences [82] [vide *Ill* . (a) to s. 71, I.P.C.]. In other words, a man cannot be punished for the whole as well as its parts, separately, [83] *e.g.* , where movables belonging to two persons are stolen from one person at the same time. [84]

3. It follows that two separate sentences cannot be passed for an offence and its aggravated form arising out of the same transaction; in such a case, there will be one sentence only, in respect of the aggravated offence. [85] This principle has been applied to offences under—

S s. 147 and 148, I.P.C.; [86]

S s. 279 and 304A, I.P.C.; [87]

S s. 380 and 457, I.P.C.; [88]

S s. 347 and 384, I.P.C.; [89]

S s. 279 and 337 or 338; [90]

Some High Courts are, however, of the view that even in such cases, the Court can pass separate sentences for the two offences subject to the limit imposed by the latter part of s. 71, I.P.C. [91]

4. A case coming under the foregoing part of s. 71 is to be distinguished from a case under sub-section (1) of s. 220 [*old* s. 235], *post* , which relates to 'one series of acts so connected together as to form ' *one transaction* ', which s. 71 of the I.P.C. cannot be applied [92] *e.g.* , one single conspiracy, spread over several years; [93] or a criminal breach of trust in respect of several sums of money committed during several years, in pursuance of a criminal conspiracy. [94]

5. When one single act constitutes an offence under *different* provisions of law, the case comes under the second part of s. 71 (*see below*) and not the present one.

(b) Different offences.— In a case involving several offences, the Court shall not punish the accused with a more severe punishment than what could be awarded by that Court for any one of such offences, in the following contingencies—

(i) Where an offence falls within two or more separate definitions of offences under the relevant law [*vide* Ill. (a), to s. 71];

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

(i) **Offence falling under different definitions of offences.—** This refers to one transaction or the same facts constituting an offence, even though it may come under different definitions of the *Penal Code* or other laws, or under different laws. [1] Thus, the same facts or act may constitute offences under—

(a) Ss. 411 (dishonest receipt of stolen property) and 414, I.P.C. (concealment or disposal of that property). [2]

(b) S s. 323 (hurt) and 352, I.P.C. [3]

(c) S s. 196 (using evidence known to be false) and s. 471, I.P.C. (using as genuine a forged document). [4]

(d) This provision has been applied to the Opium Act, 1878, where Cls. (a) and (b) of s. 9 constitute possession and transportation of opium separate offences, for each of which the maximum sentence of imprisonment would be one year. *Held* , that when a person is charged with both offences, he cannot be sentenced to more than one year's imprisonment. [5] Separate sentences for the two offences could be imposed to run consecutively, provided the aggregate of the two sentences did not exceed one year. [6]

(ii) **Each of several acts constitutes one offence, and a different offence, when combined.—** As illustration of this category is to be found in III. (m) to sub-section (4) to s. 220 [*old* s. 235(3)], which uses the same language. That illustration is,—A commits robbery on B (s. 302, I.P.C.) and in doing so voluntarily causes hurt to him (s. 323, I.P.C.). Here, in the same transaction, A has committed two offences separately; and a third one, under s. 394 (voluntarily causing hurt in committing robbery), as the combined effect of the transaction. In such a case, A may be tried at one trial and convicted for offence under s s. 323, 392 and 394, but the effective sentence cannot exceed the maximum punishment for the severest of these offences, i.e., under s. 394,*3* , imprisonment for life, or rigorous imprisonment for 10 years, and fine. [7]

An offence and its aggravated form have been placed under this category by some High Courts (*see, ante*).

In all the foregoing cases under (a) and (b), separate sentences may be passed on each of the counts, but the punishment of the accused cannot exceed the maximum sentence which the particular Court had power to award for the most serious of such offences, singly. [8]

8. Cases not falling under s. 71, I.P.C.—

Where the offences with which an accused is charged at the same trial are separate and distinct offences (independent of each other), not falling under any of the foregoing three categories specified in s. 71, I.P.C., there is no question of applying s. 71, I.P.C., and maximum sentences for the several offences may be awarded, to run consecutively, *e.g.* , for the offences under—

S s. 380 and 457, I.P.C.; [9]

S s. 366 and 376, I.P.C.; [10]

S s. 146/147, and 323 or 325 or 332 or 347; [11]

Section 201, to cause disappearance of the evidence of two offences, by the same act, thereby committing two offences under s. 201. [12]

9. 'Consecutive' and 'concurrent' sentences.—

1. When several punishments are imposed for several offences at one trial, the Court may direct that the several punishments shall run *concurrently* , that is to say, the accused shall suffer imprisonment for the *maximum* term of the several punishments awarded; in the absence of any such direction, [13] the several terms will run *consecutively* , which means that he would suffer imprisonment for the aggregate of the several terms, one sentence commencing on the expiry of the other.

   But, while determining the sentence, the Court should exercise its judicial discretion to determine whether the sentence should run concurrently or consecutively. [14]

2. But the power to direct that separate sentences shall run concurrently relates only to substantive sentences [15] of imprisonment so that several sentences of imprisonment in default of payment of fine cannot be made concurrent with each other. [16] Nor does it apply to substantive sentences of fine. [17]

10. Directives for sentence to run concurrently or consecutively.—

The direction for the sentence to run concurrently or consecutively is a direction as to the mode in which the sentence is to be executed. In certain cases if the person convicted is a habitual offender and has been found guilty in various courts and it is suspect that he would be menace if let loose in society the direction for consecutive running of sentence should be given. [18]

11. Sentence in case of conviction of several offences at one trial.—

The term 'imprisonment' in s. 31 also includes life imprisonment and in such cases for conviction of several offences in one trial under s. 31 of the Code will apply to life imprisonment also in which consecutive sentences may be passed. [19]

12. Total sentences in several offences may exceed the limit of the extent of punishment.—

Each of the terms of imprisonment has to be within the power of the Court in case of sentence of several offences, merely because total term of imprisonment in case of consecutive sentences is in excess of the punishment within the competency of the Court, the said consecutive sentences would not be rendered illegal thereby. [20]

However, the recent decision of the Supreme Court has, however, declared that the provisions to s. 31 of the Code clearly mandate that the accused could not have been sentenced to imprisonment for a period longer than fourteen years. So, when several sentences imposed on the accused consecutively under various sections of the I.P.C. by the Trial Court as modified by the High Court amounted to imprisonment of total period of twenty years, the Supreme Court has held that both the Trial Court and the High Court committed illegality in imposing the consecutive sentences exceeding fourteen years of imprisonment. As the accused was in Jail and

had undergone twelve years of imprisonment, the Supreme Court sentenced the accused appellant to the period already undergone. [21]

13. Sub-section (2) : Jurisdiction in case of consecutive sentences.—

This sub-section, in effect, enlarges the ordinary powers of a Magistrate as specified in s. 29. The provisions may be explained thus: under s. 29(2), a Magistrate of the First Class cannot pass a sentence for a term exceeding 3 years. If, in course of a trial, it appears to him that a higher term should be imposed, he must send the case for trial before a higher forum [s. 322(1),*post*]. The limit imposed by s. 29, however, applies in case of a trial or conviction for a single offence.

14. Section 31(2)

comes into operation where the trial is for several offences or on several charges. If the Magistrate convicts the accused of more than one such offences, and awards several sentences to run consecutively, the present sub-section says that the Magistrate's competence to punish the accused shall not be limited by s. 29, and the First Class Magistrate, for instance, shall not be obliged to send the case to the Chief Judicial Magistrate, merely because the aggregate of the consecutive exceeds *three* years. According to *Proviso* (b) of the present sub-section, the First Class Magistrate will be competent to pass an aggregate sentence up to *six* years, for the several offences to run consecutively.

15. Provisos to sub-sections (1)-(2) : Aggregate limit of separate sentences at one trial.—

1. Though sub-sections (1)-(2) authorize the Court to award separate sentences for each of several offences at one trial [22] and to direct that they shall run consecutively, [23] that is to say, one sentence to be undergone after the expiry of the other, an overall limit is imposed by these two *Provisos* which provide that in any such case, the *aggregate* of the separate or several sentences shall not exceed—

   (i) A maximum period of 14 years. Thus, an aggregate sentence of 20 years for several offences would be illegal. [24]

   (ii) Twice the quantum of punishment, which the Court is competent to pass for a single offence. [25]

2. It is evident that the above aggregate limit has no application in the case of separate trials for several offences, [26] , [27] even though the judgments may be delivered and the punishment awarded on the same day. [28]

16. Sub-section (3) : Appeal in case of consecutive sentence.—

1. This provision is to be read with s. 376 [*old* s. 413], which bars appeal in 'petty cases'. Thus, under s. 376(c), there will be no appeal if a Magistrate of the First Class passes a sentence of fine not exceeding R s. 100, where the accused is convicted of a single offence. The result will be the same where the sentences for several offences are concurrent, and a concurrent sentence does not exceed R s. 10, because there is, in effect, a single sentence. In such a

case, the accused would *not* be allowed to aggregate the *concurrent* sentences to appeal against them collectively. [29]

2. The position would be different when the sentences for several offences are *consecutive* . By fiction, the *aggregate* of the separate sentences would be treated as single sentence, so that the case would be appealable if the aggregate of the consecutive sentences of fine passed by a Magistrate exceeds R s. 100, even though sentence for any one of them does not exceed R s. 100. [30]

3. This provision does not extend to imprisonment in default of payment of fine or for failure to furnish security (*proviso* to s. 376 [*old* s. 415]).

17. S s. 31 and 427.—

These two sections deal with two different situations: (a) s. 31 deals with the case where there are several sentences for different convictions against the caused at the same trial. (b) s. 427, on the other hand, deals with the case where a person already undergoing a sentence of imprisonment for conviction at a previous trial, is again sentenced for conviction in a subsequent case, to imprisonment. [31]

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60 Cf. *Surja v. State,* AIR 1963 Raj 202 [*LNIND 1963 RAJ 160*].

61 *Basudeb v. State,* (1983) Crlj 527 (para 2) Ori.

62 *Tetar v. Ganauri,* AIR 1968 Pat 287 .

63 *Bhaskaran v. State,* (1978) Crlj 738 ; *Mulaim v. State,* (1974) Crlj 1397 (All) FB .

64 *Puranmal v. State of Orissa,* AIR 1958 SC 935 [*LNIND 1958 SC 89*](para 5) : : 1958 Crlj 1432 1959 SCR 1162 [*LNIND 1958 SC 89*].

65 *Sashi v. State of Assam,* AIR 1967 A&N 111 (para 4).

66 *Mithoo* , AIR 1942 Sind 30 .

67 *Bhedu* *v.* *Hari,* AIR 1958 Pat 35 .

68 *Mrityunjay* *v.* *State* *of* *Bihar,* AIR 1967 Pat 286 1181 ; *Surja v. State,* AIR 1963 Raj 202 [*LNIND 1963 RAJ 160*].

69 *Jayaram* *v.* *State* *of* *Bombay,* (1955) 2 SCR 1349 1055.

70 *Rameshwar* *v.* *R.T.A.,* AIR 1958 All 575 [*LNIND 1957 ALL 258*](para 8).

71 *Jayaram* *v.* *State* *of* *Bombay,* (1955) 2 SCR 1349 1055.

72 *Jayaram* *v.* *State* *of* *Bombay,* (1955) 2 SCR 1349 1055.

73 *Rameshwar* *v.* *R.T.A.,* AIR 1958 All 575 [*LNIND 1957 ALL 258*](para 8).

74 *Husain* *v.* *Dalipsinghji,* AIR 1979 SC 45 (para 42).

75 *Husain* *v.* *Dalipsinghji,* AIR 1979 SC 45 (para 42).

76 *Roshan* *v.* *State* *of* *Punjab,* AIR 1965 SC 1413 [*LNIND 1964 SC 339*](para 15) : (1965) 2 SCR 316 [*LNIND 1964 SC 339*] : (1965) 2 Crimes 426 .

77 *Emp.* *v.* *Dharmdas,* AIR 1933 Sind 9 .

78 *Bijoy* *v.* *Kamal,* (1916) 20 CWN 1300 .

79 *Emp.* *v.* *Hamma,* AIR 1928 Bom 145 .

80 Cf. *Debi* *Dayal* , (1913) 15 Crlj 300 (Oudh) .

81 *Puranmal* *v.* *State* *of* *Orissa,*
AIR 1958 SC 935 [
LNIND 1958 SC 89](para 5) :
1959 SCR 1162 [
LNIND 1958 SC 89] :
1958 Crlj 1432 .

82 *Q.E.* *v.* *Malu,*
(1899) 1 Bom LR 142 .

83 *Lalbaksh* ,
AIR 1943 Lah 212 .

84 *Shankerlal* *v.* *Corpn.,*
AIR 1962 Cal 611 [
LNIND 1962 CAL 83]; *Delhi Municipality v. Moti,*
(1972) Crlj 1536 FB .

85 *Thangavelu* , in re.,
(1972) Crlj 390 (para 16).

86 *Thangavelu* , in re.,
(1972) Crlj 390 (para 16).

87 *Mohmadalli* *v.* *State* *of* *Gujarat,*
AIR 1971 Guj 72 [
LNIND 1970 GUJ 118].

88 *Durgacharan* *v.* *Isamuddin,*
(1946) 51 CWN 534 .

89 *Q.E* . v. *Malu* ,
(1899) 1 Bom LR 142 .

90 *State* *v.* *Gulam,*
AIR 1956 MB 141 (FB) .

91 *State* *v.* *Gulam,*
AIR 1956 MB 141 (FB) .

92 *Kali* *Das* ,
(1911) 38 Cal 433 457.

93 *Swaminathan* *v.* *State* *of* *Madras,*
AIR 1957 SC 340 (para 7) :
1957 Crlj 422 .

94 *State of Bombay v. Umarsaheb,* [AIR 1962 SC 1153 : 1962 Supp (2) SCC 711 : LNIND 1962 SC 23 : (1962) 2 Crimes 259].

1 *Sukhanandan*, (1917) 19 Crlj 157.

2 Vide Ill. (j) to s. 220, post (which uses the same language).

3 Vide Ill. (i), *ibid*.

4 Vide Ill. (l), *ibid*.

5 *Puranmal v. State of Orissa,* [AIR 1958 SC 935 : LNIND 1958 SC 89 : 1959 SCR 1162 : LNIND 1958 SC 89 : 1958 Crlj 1432](para 5).

6 *Puranmal v. State of Orissa,* [AIR 1958 SC 935 : LNIND 1958 SC 89 : 1958 Crlj 1432](para 5) : 1959 SCR 1162.

7 *Chandra Kant*, (1886) 12 Cal 496.

8 *Wazir*, (1887) 10 All 58.

9 Cf. *Udai Bhan v. State of U.P.,* [AIR 1962 SC 1116 : LNIND 1962 SC 37 : (1962) 2 Crimes 251](para 12) : 1962 Supp (2) SCR 830.

10 *Tek Singh*, (1928) 29 Crlj 248.

11 *Batisa*, AIR 1932 Pat 335; *Sahebraj*, AIR 1933 All 819.

12 *Roshan Lal v. State of Punjab,* [AIR 1965 SC 1413 : LNIND 1964 SC 339 : (1965) 2 SCR 316 : LNIND 1964 SC 339 : (1965) 2 Crimes 426](para 15).

13 *Idris* *v.* *Emp.,* (1939) 40 Crlj 751 .

14 *Khuda Bux* *v.* *State,* AIR 1951 All 912 916 .

15 *Venkataswamy* , (1937) Rang 366.

16 *Surja* *v.* *State,* [AIR 1963 Raj 202 *LNIND 1963 RAJ 160*].

17 *Sashi v. State of Assam,* AIR 1967 A&N 111 (para 4).

18 *K. Prabhakaran* *v.* *P. Jayarajani,* [AIR 2005 SC 688 *LNIND 2005 SC 30*]: [(2005) 1 SCC 754 *LNIND 2005 SC 30*] : [2005 SCC (Cri) 451 *LNIND 2005 SC 30*] : (2005) 1 KLT 510 .

19 *Kamalanantha* *v.* *State of T.N.,* [AIR 2005 SC 2132 *LNIND 2005 SC 337*]: [(2005) 5 SCC 194 *LNIND 2005 SC 337*] : [2005 SCC (Cri) 1121 *LNIND 2005 SC 337*].

20 *Kamalanantha* *v.* *State of T.N.,* [AIR 2005 SC 2132 *LNIND 2005 SC 337*]: [(2005) 5 SCC 194 *LNIND 2005 SC 337*] : [2005 SCC (Cri) 1121 *LNIND 2005 SC 337*].

21 *Chatar Singh* *v.* *State of M.P.,* [AIR 2007 SC 319 *LNIND 2006 SC 1037*]: [(2007) 2 SCC 370 (Cri) : (2006) 12 SCC 37 *LNIND 2006 SC 1037*] : 2007 Crlj 796 .

22 *Daulatbai* , in re., 3 All 305.

23 *Nga* *v.* *Emp.,* AIR 1937 Rang 391 .

24 *Sheo Narain v. Emp.,* (1910) 11 Crlj 679 680.

25 *Daulatbai* , in re., 3 All 305.

26 *Daulatbai* , in re., 3 All 305.

27 *Dulli v. Emp.,* AIR 1925 All 305 .

28 *Daulatbai* , in re., 3 All 305.

29 *Aziz* , (1913) 40 Cal 631 ; *Jagadish v. Emp.,* AIR 1927 Nag 255 .

30 *Nawabali v. Jainab,* (1932) 59 Cal 1131 .

31 *Mohd. Hussain Umar Koehra v. K.S. Dalipsinghji,* AIR 1970 SC 45 58 : (1970) 1 SCR 130 : (1969) 3 SCC 429 [*LNIND 1969 SC 147*] : 1970 Crlj 9 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 32

Mode of conferring powers.

(1) In conferring powers under this Code, the High Court or the State Government, as the case may be, may, by order, empower persons specially by name or in virtue of their offices or classes of officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

1. Scope of Section 32.—

This section corresponds to *old* s. 39 with this change that it now comprises both the State Government and the High Court, so that the conferment of both executive and judicial powers are dealt with.

It is to be noted, in this context, that s s. 36-38 and the Third Schedule of the *old* Code, enumerating the 'ordinary' and 'additional' powers of Magistrates have been omitted from the *new* Code, so that whether a Magistrate has any particular power has to be ascertained from the relevant substantive section. In fact, the subject of conferment of power has lost much importance because the *new* Code statutorily confers many of the powers which under the *old* Code rested on special empowerment.

But even under the *new* Code, there are powers which may be exercised by an Executive Magistrate only if so empowered by the specified authority. Thus, under s. 143, any *Executive* Magistrate, other than the District Magistrate or Sub-Divisional Magistrate, can make an order prohibiting repetition of a public nuisance, only if empowered by the State Government or the District Magistrate in this behalf. Under s. 20(2), an Additional District Magistrate shall exercise such powers of a District Magistrate as the State Government may confer

upon him. *See also* s. 21 (special Executive Magistrate, *ante*).

The appointment of a Civil Judge as an Additional Sessions Judge is governed not by this section, but by s. 9. [32]

2. Sub-section (1) : General or special empowerment.—

The present sub-section prescribes the mode in which the conferment of power may be made under any of the sections of the Code which makes a Magistrate competent to exercise a power only if he is empowered in that behalf by the High Court or the State Government, as the case may be.

Such conferment may be 'general' or 'special': It is general when it is conferred on a class of officials by their official title, *e.g.* , a Magistrate of the First or Second Class, in which case any officer who falls under that class may exercise that power. [33] On the other hand, it is *special* when it is conferred on a particular person by his name or the office, *e.g.* , the Deputy Superintendent of Police, Porbandar, held by him, [34] so that no other person can exercise that power. Conversely, where an officer is specially empowered by name, he can exercise that power even when transferred to another area.

The expression 'specially empowered', however, does not mean any special or extraordinary power but only that the power so conferred becomes the personal power of the person on whom it is conferred by name or by virtue of his office. [35]

3. Sub-section (2) : Date from which the power takes effect.—

1. This sub-section provides that when a power is conferred in accordance with this section, it comes into effect from the date when it is 'communicated', *i.e.* , made known to the officer concerned (not necessarily the date of its publication). [36]

2. It follows that the conferment cannot be given any retrospective effect. Hence, when a Magistrate having first class power is reverted to second class, any exercise of first class power by him after such reversion becomes illegal and cannot be validated by a subsequent notification vesting him with first class powers with retrospective effect. [37]

4. Effect of conferment of power pending trial.—

Since the conferment of a power takes effect immediately upon its communication to the officer concerned, it follows that if a Magistrate who started a case, having second class power, is vested with first class power at any time before pronouncing judgment, he shall have the power to impose a higher sentence according to his first class powers. [38]

5. Effect of appeal.—

The right and forum of appeal from the judgment of a Magistrate is to be determined with reference to his power

at the time of pronouncing the judgment. [39]

Hence, if a Magistrate who started a case with second class power passes a sentence of fine below R s. 100, no appeal will lie from such sentence [*see* s. 376(c), *post*] if he had been conferred first class power at any time prior to the passing of that sentence, though there was no bar to appeal, [40] had he been treated as a second class Magistrate for purposes of appeal.

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32 *Prem Nath v. State of Rajasthan,* AIR 1967 SC 1955 (para 11) : (1967) 3 SCR 186 [*LNIND 1967 SC 73*] : 1967 Crlj 1569 .

33 *Madhava v. District Collector,* AIR 1970 Ker 50 52 [*LNIND 1968 KER 205*].

34 *Sindhi Lohana v. State of Gujarat* , (1967) SC [Cr AIR13/64, dated 31-3-1967]; *Emp. v. Savalram,* AIR 1964 Bom 156 .

35 *Deshpande* , AIR 1964 AP 471 [*LNIND 1961 AP 91*].

36 *Gurbachan v. Jagiro,* AIR 1956 Punj 254 .

37 *Bakshi v. Emp.,* AIR 1938 All 157 .

38 *State v. Debnu,* AIR 1967 HP 52 .

39 *Bejoy v. Sitanath,* AIR 1940 Cal 540 .

40 *Bejoy v. Sitanath,* AIR 1940 Cal 540 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 33

Powers of officers appointed.

Whenever any person holding an office in the service of Government who has been invested by the High Court or the State Government with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same State Government, he shall, unless the High Court or the State Government, as the case may be, otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

STATE AMENDMENT

Nagaland. —This section has been extended to *Nagaland* [Nagaland Gazette, dated 30-6-1978].

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1. Scope of Section 33.—

This section corresponds to *old* s. 40, with the insertion of the fact that the new s. 32 includes the High Court as well.

2. Continuance of powers once conferred.—

1. When any powers have been conferred upon an officer with reference to a local unit, say, a district, it would subsist so long as he is not transferred out of that district [41] or to serve under another Government.

2. A power is not lost by mere disuse, [42] or because he had for some time been deputed on foreign service, remaining under control of the same Government, [43] or because he has, on transfer, been

vested with higher powers of the same nature,—the doctrine of merger not being applicable to such case. [44]

3. If he goes on leave and returns to his old post [45] or is transferred to an office of the same nature at another place within the same local area in respect of which he was vested with the power, *e.g.* , within the same district, [46] he will continue to have the power on resumption of duties, and no fresh notification empowering him again is necessary. [47]

4. On the other hand, he would lose the power—(i) if he absents himself without leave, thereby forfeiting his office under the relevant rules relating to his service; [48] (ii) if an officer having two capacities,—civil-judicial and magisterial, is transferred to a new place in his civil capacity, he cannot act as Magistrate unless he is so empowered again, [49] because his new office is *not* 'of the same nature'; (iii) when he retires, fresh empowerment would be necessary if he is re-appointed; [50] (iv) when he resigns and the resignation is accepted; [51] (v) if the authority which had conferred the power (High Court or State Government) directs the contrary, or withdraws the powers or any of them, under s. 34, below; (vi) from the moment of his making over charge [52] when he is transferred out of the local area to which he had been appointed or to service under another Government.

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41 *Emp.* *v.* *Anand,* (1881) 3 All 563 (FB) .

42 *Amulya* , (1963) Crlj 721 .

43 *Ramaratnam* , in re., AIR 1944 Mad 302 [*LNIND 1943 MAD 240*].

44 *Sujani* *v.* *Shyamshah,* AIR 1956 Nag 67 .

45 *Pritam* , AIR 1930 Lab 833 .

46 *Bhartu* , AIR 1956 Punj 252 .

47 *Emp.* v *Iiranna* , (1891) 15 Mad 132 .

48 *Bai* *Harku* *v.* *Sitaram,* (1900) 2 Bom LR 536 .

49 *Emp.* v. *Karimbux,* AIR 1933 Sind 398 400 .

50 *Mahomed,* AIR 1923 Mad 598 599 .

51 *Sudarsana v. Pillai,* 45 MLJ 798.

52 *Sudarsana v. Pillai,* 45 MLJ 798.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 34

Withdrawal of powers.

(1) The High Court or the State Govern ment, as the case may be, may withdraw all or any of the powers conferred by it under this Code on any person or by any officer subordinate to it.

(2) Any powers conferred by the Chief Judicial Magistrate or by the District Magistrate may be withdrawn by the respective Magistrate by whom such powers were conferred.

1. Scope of s. 34: Cancellation of powers.—

This section corresponds to *old* s. 41, with changes consequential upon separation of the Executive and the Judiciary.

2. Which powers may be withdrawn.—

Sub-section (1) makes it clear that it is only the powers conferred by the High Court or State Government, under s. 32, which may be withdrawn under the present section. The powers which are conferred by the Code itself (*e.g.* , under s. 109), [53] upon a Magistrate by virtue of his appointment, cannot be taken away except by termination of the appointment owing to resignation, dismissal or the like. [54]

3. Mode of withdrawal.—

Though there is no provision corresponding to s. 32 to provide the mode of withdrawal, it is clear that a power conferred by s. 32 can be withdrawn either by sending a copy of the order of withdrawal to the Magistrate concerned or by publishing it in the Official Gazette, [55] and it would take effect from that date. It cannot be done by mere executive instructions. [56] The powers conferred would continue until there is a communication of the

order to the Magistrate or until it is officially published. [57]

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53 *State* *v.* *Gangadakar,* (1962) 2 Crlj 711 712 Mys.

54 *State* *v.* *Gangadakar,* (1962) 2 Crlj 711 712 Mys.

55 *Sudhakar* *v.* *State,* [AIR 1957 All 267 *LNIND 1955 ALL 181*](268-69).

56 *Veeramachaneni* *v.* *Nooli,* AIR 1957 AP 247 (248-49).

57 *Sudhakar* *v.* *State,* [AIR 1957 All 267 *LNIND 1955 ALL 181*](268-69).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER III

POWER OF COURTS

S. 35

Powers of Judges and Magistrates exercisable by their successors-in-office.

(1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office.

(2) When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Additional or Assistant Sessions Judge.

(3) When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate.

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1. Scope of s. 35 : Successors-in-office of Judges and Magistrates.—

This section corresponds to *old* s. 559 with verbal changes consequential upon the separation of the Executive and the Judiciary, and the numbering of *old* sub-sec. (2) as sub-sec. (3) and *vice versa.*

2. Scope of sub-sec. (1).—

This Section applies to *all* Judges and Magistrates and is not confined to those Magistrates whose courts are permanent. [58]

2. Whether the successor is appointed temporarily or permanently is immaterial, once such person has the power to act as the presiding officer of the Court of his predecessor [see s. 70,*old* s. 75] [59] or otherwise to exercise the powers vested in his predecessor, *e.g.* , for making a complaint under s. 360 [*old* s. 476], in respect of an offence under s. 195, I.P.C.; [60] for transferring a case of which cognizance had been taken by his predecessor under s. 192. [61]

3. A Division Bench of the Delhi High Court [62] has held that succeeding Magistrate has, by virtue of s. 35(1), the power to issue process on a complaint of which cognizance had earlier been taken and the complainant and/or his preliminary evidence had been examined by his predecessor.

   Similar view has been taken by the Division Bench of Calcutta High Court that even though cognizance had been taken by the predecessor-in-office, SDJM succeeding him can, in view of s. 35(1) of the Code can transfer that case to another Judicial Magistrate. [63]

4. A Magistrate cannot be said to be successor-in-office within the purview of this section unless there has been an order under s. 15(2) [corresponding to *old* s. 17(1), assigning business to him. [64] In the absence of such formal order, when a Magistrate is asked to do some particular business of the S.D.M., as a 'local arrangement' on a particular day or days, he does not become the successor-in-office of the S.D.M., and cannot, therefore, make an order of transfer of a case for disposal. [65]

5. Since the provision in sub-sec. (1) is "subject to the other provisions of the Code", a successor-in-office cannot exercise the following powers in view of contrary provisions in the Code itself:

   To award costs under s. 148(3), which power belongs only to 'the Magistrate passing a decision'; [66] but there is nothing to debar the successor from *assessing* the costs ordered by his predecessor. [67]

The Patna High Court, [68] has, however, held that the expression 'passing a decision' in s. 148(3) is not to be interpreted literally and would include the successor-in-office of the Magistrate or Judge who made the decision.

3. Sub-sec. (2)-(3) : 'Doubt as to who is the successor-in-office'.—

1. This expression occurs in both sub-sec. (2)-(3). Its object is to provide for the determination of a dispute, if it arises, as to who is the successor-in-office in a particular case. It does not mean that even where there is no such dispute, the successor-in-office cannot exercise any power so long as there is no determination by the superior officer specified in sub-sec. (2) or (3), as the case may be. [69] Its object is not to limit sub-sect. (1) in any manner. [70]

2. On the other hand, the only power conferred by this expression is to resolve a genuine doubt. It does not empower the Sessions Judge or the District Magistrate to declare one Magistrate or Judge to be a successor of another, where he is not so, or to confer upon him powers which he does not possess, under the Code. [71]

58 *Ajaib Singh v. Joginder,* AIR 1968 SC 1422 [*LNIND 1968 SC 139*] (para.5) : (1969) 1 SCR 145 [*LNIND 1968 SC 139*] : 1969 Crlj 4 .

59 *Kartick v. Emp.,* AIR 1932 Pat 175 .

60 *Ajaib Singh v. Joginder,* AIR 1968 SC 1422 [*LNIND 1968 SC 139*] (para 5) ; (1969) 1 SCR 145 [*LNIND 1968 SC 139*] : 1969 Crlj 4 .

61 *Syed Ayub v. State of U.P.,* AIR 1962 All 132 137 ; *Bholanath v. Gour,* AIR 1953 Cal 777 [*LNIND 1953 CAL 142*].

62 *Gulati v. Birmani* , (1986) Crlj (para 9) Del (DB).

63 *Kamal v. State,* 1977 Crlj 1492 : (1976) CHN 901 (Cal-DB).

64 *Krishnadeo v. Budhni,* AIR 1965 Pat 1 (FB) .

65 *Dubey v. Jha,* AIR 1971 Pat 15 (para 6).

66 *Bhagawandas v. Md. Gani,* AIR 1943 Mad 478 [*LNIND 1943 MAD 28*].

67 *Sarju v. Ramchandra,* AIR 1959 Pat 151 .

68 *Chandrama v. Harbans,* AIR 1965 Pat 21 .

69 *Ajaib Singh v. Joginder,* [
AIR 1968 SC 1422
LNIND 1968 SC 139](para 5) :
(1969) 1 SCR 145 [
LNIND 1968 SC 139] : 1969 Crlj4.

70 *Kamal* v. S *tate,* :
(1976) CHN 901
1977 Crlj 1492 Cal DB .

71 *Ramzani v. State,*
AIR 1960 All 350 352 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IV

A.—POWERS OF SUPERIOR OFFICERS OF POLICE

S. 36
Powers of superior officers of police.

Police Officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

STATE AMENDMENT

Applicability to Nagaland.— Provisions of s. 36 have been made applicable to the whole State of Nagaland. [1]

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1. Scope of s. 36.—

This section has been transposed, *verbatim,* from *old s.* 551 to put into a separate chapter all provisions relating to the powers of superior Police Officers, along with some other allied provisions, which lay scattered, in the *old* Code. The meaning of 'officer in charge of police station' and the special powers of such officer have been explained under s. 2(o), p. 29, 30, *ante* . The present section is an extension of those powers to all police officers who are superior in rank to an officer in charge of a police station, with this addition that while the powers of the latter are confined within the limits of the police station of which he is in charge, such powers conferred on the superior officers, by the present section, extend throughout the local area to which they are appointed. [2] It is, however, an enabling provision and does not compel the exercise of any power. [3]

2. 'Police officer superior in rank'.—

In order to apply this section, the superior officer must be a 'Police officer' and must be superior in rank to the officer in charge of a police station. 'Rank' refers to the hierarchy of police officers. [4]

3. Officers held to be superior in rank to officer-in-charge of police station:

1. Addl. Inspector-General of Police. [5]
2. Inspector-General of Police. [6]
3. Inspector-General, Vigilance (where the Vigilance Dept. has been notified as a 'police station'). [7]
4. An Inspector of Police of the C.I.D. [8]
5. A Special Police Officer, appointed under the Suppression of Immoral Traffic in Women & Girls Act, 1956. [9]

The Deputy Superintendent of the Vigilance Department is *not* such an officer. [10]

4. Power of superior Police Officers.—

1. Since the jurisdiction of Inspector General or Addl. Inspector General of Police extends over the State, they can exercise the powers of investigation or direction to investigate, which belong to the officer in charge of a police station, under ss. 154, 156-157. [11] Where the Chief Minister received a complaint from a private person and sent it over to the Addl. I.G., who directed the Deputy Superintendent to investigate into it, there was nothing contrary to the present section [*old* s. 551] of the Code or *Art. 14 of the Constitution* . [12]
2. Where the jurisdiction of the superior officer extends to the entire State, [13] and the present section applies, no specific appointment is necessary for the exercise of any of the powers on an officer in charge of a police station throughout the State, *e.g.* , investigation into a cognizable offence. [14]
3. Where the Vigilance Department is notified as a 'police station' for purposes of the Code, and an Inspector-General, Vigilance, is appointed, by the state Government, without demarcating and local area for his jurisdiction, he can exercise the power of an officer-in-charge of a police station throughout the State. [15] Merely because an Inspector-General is in charge of bribery and corruption cases, it cannot be said that he cannot be directed by the State Government, in exercise of its executive function, to take over investigation of a cognizable case, registered by the Railway police. [16]
4. An officer, superior in rank to an officer-in-charge of a police station is competent to make 'further investigation' under s. 173(8),*post* either on his own initiative or at the direction of the State Government, [17] of course, on receipt of fresh evidence since submission of report under s. 173(2).2 [18]
5. As allegations have been made against the officer of a local police station in regard to the mode and manner in which investigation was carried out, Additional Director General of Police can direct further investigation of the case to CID which is part of investigating authority of the State. [19]

5. S s. 36 and 156(3).—

Section 36 does not enable Magistrate to direct any officer other than officer-in-charge of a police-officer, even though he may be superior in rank, to make an investigation under s. 156(3). [20]

6. Sections 36 and 74.—

Section 36 authorises the Superintendent of Police, Respondent No. 3 to endorse the warrant against the first petitioner in favour of any other police officers like Respondent Nos. 7 to 15, the special squad, to arrest the petitioner No.1. But s. 74 requires such endorsement to be made in the warrant of arrest itself. In the absence of such endorsement on the warrant of arrest and the document of the authorisation issued by the Superintendent of Police not referring to the warrant of arrest of the petitioners, the arrest of the petitioner No. 1 is in clear violation of the procedure established by law. [21]

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1 *Nagaland Gazette* 4-5-1974, Extraordinary No. 8.

2 *Emp.* *v.* *Mathura,* AIR 1932 Cal 850 .

3 *Emp.* *v.* *Mathura,* AIR 1932 Cal 850 .

4 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (para 13) (Pat).

5 *Kapur v. Pratap Singh,* AIR 1961 SC 1117 1121 : (1962) 2 SCR 143 : (1961) 2 Crimes 161 .

6 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (Para 13)

7 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (Para 13)

8 *Textile Traders v. State of U.P.,* AIR 1959 All 337 339 [*LNIND 1958 ALL 184*].

9 *Delhi Administration v. Ram Singh,* AIR 1962 SC 63 [*LNIND 1961 SC 230*](para 32) : (1962) 2 SCR 694 [*LNIND 1961 SC 230*] : (1962) 1 Crimes 106 .

10 *Baidyanath v. State,* (1969) Crlj 339 (341)Or .

11 *Delhi Administration v. Ram Singh,* AIR 1962 SC 63 [LNIND 1961 SC 230](para 32) : (1962) 2 SCR 694 [LNIND 1961 SC 230] : (1962) 1 Crimes 106 ; *Baidyanath v. State,* (1969) Crlj 339 (341) Or.

12 *Kapur v. Pratap Singh,* AIR 1961 SC 1117 1121 : (1962) 2 SCR 143 : (1961) 2 Crimes 161 .

13 *Pillai v. Emp.,* (1912) 35 Mad 397.

14 *Textile Traders v. State of U.P.,* AIR 1959 All 337 339 [LNIND 1958 ALL 184].

15 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (Para 13).

16 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (Para 13).

17 *Baidyanath v. State,* (1969) Crlj 339 (341)Or .

18 *State of Bihar v. Saldanna,* (1980) Crlj 98 (paras 12, 18) SC; *Ram v. State of Bihar,* (1986) Crlj 511 (Para 13)

19 *State of A.P. v. A.S. Peter,* AIR 2008 SC 1943 [LNIND 2008 SC 654]: (2008) 3 SCC 602 [LNIND 2008 SC 654] : (2008) 2 SCC 106 (Cri) .

20 *State of Kerala v. Kolukkan,* AIR 1994 Ker 1288 (para 13).

21 *Kurra Rajaiah v. Government of A.P.,* 2007 Crlj 2031 AP .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IV

B.—AID TO THE MAGISTRATES AND THE POLICE

S. 37
Public when to assist Magistrates and police.

Every person is bound to assist a Magistrate or police officer reasonably demanding his aid—

(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest; or

(b) in the prevention or suppression of a breach of the peace; or

(c) in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

1. Scope of s. 37.— This section reproduces old s. 47, with the following changes:

(i) The worlds 'whether within or without presidency towns' have been omitted as superfluous.

(ii) Clause (b) of the old section has been split up into (b) and (c), to make it clear that the duty of the public under the present section is three-fold.

2. Duties of the public to assist Magistrate or Police officer.—

1. Though some of these duties are collected under Part B of Chap. IV of the *new* Code [s s. 37-40], there are also other provisions in the Code which lay down similar duties, and the punishment for refusing such assistance is laid down in s. 187 of the I.P.C., which should be read in this context.
2. These duties are —

(i) Assistance in the matter of arrest, prevention or, suppression of breach of the peace; prevention of any injury to public property [s. 37; *old* s. 42].

(ii) Duty to give information to the nearest Magistrate or Police officer of the commission of certain serious offences, specified in s. 39 [*old* s. 44].

(iii) Duty of every person residing in a village to give information as to certain matters specified in s. 40 [*old* s. 45].

(iv) To execute a warrant issued to a person other than a police officer [s. 72(1),*old* s. 77], [s. 72(1)- *old* s. 77].

(v) When a warrant is issued for execution to a person other than a police officer, as aforesaid, every other person may render assistance in such matter, under the circumstances specified in s. 38 [*old* s. 43].

(vi) To assist in the dispersal of an assembly, when so required by Magistrate or specified Police-officer [s. 129(2),*old* s. 128].

'Every person' 1. The duties under the present section are imposed not only on members of the public but also Government or other public servants, *e.g.* , a *chowkidar.* [22]

3. 'Reasonably.—

1. The *duty* imposed by this section, the breach of which is punishable under s. 187, I.P.C., is subject to the condition that the order of the Magistrate or Police Officer demanding assistance from a member of the public must be a 'reasonable' order. [23] This means that such officer has no general power to have his own duties, for which he is paid, discharged by members of the public. [24]
2. It follows that a member of the public has no duty to carry out the following order of a Magistrate or Police Officer—

(a) To find out a clue to a theft; [25]

(b) To trace out the whereabouts of an absconding criminal or collect evidence to warrant his conviction.

(c) To assist in the matter of arresting unknown persons. [26]

3. On the other hand, the following are *reasonable* orders and refusal on the part of the person ordered, would be punishable :

(a) To assist in a search held under s. 100 [*old* s. 103]. [27]

(b) To assist in the removal of an arrested person who refused to move. [28]

4. Cl. (a) : Aiding in the matter of arrest.—

The order of the officer demanding aid will be legal and the person rendering aid shall be protected under this section, only if the following conditions are present:

(a) The police officer is competent to arrest under the law; [29]

(b) Such officer must be present at the place where the aid for arrest is sought. [30] A private person may himself arrest under the conditions specified in s. 43 [*old s.* 59]; but apart from those circumstances, a private person may be conferred such power by delegation, under the present section. [31]

(c) Where the person asked to aid does not use force or commit injury which is not necessary for such aid.

5. Persons whom a Police officer is authorised to arrest.—

1. A person would be bound to aid a Police officer under this clause only if the Police officer was himself authorized to arrest the person concerned. Hence it would be useful to refer to the provisions which authorise a Police officer to arrest, with or without warrant:

(a) To arrest, without warrant, any of the persons who come under s. 41,*post* .

(b) To arrest, without warrant, a person accused of committing non-cognizable offence who refuses to give his name and residence [s. 42].

(c) To arrest, without warrant, a person to prevent the commission of a cognizable offence, which, it appears, cannot be prevented otherwise [s. 151].

(d) To arrest, in execution of a warrant which has been directed or endorsed to him [s. 74].

(e) An officer in charge of a police station —

(i) may arrest, without warrant members of an unlawful assembly, who refuse to disperse [s. 129(2)].

(ii) may arrest, without warrant, a person suspected of the commission of a cognizable offence [s. 157(1)].

6. Punishment for refusal to aid .—

1. The intentional omission to offer the aid reasonably demanded under this section would be punishable under s. 187,I.P.C. Code . [32]
2. But there would be no punishment if the demand is not 'reasonable', [33] *e.g.* —

(i) Where the demand was *vague* ; but not so, where it was clear that the aid required was to prevent escape of the arrested person. [34]

(ii) Where the aid which was asked had no direct relation to the execution of the duty of the police officer himself. [35]

(iii) Where the act demanded by the Police officer was not definite or specific, but a demand to do whatever the Police officer himself was paid for, thus making a wholesale delegation of the Police officer's own duty. [36]

(iv) Where the Police officer who demanded the aid was not himself in the party commissioned to arrest the accused, or not competent to arrest. [37]

(v) Where the act demanded does not come within the purview of any of three clauses of this section, [38] *e.g.* to assist in the burial of a dead person.

(vi) Where the aid demanded is not personal assistance, [39] but to supply a contingent of men. [40]

7. S s. 37 and 43.—

1. Both s s. 37 and 43 confer upon a private person certain powers in the matter of arresting another person, but there are important points of difference under the two provisions:

(a) Under s. 43 the private person may himself arrest, without the intervention of any police officer, provided the person to be arrested comes under the classes specified in that section.

Under s. 37, The private person cannot act *suo motu* ; he can only *assist* a magistrate or police officer requesting him to assist such officer in the matter of arresting another person if the conditions laid down in s. 37 are satisfied.

(b) Under s. 37, the Police Officer cannot make a wholesale delegation of his power to arrest and direct the private person to effect the arrest even in the absence of the officer. [41]

22 *Manik* *v.* *Kenaram,* (1902) 6 CWN 337 .

23 *Emp.* *v.* *Bakshi* *Ram,* (1881) 3 All 201 .

24 *Emp.* *v.* *Joti* *Prasad,* (1920) 42 All 314 315.

25 *Emp.* *v.* *Bakshi* *Ram,* (1881) 3 All 201 .

26 *Emp.* *v.* *Joti* *Prasad,* (1920) 42 All 314 315.

27 *Ram Prasad,* (1938) 17 Pat 632.

28 *Ambika* *v.* *Emp.,* AIR 1932 All 506 .

29 *Amarendra* *v.* *State* *of* *Bihar,* AIR 1955 Pat 106 107 FB.

30 *Ippili* *v.* *Emp.,* (1920) MWN 110 .

31 *Ippili* *v.* *Emp.,* (1920) MWN 110 .

32 *Ippili* *v.* *Emp,* (1920) MWN 110 .

33 *Emp.* *v.* *Bakshi* *Ram,* (1881) 3 All 201 .

34 *Ambika* *v.* *Emp.,* AIR 1932 All 506 .

35 *Ramaiya,* (1903) 26 Mad 419 421 FB.

36 *Emp.* *v.* *Hanif,* AIR 1937 Sind 254 .

37 *Amarendra* *v.* *State* *of* *Bihar,* AIR 1955 Pat 106 107 FB .

38 *Emp.* *v.* *Bakshi* *Ram,* (1881) 3 All 201 .

39 *Emp.* *v.* *Joti* *Prasad,* (1920) 42 All 314 315.

40 *Ramaiya,* (1903) 26 Mad 419 421 FB.

41 *Emp.* *v.* *Hanif,* AIR 1937 Sind 254 ; *Amarendra,* AIR 1955 Pat 106 . *CRPC*

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IV

B.—AID TO THE MAGISTRATES AND THE POLICE

S. 38
Aid to person, other than police officer, executing warrant.

When a warrant is directed to a person other than a police officer, any person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

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1. Scope of s. 38.—

This section reproduces *old* s. 43.

2. S s. 37 and 38: Aid to person other than a Police officer, executing a warrant of arrest.—

1. While under s. 37, the person who is asked to render aid is bound to assist the Magistrate or Police officer who demands such aid, under the present section it is not obligatory to render such aid, when the person requiring such aid is other than a Police officer, who has been directed to execute a warrant of arrest, under ss. 72(1) and 73(1) [*old* ss. 77-78].
2. The object of this enabling section, therefore, is to protect the person who renders the aid. The conditions for such protection are—

(a) The aid is rendered to a person to whom a warrant for arrest has been directed for execution [ss. 72(1); 73(1)].

(b) Such person is near at hand and is act ing in the execution of that warrant [s. 38].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IV

B.—AID TO THE MAGISTRATES AND THE POLICE

S. 39
Public to give information of certain offences.

(1) Every person, aware of the commission of, or of the intention of any other person to commit, any offence punishable under any of the following sections of the *Indian Penal Code (45 of 1860)* , namely—

(i) Sections 121 to 126, both inclusive, and Section 130 (that is to say, offences against the State specified in Chapter VI of the said Code);

(ii) Sections 143, 144, 145, 147 and 148 (that is to say, offences against the public tranquillity specified in Chapter VIII of the said Code);

(iii) Sections 161 to 165-A, both inclusive (that is to say, offences relating to illegal gratification);

(iv) Sections 272 to 278, both inclusive (that is to say, offences relating to adulteration of food and drugs, etc);

(v) Sections 302, 303 and 304 (that is to say, offences affecting life);

CRPC
[(v-a) **Section 364-A (that is to say, offence relating to kidnapping for ransom, etc.);]**

(vi) Section 382 (that is to say, offence of theft after preparation made for causing death, hurt or restraint in order to the committing of the theft);

(vii) Sections 392 to 399, both inclusive, and Section 402 (that is to say, offences of robbery and dacoity);

(viii) Section 409 (that is to say, offence relating to criminal breach of trust by public servant, etc.);

(ix) Sections 431 to 439, both inclusive (that is to say, offences of mischief against property);

(x) Sections 449 and 450 (that is to say, offence of house-trespass);

(xi) Sections 456 to 460, both inclusive (that is to say, offences of lurking house-trespass); and

(xii) Sections 489-A to 489-E, both inclusive (that is to say, offences relating to currency notes and bank notes),

shall, in the absence of any reasonable excuse, the burden of proving which excuse shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police officer of such commission or intention.

(2) For the purposes of this section, the term "offence" includes any act committed at any place out of India which would constitute an offence if committed in India.

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1. Scope of s. 39.—

1. This section corresponds to *old* s. 44, with the addition of various new offences, as suggested by the Commission [43] as well as the Joint Committee on the Bill of 1970, [44] which also redrafted the section, to clarify the reference to the offences covered by the section.
2. Under the *new* section, it is obligatory for every person to inform the nearest Magistrate or Police officer in respect of the offences specified in the section, under the following circumstances :

It is observed by the Supreme Court that every citizen who has knowledge of commission of a cognizable offence has a duty to lay information before the police and to co-operate with the investigating officer and is duty bound to appear before the competent Criminal Court to tender his ocular evidence. The Supreme Court has also advocated the amendment of the *Code of Criminal Procedure* as recommended by the Law Commission, in this respect, as the witnesses are turning hostile due to deterioration in law and order situation.[45]

(i) Such person is aware of the commission or the intention of any other person to commit, any of these offences, anywhere in India or abroad.

(ii) The information must be given 'forthwith', *i.e* ., as soon as he acquires knowledge of the commission of or the intension to commit such offence.

(iii) These offences are—under ss. 121-126; 130; 143-145; 147-148; 161-165A; 272-278; 302-304; 382; 392-399; 409; 431-439; 449-450; 456-460; 489A-E, I.P.C., *viz* .—

(a) *Offences against the State*— Waging war against the Government of India and conspiracy to commit such offence, collecting arms etc. with the intention to commit such offence; concealing design to wage war; assaulting President, Governor, etc., with intent to compel or restrain exercise of any lawful power; Sedition; waging war against any Asiatic Power in alliance with the Government; committing depredation on territories of Power at Peace with the Government; Aiding escape of, rescuing or harbouring such prisoner.

(b) *offences against the Public Tranquility*— Being member of unlawful assembly; joining such assembly with deadly weapon; joining or continuing in such assembly, knowing it has been commanded to disperse; Rioting with deadly weapon.

(c) *Offences by or relating to public servants*— Public servant taking illegal gratification in order to influence public servant; taking gratification for exercise of personal influence with public servant; abetment of foregoing offences; public servant obtaining valuable thing without consideration in connection with his public business; abetment of such offence.

(d) *Offences affecting public health*— Adulteration of food or drink intended for sale; sale of noxious food or drink; adulteration of drugs and sale of adulterated drugs; sale of drug as a different drug or preparation; fouling water of public spring or reservoir; making atmosphere noxious to health.

(e) *Offences affecting human body*— Murder, [46] murder by life convict; culpable homicide not amounting to murder.

(f) *Offences against property*— Theft after preparation made for causing death, hurt or restraint for committing theft; Robbery and attempt to commit robbery; voluntarily causing hurt in committing robbery; dacoity with murder; robbery or dacoity with attempt to cause death or grievous hurt; attempt to commit robbery or dacoity when armed with deadly weapon; making preparation to commit dacoity; Criminal breach of trust by public servant, banker, merchant or agent; Mischief by injury to public road, etc., by causing inundation or obstruction to public drainage, by destroying etc. a light house or sea-mark, by destroying a landmark etc. fixed by public authority, or by fire or explosive substance with intent to cause specified damage, with intent to destroy house; mischief with intent to destroy or make unsafe a decked vessel, committing the same offence with fire or explosive substance; intentionally running aground vessel with intent to commit theft etc.; house-trespass in order to commit offence punishable with imprisonment for life; lurking house-trespass or house-breaking by night, committed such offence in order to commit offence punishable with imprisonment; lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint; grievous hurt whilst committing lurking house-trespass or house-breaking; death or grievous hurt caused by one of persons concerned in lurking house-trespass or house-breaking.

(g) *Offences relating to documents and property marks*— Counterfeiting currency notes or bank notes; using as genuine or possession of such currency-notes or bank-notes; making or possessing instruments or materials for forging or counterfeiting such notes; making or using documents resembling currency-notes or bank-notes.

' *Every person* '.—1. There is a consensus of opinion [47] that the words 'every person,' though wide, cannot include the accused person himself because of the words which follow: 'aware of the commission;, 'any other

person'.

The contrary view taken by the Madras High Court [48] does not appear to be sound in view of the context in which the words 'every person' are used.

2. The expression would include public servants, including a Police officer. [49]

2. Punishment for breach of duty .—

1. The omission to give the information required by this section may constitute an offence under ss. 118, 176 or 202 [50] of the I.P.C., under the conditions mentioned therein, provided that there shall be not such liability if the person bound to give such information proves that he had 'reasonable excuse' [51] for failing to give such information.

2. The object of this section as well as s. 40 being to ensure that the information should not be withheld from the Police who are to take proper steps for the suppression of such crimes, or to bring the offenders to book, [52] when once such information has reached the authorities from some person, the others who were also bound to give that information under this section, should not still be punished. [53]

3. Punishment for giving *false* information, [54] on the other hand, is under ss. 177, 182, 203, I.P.C..

3. Weight of evidence of such person.—

A person who, without reasonable excuse, fails in his duty to give information as to the commission or intention to commit an offence specified in this section is liable to be discredited as a witness at a trial for that offence, being in the position of an accomplice. [55] Of course, what credit should be given to such witness would depend on all relevant circumstances. [56]

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43 37th Rep. of the Commission, para 176(v); 41 st Rep., para 43.

44 Rep. of the Joint Committee (Com. 1-5), p. 348, on C1. 42.

45 *State of Gujarat v. Anirudh Singh,* AIR 1997 SC 2780 [LNIND 1997 SCDRCHYD 22]: (1997) 6 SCC 514 [LNIND 1997 SCDRCHYD 22] : 1997 SCC (Cri) 946 [LNIND 1997 SCDRCHYD 22].

46 *Ram Balak v. State,* AIR 1964 Pat 62 (para 12).

47 *Torap v. Emp.,* (1895) 22 Cal 688 ; *Mahadeo v. Emp.,* AIR 1941 Pat 550 .

48 *Chinnagangappa v. Emp.,* AIR 1930 Mad 870 871 .

49 *Cf. Shiam v. Abdul,* AIR 1935 All 538 541 .

50 *Ram Balak v. State,* AIR 1964 Pat 62 (para 12).

51 *Sher Singh,* (1889) 5 PR 37 .

52 *Ran Balak v. State,* AIR 1964 Pat 62 (para 12).

53 *Gopal,* (1892) 20 Cal 316 ; *Rampal* , (1928) 53 Bom 184.

54 *Cf. Ramasami v. Emp.,* 27 Mad 271 (289).

55 *Anna v. State of Hyderabad,* AIR 1956 Hyd 99 (para 17).

56 *State of Orissa v. Raja,* (1971) 37 Cut LJ 667 683.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IV

B.—AID TO THE MAGISTRATES AND THE POLICE

S. 40
Duty of officers employed in connection with the affairs of a village to make certain report.

(1) Every officer employed in connection with the affairs of a village and every person residing in a village shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is nearer, any information which he may possess respecting—

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in or near such village;

(b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under Section 143, Section 144, Section 145, Section 147, or *Section 148 of the Indian Penal Code (45 of 1860)* ;

(d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;

(e) the commission of, or intention to commit, at any place out of India near such village any act which, if committed in India, would be an offence punishable under any of the following sections of the *Indian Penal Code (45 of 1860)*, namely, 231 to 238 (both inclusive), 302, 304, 382, 392 to 399 (both inclusive), 402, 435, 436, 449, 450, 457 to 460 (both inclusive), 489-A, 489-B, 489-C and 489-D;

(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the State Government, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands;

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority in any territory in India to which this Code does not extend, in respect of any act which if committed in the territories to which this Code extends, would be an offence punishable under any of the following sections of the *Indian Penal Code (45 of 1860)*, namely, 302, 304, 382, 392 to 399 (both inclusive), 402, 435, 436, 449, 450 and 457 to 460 (both inclusive);

(iii) the words "officer employed in connection with the affairs of the village" means a member of the panchayat of the village and includes the headman and every officer or other person appointed to perform any function connected with the administration of the village.

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1. Scope of s. 40.—

This clause, corresponding to *old* s. 45, was redrafted ‘to make the provision more intelligible’.

2. S s. 39-40.—

1. While **s.** 39 has the widest possible ambit, covering ‘every person’, in s. 40 the duty to inform is laid upon the following classes of persons only:

(a) Every person employed in connection with the affairs of a village, which expression, as explained in sub-sec. (2)(iii), means—(i) a member of the panchayat of the village; [57] (ii) The village headman; (iii) every other person appointed to perform any function connected with the administration of a village.

(b) Every person *residing* in a village. This expression will not, therefore, include a person who merely *owns* a house in a village. [58]

2. The offences in respect to which the duty to inform lies are also different under the two sections. Under s. 40, the information is to be given in respect of—

(i) The residence in or near the village of any notorious receiver or vendor of stolen property (Cf. ss. 411-413, I.P.C.).

(ii) The resort to any place within or passage through, the village, of thug (s. 310), robber (s. 390), escaped convict (Cf. s. 216), or 'proclaimed offender, [which expression is explained in sub-sec. (2)(ii)].

(iii) The commission or intent to commit in the village—

(a) any non-bailable offence.

(b) any offence under ss. 143-145, 147-148, I.P.C.

(iv) Any of the following facts which have taken place in such circumstances as lead to a reasonable suspicion that a non-bailable offence has been committed in respect of the person concerned—

(a) Sudden or unnatural death;

(b) discovery of a corpse or part thereof;

(c) the disappearance of any person from village.

(v) The commission of intention to commit at a place outside of India but near such village of any of the following offences under the I.P.C.—Ss. 231-238, 302,

304, 382; 392-399; 402; 435-436; 449-450; 457-460; 489A-D.

(vi) Any matter likely to affect—

(a) The maintenance of order;

(b) the prevention of crimes;

(c) the safety of person or property, respecting which the District Magistrate by general or special order, made with the previous sanction of the State Government, has directed the person specified in sub-sec. (1) to communicate information.

3. Sub-sec. (1) : 'Every officer employed....village'.

This expression is explained in sub-sec. (2)(iii), to include the following persons—

(i) A member of the panchayat of the village;

(ii) The headman; [59]

Any other person appointed to perform any function in connection with the administration of the village, *e.g.* , a village Magistrate in the State of Tamil Nadu. [60]

This expression substitutes the detailed mention of 'headman, accountant, watchman [61] or police officer .... or collects revenue or rent,' in sub-sec. (1) of *old* s. 45.

4. 'Every person residing in a village'—

1. This expression will include every person who is resident in the village, whether as owner or occupier of land or house. It obviates the difficulty, under the *old* section which mentioned 'owner or occupier of *land',* from which it was concluded that the owner of a house shall not be liable under this section. [62] But under the *new* sub-section, the emphasis is on the fact of 'residence' and the owner of land or house will be liable under this provision only if he is residing in the village. [63]

2. The omission of the words 'and the agent of any such owner or occupier' will obviate the difficulty in determining who could be said to be an 'agent'. [64] Under the *new* section, nobody will be responsible only in his capacity as agent of somebody else. He will be responsible only if he is a resident of the village. Nor will the *new* provision exclude a person who is residing in a house belonging to another. [65]

5. 'Forthwith'.—

It means within a reasonable time. [66] The object is that the earliest information should be communicated by those who are in the best position to obtain the same. [67]

6. 'Any information which he may possess'.—

1. 'Information' means an objective fact and does not mean a person's belief or opinion. [68]

2. It would not include either a 'rumour' [69] or a vague [70] report, unless it causes a 'reasonable suspicion' within the purview of C1. (b) or (d).

3. The word 'possess' makes it clear that the person concerned has no obligation to 'obtain' any information. His duty arises only when the information comes to him. [71]

7. 'In or near such village'.—

The expression, used in Cls. (a), (c) and (d), indicates that there must be reasonable proximity from the village of the person concerned and the place where the respective fact takes place, and the 'nearness' is to be determined having regard to rural ideas. But it would not include a place where a suicide was committed, if it is in another village at a distance of one mile, and separated by a rivulet. [72]

8. Cl. (a) : 'Notorious receiver of stolen property'.—

Notoriety implies a habit or course of act ion and something more must be shown to bring a person under this category than that he received the proceeds of several robberies on one and the same day. [73] Habit must be proved by an aggregate of acts on different occasions. [74]

9. Cl. (b) :

1. The words 'passage through' would comprehend the temporary visit of such offender or suspect, but not where a suspect had been arrested from elsewhere by the Police and released in the village of the person concerned. [75]

2. The words 'proclaimed offender', as defined in *new* sub-sec. (2)(ii), will include not only a person who has been proclaimed under s. 87,[76] but also a person who has been proclaimed as an offender by any Court or other authority in any territory to which the Code does not extend, in respect of any of the offences specified in sub-sec. (2)(ii), such as murder. Sub-sec. (2)(ii) makes it clear that the expression 'proclaimed offender' has been used in a generic sense. [77]

10. Cl. (c) :

1. There is no obligation to give information as to the commission of a bailable offence other than those specified in this clause. [78]

2. Nor does this clause apply unless an offence is involved, *e.g.* , the information is merely that a jewel is missing. [79]

11. Cl. (d) :

This clause imposes the obligation to give information of the following occurrences:

(a) Sudden, unnatural or suspicious death of some person in or near the village of the person bound to inform.

A death caused by suicide is an 'unnatural death', [80] but not a death caused two days after fall from a tree. [81]

(b) Discovery of a corpse in or near such village in such circumstances which lead to a reasonable suspicion that a sudden, unnatural or suspicious death has occurred.

In this case, it is not necessary that the death had taken place at the spot or in the village where the corpse has been found. [82]

(c) Disappearance from such village of any person under circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person.

12. Punishment for omission to give information.—

1. An omission to give information as required by this section, is punishable under s. 176 of the I.P.C., on the following conditions:

(a) It must be *intentional* . [83]

(b) It follows that there cannot be conviction if the person concerned has no knowledge of the commission of any offence coming under the section. Mere rumour is not such knowledge. [84] It must constitute 'information', [85] which he was bound to communicate.

(c) The person concerned must come under sub-sec. (1). [86] Thus under Cl. (a) or (c)-(e), the place of commission of the offence must be 'near' the village of the person concerned. [87]

(d) There cannot be any conviction if the Police had already obtained the information from another person who was also bound to give it, [88] because the object of the section is to obtain the information and not to cause vexation. But a person cannot escape liability merely because another person who was also bound to give information was present at the occurrence. [89]

(e) No Court can take cognizance of such offence except on a complaint under s. 195(1) (a),*post* .

2. Giving *false* information, on the other hand, is punishable under s. 211, I.P.C., [90] but not so if it does not necessarily amount to a 'charge' of an offence. [91]

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57 *Cf.* *Swami* *Nath* *v.* *S.D.O,* AIR 1958 All 660 [LNIND 1958 ALL 46](para 4).

58 *Hiru* *v.* *Emp.,* AIR 1929 Bom 12 .

59 *Hiru* *v.* *Emp.,* AIR 1929 Bom 12 .

60 *Sessions Judges v. Sivan,* (1909) 32 Mad 258(FB) .

61 *Lachmi* *v.* *emp.,* AIR 1924 Pat 691 .

62 *Hiru* *v.* *Emp.,* AIR 1929 Bom 12 .

63 *Hiru* *v.* *Emp.,* AIR 1929 Bom 12 .

64 *Keamuddin,* (1901) 28 Cal 504 .

65 *Madhusudan,* (1875) 23 WR 60 .

66 *Emp. v. Waman Dhonddev,* Ratan, 784.

67 *Matuki* *v.* *Emp.,* (1885) 11 Cal 619 624.

68 (1882) 4 All 498 (499).

69 *Lachmi* *v.* *Emp.,* AIR 1924 Pat 691 .

70 *Bhup Singh,* in re., (1900) AWN 207 (208).

71 *Lachmi* *v.* *Emp.,* AIR 1924 Pat 691 .

72 *Sridhar* *v.* *State,* [AIR 1954 HP 67 *LNIND 1954 HP 31*].

73 *Baburam,* (1892) 19 Cal 190 .

74 *Kasem* *Ali,* (1920) 47 Cal 154 .

75 *Emp. v. Malik,* (1887) 31 P.R. 59(Cr) .

76 *Ram* *Sarup,* AIR 1938 Oudh 80 .

77 *Ram* *Sarup,* AIR 1938 Oudh 80 ; *Emp v. Narpat,* (1901) AWN 10.

78 *Matuki* *v.* *Emp.,* (1885) 11 Cal 619 624.

79 *Vemi,* in re., (1909) 9 Crlj 224 (Mad) .

80 *Domarsing,* AIR 1922 Nag 87 88 .

81 *Domarsing,* AIR 1922 Nag 87 88 .

82 *Matuki* *v.* *Emp.,* (1885) 11 Cal 619 624.

83 *Emp.* *v.* *Gopal,* AIR (1892) 20 Cal 316 .

84 *Lachmi* *v.* *Emp.,* AIR 1924 Pat 691 .

85 *Vemi,* in re., (1909) 9 Crlj 224 (Mad) .

86 *Thakori v. Emp.,* 12 Crlj 425.

87 *Sridhar* *v.* *State,* [AIR 1954 HP 67 *LNIND 1954 HP 31*].

88 *Rampal,* (1929) 53 Bom 184.

89 *Pavallimankkal,* in re., AIR 1916 Mad 493 .

90 *Hiru* *v.* *Emp.,* AIR 1929 Bom 12 .

91 *Sessions Judges v. Sivan,* (1909) 32 Mad 258(FB) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V
ARREST OF PERSONS

S. 41
When police may arrest without warrant.

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

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

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

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

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

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with the such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured;

and the police officer shall record while making such arrest, his reasons in writing.

[2]

[*Provided* that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest .]

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;]

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

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

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

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

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

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

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

Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.]

1. Scope of Chap. V. —

1. Arrest of a person may be effected in two ways—

   (i) Under a warrant issued by a criminal Court, and

   (ii) without any such warrant under circumstances and by persons specified by the Code.

2. Arrest under warrant is dealt with in the next Chapter (VI), under the sub-heading 'B—Warrant of Arrest'. Hence, the scope of the present Chapter is broadly confined to arrest without warrant.

3. But, apart from the provisions relating to arrest without warrant, which are contained in s s. 41-44, 50, 55, 56, 57, 58, there are certain provisions in the present Chapter which relate to *any* arrest, whether made under warrant or without warrant, and that is why, under *old* Chap. V, they were classified separately, under sub-heading 'A— Arrest Generally'. It is not clear if the omission of these sub-headings in the *new* Chapter would be conducive to a better understanding of the provisions. Any way, these general provisions relating to arrest of any kind are contained in s. 45 (arrest of members of the Armed Forces); s. 46 (arrest how made); s. 47 (search of place entered by person sought to be arrested); s. 48 (pursuit of offenders into other jurisdictions); s. 49 (prohibition of unnecessary restraint in effecting arrest); s. 51 (search of arrested person); s. 52 (seizure of offensive weapons); s s. 53-54 (medical examination of arrested person); s. 59 (discharge of person arrested); s. 60 (retaking of arrested person who escapes from lawful custody).

4. Since several classes of persons are empowered by the Code to arrest without warrant under different circumstances, the provisions relating to such arrest are under different categories:

   A. *Arrest without warrant by Police Officer* [s s. 41, 42, 55, 151, 432(3)].

   B. *Arrest without warrant by private person* [s. 43].

   C. *Arrest without warrant by Magistrate* [s. 44] [4]

   D. *Arrest without warrant by superior officers of Armed Forces* [ss. 130(2); 131].

5. It should be noted, in this context, that the provisions of s s. 41-44 are controlled by *new* s. 45,*post,* with the result that no member of the Armed Forces can be arrested without warrant by a Magistrate, Police officer or private person, for anything 'done by him in the discharge of his official duties', without the previous consent of the appropriate Government (see under s. 45,*post*).

6. It is to be noted that arrest is not a must in every case and there must be sufficient reasons for exercising such power by the police officers. [5]

7. In view of Section 41 of the Code, powers of arrest can be exercised by the police without intervention of the Court. [6]

2. Scope of s. 41.—

This Section corresponds to old s. 54 with the following changes :

(i) The different clauses of the *old* section marked as 'first', 'secondly', and so on, have been made Cls. (a)-(i) of sub-sec. (1) of the *new* section, with some verbal changes, *e.g.* , the expression 'Armed Forces of the Union' has been substituted for 'Army, Navy or Air Force'.

(ii) In Cl. (i) corresponding to Cl. Ninthly of the *old* section, the word 'requisition' has been qualified by the words 'whether written or oral', to set at rest judicial controversy, as recommended by the Commission. [7]

(iii) *Old* s. 55 has been made sub- sec. (2) of the present section, making it shorter by giving reference to the sections, instead of describing their contents.

(iv) The persons to be arrested cannot claim a notice before arrest by police under s. 41 of the Code. [8]

(v) The direction of the High Court to the police not to arrest the first respondent, except after written notice is illegal and has been set aside. [9]

3. S s. 41(1) and 155(2) : Investigation into non-cognizable case.—

Section 41(1) confers a general power upon *any* police officer to arrest without warrant, but it is subject to various other provisions. Thus, s. 41(1) is confined only to the power to *arrest* and extends to both cognizable and non-cognizable offences; but it would not empower the Police officer to *investigate* into the case if the offence involved is *non* -cognizable, without the order of a competent Magistrate under s. 155(2). [10]

4. Powers of an officer in charge of Police station and other Police officers to arrest without warrant.—

The Code makes a distinction between the powers of an officer in charge of a police station from those of other police officers, to make an arrest without a warrant.

(1)

1. **Any police officer** may, without an order from a Magistrate and without a warrant, arrest the following persons:

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

(ii) Any person having in his possession, without lawful excuse, any implement of house-breaking;

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

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

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

(vi) Any person reasonably suspected of being a deserter from the Armed Forces of the Union;

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

(viii) Any released convict committing a breach of any rule relating to re-convicted offenders, made under s. 356(5) [*old* s. 565(3)] of the Code;

(ix) Any person for whose arrest an oral or written requisition has been received from other Police officer and it appears therefrom that the person might lawfully be arrested without a warrant of the officer who issued the requisition;

(x) Any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and refuses on demand of such officer to give his name and residence or gives a name or residence which such officer has reason to believe to be false (in such a case the arrest is made for the purpose of ascertaining the true name and residence of such person and continues only until that is ascertained) [s. 42(1)].

2. The procedure to be followed by such Police officer after an arrest without warrant is laid down in s s. 56-57 [*old* ss. 60-61].

(2) In addition to the above, **an officer-in-charge of a police station** may arrest or cause to be arrested without warrant the following persons [s. 41(2)].

Any person coming within any of the categories mentioned in s s. 109-110,*e.g.* :

Any person found taking precautions to conceal his presence within the limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence [s. 109].

5. Sub-sec. (1): 'Police officer.—

1. The word 'police officer', not being defined in the Code, has been interpreted to refer to a member of the Police force under Indian *Police Act, 1861* , [11] and would not, therefore, for the

purposes of this section include persons such as a *Chowkidar* [12] or *Daffadar,* [13] but would include a constable. [14]

2. When a Police officer is placed in charge of a police station, he is referred to in the Code as an 'officer in charge of a police station' [s. 2(o),*ante*] and vested with additional powers (see *below*).

3. Since the Code does not extend to the State of Jammu and Kashmir, a Police officer of that State would not come under the present section, [15] and would have no power to arrest a person in India. [16]

4. Any officer who is not a police officer [17] or a private person cannot arrest under the present section, even though authorised by a Police officer, but he ay assist a policy officer in such arrest [s. 37(a),*ante*]. In other words, a Police officer cannot delegate to a private person the power conferred upon him by the present section.

5. The word 'may' indicates that s. 41 only confers a discretionary power [18] upon a Police officer and not a duty to arrest, such as under s. 55(1), when directed by a superior officer in accordance with the requirements of that section or when a warrant is issued to him.

6. Whether power under s. 41 can be exercised at a place beyond jurisdiction.—

Ordinarily, the power of a Police officer are limited to the local limits of his station. But the Code specifically provides that the power of a police officer to arrest without warrant [s. 48,— *old* s. 58] or to retake him on escape [s. 60— *old* s. 66] are not so limited and that he is entitled to pursue the offender and arrest him at any place in 'India'. [19] [see, further, under those sections], but not outside the territory of India. [20]

As the petitioner No. 1 is accused of at least five cognizable offences in the State of Andhra Pradesh, the special squad of police officers constituted by the Superintendent of Police can even arrest without arrest in the State of U.P. under s. 41(1) (a) of the code. When the petitioner Nos. 2 to 5 resisted such arrest of the petitioner No. 1, they can be arrested in U.P. under Section 41(1) of the Code. But as the offence was committed outside the State, police officer of A.P. had the obligation to produce them before the concerned Magistrate of that State under Section 56 of the Code and when that was not done and they were brought out in the State of A.P., their custody is held to be illegal. [21]

7. Power to arrest, and investigation.—

1. The power to arrest without warrant under the present section, does not, of itself, confer on the Police officer the power to investigate the case against the arrested person. That power belongs to the officer in charge of a police station, under s. 156,*post.*

2. That is why, the Police officer who arrests without warrant has to send the arrested person before the officer in charge of a police station or before a Magistrate, having jurisdiction [22] in the case [s. 56 (*old* s. 60)].

8. Remand of arrested person.—

The provision for remand is applicable to an arrest made under the instant section. [23]

9. 'Arrest', what it means.—

1. As s. 46(1) says, an arrest means the taking of a person into custody so that he may be held to answer for a crime, effected by act ual restraint or submission to custody. If the arrest is effected without due compliance with the provisions of the Code or other relevant law, it would amount to wrongful confinement [s. 342, I.P.C.].
2. The word 'arrest' is derived from the French word 'arreter' meaning 'to stop or stay' and signifies a restraint of the person. [24]

   It means to physical restraint put on person as a result of allegations of accusation that he has committed a crime or offence of quasi-criminal in nature. [25]

The word 'arrest' in its ordinary and natural sense means apprehension, restraint or deprivation of person of personal liberty. In its legal sense, it consists in taking into custody another person under the authority empowered by law, for the purpose of holding or detaining him to answer criminal charge or of preventing the commission of a criminal charge. [26]

When a person is found or kept in the Police Station or his movements are restricted within the precincts of the Police Station, he can be said to be arrested. [27]

It is not necessary to touch or confine the body of the person arrested. It is sufficient if that person submits to the custody by word or action. [28]

Questioning by the police on suspicion is not covered by the definition of arrest. [29]

3. But power to arrest implies the power to 'detain', so that once a person has been arrested, the Police have the authority to detain [30] him, subject to the limitations imposed by *Art. 22 of the Constitution* or s s. 56-57,*post* .

10. 'Arrest' and 'custody'.—

See under s. 46(1),*post.*

11. Different clauses of the section not interdependent .—

The various clauses of the section confer specific powers under different contingencies, or in respect of different classes of persons. They do not limit the ambit of each other. [31] Thus, the receipt of a requisition from another police officer under Cl. (i), would not debar the receiving officer to exercise his own power under Cl. (a), on the basis of his own information or suspicion, [32] provided he purports to act on his own authority. [33] [See, further, under s. 55,*post.*]

12. Cl. (a): 'Cognizable offence'.—

This clause may be applied only [34] where the offence is 'cognizable', as defined in s. 2(c), *ante.*

13. 'Complaint'.—

1. The complaint referred to in the present clause may have been made to the arresting police officer [35] or to some other person competent to receive it. [36]

2. The word 'reasonable', qualifying the word 'complaint', suggests that ultimately it comes to a case of a reasonable exercise of the Police officer's discretion to use his drastic power to arrest without warrant. [37] , [38] Where a Magistrate acts upon a complaint of a cognizable case, it should be treated by a Police officer as a reasonable complaint. [39]

14. 'Credible information', 'reasonable suspicion'.—

1. These words confer a wide discretion upon police officers and must, therefore, be strictly construed. [40] The limitations of credibility and reasonable ness have been imposed to prevent abuse of the power. [41]

   On mere suspicion, police must not arrest any person under Section 41 of the Code unless suspicion is well founded. [42]

   No person can be arrested without warrant on the ground that he may commit a cognizable offence in future. [43]

2. What is a 'credible' information or a 'reasonable' suspicion must, of course, depend on the circumstances of each case, [44] but there must be definite facts or averments, as distinguished from vague surmise [45] or personal feelings, [46] which the Police officer must consider for himself before taking act ion under this section. [47] The materials before him must be sufficient to cause a *bona fide* [48] belief that an offence has been committed or is about to be committed, necessitating the arrest of the person concerned. [49] He cannot take shelter under another person's belief or judgment, or delegate his discretion to some other person. [50]

3. Where a Police officer has any reason to suspect the *bona fides* of a complainant, he should leave him to go to a Magistrate instead of arresting the person named by the complainant. [51]

4. The Police officer is not the final judge to determine whether the complaint was reasonable or the information was credible or the suspicion was reasonable; it is open to judicial review. [52]

5. Burden lies on the Police officer to satisfy the Court, when his *bona fides* is challenged, to prove that his suspicion was reasonable. [53] Such evidence cannot be allowed to be introduced at the appellate stage. [54]

   Strong evidence may be required to discharge this burden—

   (i) Where there was personal enmity between the Police officer and the person arrested. [55]

(ii) Where the incident for which the arrest was made took place long ago, the accused was a fairly known person and there was not circumstance to suppose that the obtaining of a warrant from a Magistrate would involve unnecessary delay which would defeat the purpose of the arrest. [56]

6. The following have been held to constitute credible information for the purposes of this clause—

(i) A complaint recorded by a Magistrate, [57] or to any person who was entitled to receive it. [58] It is not necessary that the complaint should be made to the Police officer himself in order to constitute a 'reasonable complaint'. [59]

(ii) Knowledge of the existence of a warrant of arrest issued by another State [60] or to a person other than a Police officer, [61] even though the Police officer arresting the person may not have that warrant in his possession. [62]

(iii) A requisition received from the Police of another State, provided it appears that the latter was competent to arrest such person without warrant. [63]

7. On the other hand, the following cases would be outside the purview of the present clause—

(i) Where the allegation or suspicion did not related to any cognizable offence, [64] or suggested the likelihood of a cognizable offence being committed in the future. [65]

(ii) Where the arrest is made on the mere chance of something being proved against the person subsequent to the arrest. [66]

15. Arrest of judicial officer by Police.—

The Supreme Court has laid down a guideline to be followed by the Police if a judicial officer has to be arrested. Such arrest should be done under intimation to the District Judge or the High Court, as the case may be. Ordinarily, there should not be any handcuffing and he shall not be taken to the Police Station without prior order or direction of the Sessions Judge of the District, if available. However, there are other guidelines but those are not exhaustive. [67]

16. Cl. (c) : Proclaimed as offender. —

1. This clause is applicable not only where the proclamation has been made under s. 82 (*post)* by a Court, but also by an order of the State Government.

2. The onus of proving the fact of its being made [68] and duly published, [69] is upon the Police officer who relies on it.

17. Cl. (d) : Arrest on reasonable suspicion of possession of stolen property.—

1. In order to exercise this power, the suspicion of the police officer must be 'reasonable', i.e., founded on unsatisfactory replies of the person on interrogation as to his belongings [70] or on inquiries as might be proper in the circumstances, [71] so that he may be said to have acted in good faith. [72] But it is not necessary that he should receive a formal complaint before apprehending the person. [73]

2. While Cl. (a) applies only if the offence concerned is cognizable, Cl. (d) may apply to a cognizable offence, as under ss. 379, 411, I.P.C. as well as to a non-cognizable offence where a lower punishment is prescribed by some special Act . [74]

3. An interrogation of a suspect, allowing him to explain his possession of property believed to be stolen, would not offend against *Art 20(3) of the Constitution* . [75]

18. 'Stolen property'.—

See s. 410, I.P.C..

19. Discovery and disposal of stolen property.—

The procedure for search of the arrested person for recovery and seizure of the stolen goods from him is to be found in s s. 51, 102 [*old* s. 550]. The Police officer making such seizure must forthwith report the fact to a Magistrate who shall make necessary order for the disposal or custody of such property or the delivery thereof to the person entitled to its possession [s. 457,— *old* s. 523].

20. Cl. (e) : Arrest of person who obstructs or who escapes from lawful custody.—

This clause warrants the arrest of a person under two categories :

A. If such person (i) obstructs (ii) a police officer (iii) while in the execution of his duty. [77] The arrest would not be lawful if any of these conditions is not present. [78]

B. If such person (i) escapes or attempts to escape (ii) from lawful custody. The arrest would not be valid under this clause unless the person has been brought under custody 'lawfully'. [79] But arrest under reasonable suspicion is lawful under s. 41, Cls. (a), (d), (f), (g). Hence, in such cases, if such person escapes thereafter, he may be arrested again, without warrant and also punished for such escape, even though he may eventually be acquitted of the offence of which he had been suspected. [80]

21. Cl. (f) : Person reasonably suspected of being a deserter from the Armed Forces.—

1. This clause empowers any Police officer to arrest, without a warrant or any order from a Magistrate any person who is 'reasonably suspected, of being a deserter from the Armed Forces of India. [81]

2. As to the meaning of 'reasonably suspected', see *ante.*

3. 'Desertion' means deserting the service, which is dealt with in *Sections 38 of the Army Act, 1950* ; *Sections 38 of the Air Force Act, 1950* , and *Sections 49 of the Navy Act, 1957* .

22. Cl. (g) : Suspicion of offence committed out of India.—

1. This clause authorises *any* Police officer to arrest without warrant a person if two conditions are satisfied:

   (i) There is a 'reasonable complaint, credible information or reasonable suspicion' of such person having committed an act which would have been punishable as an offence in India. This part is similar to Cl. (a), except that it is not related to a 'cognizable offence', but extends to all extraditable offences. The meaning of the words 'reasonable complaint ... reasonable suspicion' is the same as under Cl. (a) [82] (see *ante*).

   (ii) Such offence must be an 'extraditable', offence, so that under the law of extradition, such person was liable to be apprehended or detained in custody in India. As to what is an 'extraditable offence', see the *Extradition Act, 1962* (2nd Schedule).

   (iii) There must be in existence an 'extradition warrant' against such person, under which he was liable to be extradited, [83] though the officer arresting the person might not have been himself charged with the execution of that warrant, or it may not have arrived in India as yet. [84]

2. This clause authorises an Indian Police officer to make the arrest, if the foregoing conditions are satisfied and not any officer of the foreign State to make the arrest in Indian territory. [85]

3. The person arrested is entitled to bail [86] [Sections 50(2), 25 of the *Extradition Act, 1962* .

23. Cl. (h) : Breach of Rules by released convict. —

Under s. 356(5) [*old* s. 563(3)], the State Government may make rules relating to the 'notification of residence or change of, or absence from, residence' by released convicts. If he violates any of such rules, he may be arrested, without warrant, under the instant clause.

24. Cl. (i) : Arrest by Police officer on requisition by another Police officer.—

1. This clause empowers a Police officer to arrest a person without warrant if he receives a requisition for that purpose from another Police officer. The circumstances which justify the issue of such requisition are not mentioned in this section.

2. Section 55(1) [*old* s. 56 (1) states the circumstances when a Police officer may requisition a subordinate officer to arrest a person without warrant; that requisition must be in writing. But it was held under the *old* Code that the power under s. 41(i) [*old* s. 54, Ninthly] was not restricted by anything in s. 55(1) [*old*

s. 66(1) which merely laid down the procedure to be adopted when another Police officer was sought to be requisitioned by an officer in charge of a police station or a Police officer making an investigation. [87] , [88]

3. *Change made by the new Code.*— The words 'whether written or oral', have been inserted in the present clause to adopt the view in that group of cases under the *old* Code where it was held that an oral requisition was also a valid authority under the present clause, provided such requisition discloses (a) the identity of the person to be arrested, and (b) the offence or other reason for which the arrest was being made. [89]

Comment. The textual amendment made in the present clause has not however been happy. Cl. Ninthly of *old* s. 54 used words, such as 'specify', 'it appears therefrom', which can go only with a written requisition; these have not been suitably amended to cover an oral requisition. The criticism of DESAI, J. in *State v. Ram Chandra* [1] that these words 'do not go well with a verbal requisition', therefore, remain valid under the new clause.

There is a graver objection: Under s. 55(1), the subordinate police officer, act ing under a written requisition, is bound to show that written order to the person sought to be arrested by him without warrant, so that the person affected might not only know the authority under which he was being arrested but also the grounds for such arrest [2] —a non-compliance with that requirement would render the arrest illegal. [3] When a subordinate police officer exercises his power under the present clause, under an oral requisition, he has no obligation to notify or produce any such requisition. If so, what is the significance of the words 'it appears therefrom'? Is it merely for the satisfaction of the officer receiving the oral requisition, so that he may refuse to comply with the requisition [4] if the oral requisition does not disclose that the requisitioning officer had the power to himself arrest the person without warrant? From the standpoint of the arrested person, at any rate, the position is much worse when the subordinate officer acts under an oral requisition than under a written requisition,—which must be said to be anomalous.

Thirdly, when a police officer professes to act on the written requisition of a superior officer [s. 55], can he after failing to produce that written order fall back upon 'verbal' requisition? If this were permissible, s. 55(1) would have little justification for its retention on the statute-book. [5] The answer to the present question should be in the negative. [6]

Fourthly, where a police officer purports to act under order of a superior officer, can he later justify his act ion under any of the clauses of s. 41(1),*other than* (i)? To this question the only answer which is possible was offered by the Bombay High Court in *Keshavlal's case* [7] : There may be cases where a police officer, who was requisitioned by another officer under s. 55(1), himself possessed information for independently acting under any of the aforesaid clauses of s. 41(1). In such a case if the requisition fails for non-compliance with s. 55(1), the police officer may justify the legality of his arrest under s. 41; but not where the evidence does not show that he had any such independent information. [8]

25 'Requisition received from another Police officer' .—

1. It is to be noted that this clause relates to the case of a requisition received by one Police officer from another Police officer [9] who was himself competent to arrest without warrant.

2. Though the requisition need not be in any form, it must contain the particulars specified in this clause, *viz.* ,—(a) nature of the person to be arrested: (b) the offence or other cause for which the arrest is to be made. [10]

3. In the absence of such requisition, a Police officer cannot arrest a person without warrant merely because Police officer is of the opinion that he should be arrested. [11]

4. This provision should not be confused with the case where a Police officer receives a *warrant* of arrest issued by a Court outside his jurisdiction, which is dealt with in s. 79,*post.*

26. S. 41(1)(i) not controlled by s. 55.—

1. After a prolonged controversy, it is now settled that s. 41(i) is not controlled by anything in s. 55. This is also made clear by the Code of 1973, by inserting Cl. (2) in s. 55,*post* . While s. 55 lays down the procedure to be followed where a subordinate police officer is deputed a superior police office (who is in charge of a police station or is making an investigation) to arrest a person, s. 41(1)(i) empowers the subordinate officer to act independently, in certain contingencies. [12] Now, that the word 'oral' has been inserted in s. 41(1)(i), it is clear that a subordinate police officer has the discretionary power, on his own responsibility, to arrest a person in pursuance of a verbal requisition received from *any* other police officer, [13] though such requisition would be invalid, under s. 55, as a *command* of a superior officer because it is not in writing. [14] But in such a case, the arrest will be lawful only if the subordinate officer purports to act on his own authority. [15]

2. On the other hand, a superior officer may himself arrest a person exercising his authority under any of the clauses of s. 41(1), without complying with the formalities of s. 55.

27. Sub- sec. (2) : Power of officer in charge of police station to arrest without warrant.—

1. This sub-section corresponds to *old* s. 55, substituting the description of the persons coming under *old* ss. 109-110, by simply referring to those sections, because the ambit of the sections under the *new* Code has been changed (see *post*).

2. Owing to the enlargement of s. 110, s. 41(2) now comprehends not only persons who have not committed any 'offence' as yet, but those who have, previously, committed certain offences.

3. As a result of these changes, the power of the officer in charge of a police station to arrest without warrant relates to the following categories of persons—

(i) A person who is taking precautions to conceal his presence and there is reason to believe that he is doing so with a view to committing a cognizable offence [s. 109].

(ii) A habitual robber, house-breaker, thief, forger, receiver of stolen property or who habitually aids in the disposal of stolen property or harbours thieves [s. 110(a)- (c)].

(iii) A person who habitually commits or attempts to commit or abets the commission of the offence of kidnapping, abduction, extortion, cheating, mischief, any offence against coins and stamps, or under ss. 489A-489D- (relating to currency notes) [s. 110(d)].

(iv) A person who habitually commits, attempts to commit or abets the commission or—

(a) offences involving breach of the peace [s. 110(e)];

(b) offences under the *Drugs and Cosmetics Act* , *Foreign Exchange Regulation Act* , Employees' *Provident Funds Act* , *Prevention of Food Adulteration Act* , *Essential Commodities Act* , Untouchability (Offences) Act, *Customs Act* [s. 110(f)];

(c) offence punishable under any other law for prevention of hoarding, profiteering, adulteration of food or drugs, or corruption [s. 110(f)].

(v) A person who is so desperate and dangerous as to render his being at large without security hazardous to the community [s. 100(9)].

4. The following category of persons have been omitted [16] from the ambit of s. 41 (2), owing to changes in s. 109 :

A person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself, who was specified in Cl. (b) of *old* s. 55 and of s. 109.

'Officer-in-charge of a police station'.

1. Only persons coming under the definition in s. 2(o),*ante,* would be entitled to exercise this power. According to the definition, the power can be exercised by the next in rank in case of absence or inability of the officerin-charge. [17]

2. Though the words 'within the limits of such station', which occurred in *old* s. 55(1)(a), do not exist in new s. 41(2), as it is drafted, it would appear that an officer in charge of a police station can exercise this power only if the preparation for concealment takes place within the limits of his police station. [18]

'In like manner'. Obviously, these words refer to the same manner of arrest, as referred to in the previous sub-section, namely, an arrest without any warrant or an order from a Magistrate. [19] While sub-sec. (1) empowers all police officers, including an officer in charge, sub- sec. (2) gives the additional power to an officer in charge.

'Taking precautions to conceal himself with a view to committing a cognizable offence'.

1. Since this power relates to a person who has not yet committed any offence, the power should be exercised with caution, and in the absence of proper materials, the arrested person should be released by the Court. [20]

2. For the same reason, they should be given the option of bail, after arrest [see under s. 50(2),*post*].

3. The power under this clause should be used only in such cases where there is an apprehension that serious harm would be caused before there is time to apply to the nearest Magistrate under s. 111.

'Habitually',

1. 'Habit' indicates a course of conduct or series of act s or the repetition of an offence, and the mere fact that a person was concerned in several offences at the same time may not establish a habit. [21] (See, further, under s. 110,*post.)*

2. The power under the present section cannot be used to arrest a person who has been acquitted of an offence and ordered to be set at liberty [22] or proceedings under s. 110 have been held to be illegal, except on fresh grounds of complaint. [23]

28. S. 41(2) and s s. 109, 110.—

1. The reference to s s. 109, 110, in *new* s. 41(2) is only for reference to the categories of persons specified in these sections. [24] Otherwise there is no interdependence between these sections, even though security proceedings may follow such arrest as a sequence. [25]

2. Hence, it does not follow that a proceeding under s. 109 cannot be initiated against a person unless he has first been arrested under s. 41(2).

3. For the same reason, a person may be arrested under s. 41(2), without complying with all the formalities prescribed in Chap. VIII, even though proceedings under s. 110 are contemplated against him.

4. Nor is it incumbent upon the Police to proceed under s. 109 or 110, after arresting a person under s. 41(2). The police may proceed against such person either under these preventive sections or for trial for the substantive offence. [26]

5. But, as has just been stated, the power under s. 41(2) should not be used, except on fresh materials, against a person after proceedings under s s. 109-110 have been held to be illegal. [27]

29. Special Law.—

There are other laws which empower a Police officer to arrest a person without warrant, Thus, under *Sections 34 of the Police Act, 1861* , it shall be lawful for a police officer, to

take into custody any person who, within his view, commits any of the offences specified in that section, *e.g.* , a person who is found drunk or riotous or incapable to taking care of himself.

30. Interference by the Executive.—

Any interference by the Executive, whether by a general circular or otherwise, whether in the interest of trade unionism or other plausible cause, with the power of the Police to prevent the commission of any of the specified offences, *e.g.* , wrongful confinement [coming under s. 41(1)(a)], would be illegal. [28]

31. Punishment for resistance or obstruction to lawful arrest.—

1. Intentional [29] resistance or obstruction offered by the person sought to be arrested lawfully, is punishable under s. 224, I.P.C.. Where such resistance is offered by some other person, he is punishable under s. 225, I.P.C.. [30]

2. But such person cannot be held guilty where the arrest is illegal, *e.g.* , in a case of arrest without warrant, purported to have been made under s. 41, the requirements of any of the clauses of this section are not present, [31] or where a police officer deputed a private person to arrest, while s. 55(1) provides that he could depute only another police officer. [32]

3. On the other hand, where a Police officer *bona fide* believes that a person has in his possession stolen property, he is entitled to arrest such person and the latter would be punishable if he offers obstruction. [33]

32. Escape from custody.—

1. Escape of a person who has been ‘lawfully detained’, is also punishable under s. 224, I.P.C.. [34]
2. But in order to convict a person under this section, it is necessary to prove—

   (a) That he was ‘arrested’, as distinguished from merely being brought to the police station for interrogation. [35]

   (b) That the arrested person was the offender or suspect [36] whom the Police officer was authorised to arrest under s. 41. [37] Escape of a person who had been wrongly arrested on the mistaken assumption that he was the convict, would not be punishable. [38]

   (c) That such arrest was lawful. [39] Thus, where the Police officer did not re-arrest the person [under s. 43(2) where he had been already under arrest by a private person; [40] where the Police officer purporting to act under s. 55(1), had no written order commanding him to arrest without warrant, [41] escape would not be punishable.

3. It has been held in some cases that the word ‘intentionally’ does not govern the second part of s. 224, I.P.C., relating to escape, so that the person who escapes would be liable to be punished even if he had been rescued by a mob. [42]

4. The arrest of a person on reasonable suspicion and his re-arrest when he attempts to escape would not be illegal merely because he is acquitted of the offence or he is not tried at all. [43]

33. Instances of illegal arrest without warrant .—

1. The following are some of the circumstances under which an arrest without warrant would be illegal :

   (i) An arrest *purporting* to be made under this section where the circumstances mentioned by any of the clauses of the section do not exist, [44] even though such power might be derived from other provision of law. [45]

   (ii) An arrest, under Cl. (a) of this section, of a person for non-cognizable offence, [46] *e.g.* , obstructing a public officer [s. 186, I.P.C.]. [47]

   (iii) No credible information or reasonable suspicion [48] of such person being concerned in a cognizable offence, in a case of purported arrest under Cl. (a).

   (iv) The requisition under Cl. (i) does not contain the specified particulars. [49]

2. Where a Police officer arrests under a warrant, it is the legality of that warrant or order of the Magistrate which determines the legality of the arrest; but when a Police officer arrests under s. 41, on suspicion or information, he acts on his own responsibility and the legality depends upon the *reasonableness* or the like of his suspicion or information, [50] —of which, however, he is not the final judge, but the Court. [51] In the latter case, the arrest may be illegal even though the accused may eventually be found guilty of the offence in connection with which he had been arrested, [52] for, illegality of arrest is no ground for acquittal. [53]

34. Effects of illegal arrest .—

1. As stated earlier, an illegal arrest is punishable as a wrongful confinement, under s. 342, I.P.C. [54]

2. Abuse of the power to arrest ‘corruptly or maliciously’ is punishable under s. 220, I.P.C. [55] But the question of malice would be immaterial unless there has been an excess or abuse of the legal powers of the Police officer, and ‘malice’ has to be proved independently. [56]

3. Section 166, I.P.C., may also be attracted, if the violation of the law is wilful. [57]

4. Keeping in confinement, with knowledge of its illegality, [58] is also punishable under s. 220, I.P.C.

5. But a police officer who makes a wrong arrest under a *bona fide* mistake would be protected under s. 79, I.P.C. [59]

6. Any irregularity or even illegality in the arrest would not, however, vitiate the trial of the arrested person. [60] When once the person arrested is brought for trial before a competent Court, the Court does not lose its jurisdiction on the ground that he was brought illegally from a foreign country [61] or in execution of a warrant issued by the Court of another State. [62]

35. Remedies for Illegal Arrest.—

1. *Resistance or obstruction to illegal arrest.* It has already been stated that where the arrest is illegal, it would be no offence to resist it. [63]

   The right to resist illegal arrest extends to causing of injury in the exercise of the right of private defence; [64] but not such right is available [s. 99, I.P.C.], where the arresting officer act s 'in good faith under colour of his office,' even though the arrest may not be strictly justifiable by law. [65]

II. *Prosecution of the arresting officer.* [66]

III. *Petition for habeas corpus.* A petition for *habeas corpus,* under *Art. 32* or *226* of the *Constitution* lies for obtaining release, where the arrest is illegal. [67]

IV. *Suit for damages.*

1 Where an arrest is without any authority of law or the statutory authority is exceeded or the conditions laid down by statute are contravened, an action for damages for false imprisonment lies, without any proof of act ual damage, or *mala fides.* [68], [69]

2. *Bona fides* of the officer arresting or causing an illegal arrest is no defence, unless it is made a defence by statute, *e.g.* , s. 17(1) of the Defence of India Act, 1939. [70]

3. Where the arrest was illegal *ab initio,* the arrested person may recover damages for illegal arrest in a suit even after conviction for the offence for which he had been arrested. [71] But the 'imprisonment' would terminate from the moment the arrested person is released on bail. [72]

4. Where the arrest was caused by a private person through a Police officer, act ing merely as a ministerial agent, such private person would also be liable for false imprisonment. [73] Where, however, the Police officer arrested the person in the exercise of his own powers under the law, though on the complaint of a private person, the latter may be liable in an action for malicious prosecution but not for false imprisonment. [74]

5. In case of illegality of the arrest, conviction or acquittal by the Criminal Court is immaterial in an act ion for damages for false imprisonment. [75]

6. On proof of false imprisonment, plaintiff is entitled to recover damages for expenses to recover freedom, loss of reputation, injury to feelings, mental suffering and disgrace. [76]

36. Constitutional rights of arrested person .—

Drawing from *Arts. 21* and *22* of the *Constitution* , the Supreme Court has held that an arrested person has the following fundamental rights, *interalia* (para. 29), [77] apart from those found in any statute or Police Manual (para. 28). [78]

(a) No Police officer has the right to arrest a person without a reasonable satisfaction reached, after some investigation as to the *bona fides* of a complaint and a reasonable belief both as to (i) the complicity of that person and (ii) the need to effect arrest, *viz* , that, (except in the case of heinous offences), the purpose may not be served by issuing a notice to that person to attend the Police Station and not to leave station without permission (para 24). [79]

(b) The arrested person has the right, on request, (i) to have someone (friend, relation or well-wisher) informed of the fact of arrest and the place where he is being detained; and (ii) to consult privately with a lawyer (para. 26). [80]

(c) The Police officer shall inform the arrested person when he is brought to the police station of this right.

(d) An entry shall be required to be made in the Diary as to who was informed of the arrest.

(e) It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with.

When it is found to the Supreme Court that despite the Constitutional Bench Judgment of the Supreme Court, the police is not strictly following the dictates of *Joginder Singh's case (supra)* , the Division Bench has issued fresh direction to police to follow the dictates of that Constitutional Bench judgement strictly. [81]

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1 Subs. by the (Amendment) Act, 2008 (5 of 2009), S. 5 (w.e.f. 1-11-2010) for : "(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or"

2 Inserted by *CrPC* (Amendment) Act, 2010 (41 of 2010), S. 2 (w.e.f. 2-11-2010 *vide* S.O. 2689(E), dated 1-11-2010).

3 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 5 (w.e.f. 1-11-2010) for : "(2) Any officer in-charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in Section 109 or Section 110."

4 *Ram Narain v. Sen* AIR 1958 All 758 [*LNIND 1957 ALL 279*].

5 *Ram v. State of U.P.,* 2007 Crlj NOC 439All : 2007 (3) ALJ 97 .

6 *Laxmi Narayan v. State,* 2008 Crlj 1 : (2007) 109 Bom LR 1583 (Bom) (FB) .

7 41st Rep. of the Commission, Vol. I, para 5.2.

8 *Ajeet Singh v. State of U.P.,* 2007 Crlj 170 All-FB ; *Union of India v. W.N. Chadha,* AIR 1993 SC 1082 : (1993) 1 SCC 154 : 1993 Crlj 859 : AIR 1993 SC 796 [LNIND 1992 SC 793]and *State of Maharashtra v. Mohd. Ashid,* (2006) 7 SC 56 Followed).

9 *State of Maharashtra v. Mohammed Rashid,* (2007) 7 SCC 56 : 2005 SCC (Cri) 1598 : 2006 Crlj 946 .

10 *Avinash v. State of Maharashtra,* (1983) Crlj 1833 (para 9) Bom.

11 *Avinash v. State of Maharashtra,* (1983) Crlj 1833 (para 9) Bom; *Jangi v. Emp.,* AIR 1944 All 117 ; *Mahesh v. State,* AIR 1952 TC 201 ; *Bolai,* (1907) 35 Cal 361 .

12 *Jangi v. Emp.,* AIR 1944 All 117 ; *Mahesh v. State,* AIR 1952 TC 201 .

13 *Bolai,* (1907) 35 Cal 361 .

14 *Gopal,* (1913) 36 All 6 .

15 *Charuchandra* in re., (1916) 44 Cal 86 (FB) .

16 *Shah Nawaz v. Emp,* (1915) 16 Crlj 15 (Sind) .

17 *Jangi v. Emp.,* AIR 1944 All 117 ; *Mahesh v. State,* AIR 1952 TC 201 .

18 *Charuchandra* in re., (1916) 44 Cal 86 (FB) .

19 *Shah Nawaz v. Emp.,* (1915) 16 Crlj 15 (Sind) .

20 *Yusuf v. Emp.,* 24 I AIR137.

21 *Kurra Rajaiah v. Government of A.P.,* 2007 Crlj 2031 AP .

22 *Gulam v. State,* AIR 1959 MP 147 [*LNIND 1958 MP 45*](para 3).

23 *Gopalan v. State of Kerala,* AIR 1962 Ker 215 [*LNIND 1961 KER 369*](para 23).

24 *Diectorate of Enforcement v. Deepak Mahajan,* AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 SCC (Cri) 785 : 1994 Crlj 2259 .

25 *State of Punjab v. Ajaib Singh,* AIR 1953 SC 10 [*LNIND 1952 SC 68*]: 1953 Crlj 180 .

26 *Natturasu v. State,* 1998 Crlj 1762 Mad ; *Roshan Beevi v. Joint Secretary,* AIR 1984 NOC 103 : 1984 Crlj 134Mad (FB) .

27 *Rahimal v. State of U.P.,* 1992 Crlj 3819 All (DB) : *Roshan Beevi v. Joint Secretary,* AIR 1984 NOC 103 : 1984 Crlj 134 (Mad-FB).

28 *Kultuj Singh v. Circile Inspector of Police,* 1992 Crlj 1173 (Kant-DB).

29 *State of Rajasthan v. Daulat Ram,* (2005) 7 SCC 36 [*LNIND 2005 SC 634*] : 2005 SCC (Cri) 1594 : 2005 Crlj 4117 : AIR 2005 SC 3816 [*LNIND 2005 SC 634*].

30 *Emp. v. Madan,* (1885) AWN 59(FB) .

31 *Meera Sahib,* in re., AIR 1943 Mad 207 .

32 *Sulaiman v. State of Kerala,* AIR 1964 Ker 185 188 .

33 *Sulaiman* v *State of Kerala,* AIR 1964 Ker 185 188 ; Cf. *State v. Ramchandra,* AIR 1955 All 438 [*LNIND 2014 ALL 271*].

34 *Raghuni v. Emp.,* AIR 1936 Pat 249 .

35 *Cf. Bhawoo v. Mulji,* (1888) 12 Bom 377.

36 *Keshav v. Emp.,* ILR (1937) Bom 127 .

37 *Cf. Bhawoo v. Mulji,* (1888) 12 Bom 377.

38 *R. v. Behari,* 7 WR (Cr) 3.

39 *Ally Md.,* AIR 1922 All 457 .

40 *Charuchandra* in re., (1916) 44 Cal 86 (FB) .

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42 *Kraal Dye v. State of Assam,* 1989 Crlj 1209 : 1989 (1) Crimes 746 .

43 *Easy Micah v. Tripura Administration,* (1963) 1 Crlj 673 .

44 *Tribhuwan* v. R., AIR 1849 Oudh 74 .

45 *Ratna,* (1917) 40 Mad 1028.

46 *Jokhro v. Emp.,* AIR 1934 Sind 197 .

47 *Muhammad* v . *Kannan,* AIR 1943 Mad 218 ; *Subodh v. Emp.,* (1925) 52 Cal 319 .

48 *Muhammad* v . *Kannan,* AIR 1943 Mad 218 ; *Subodh v. Emp.,* (1925) 52 Cal 319 .

49 *Muhammad* v . *Kannan,* AIR 1943 Mad 218 ; *Subodh v. Emp.,* (1925) 52 Cal 319 .

50 *Charuchandra* in re., (1916) 44 Cal 86 (FB) .

51 *Cf. Bhawoo v. Mulji,* (1888) 12 Bom 377.

52 *Pramila,* (1932) 36 CWN 669 .

53 *Emp.* *v.* *Vimlabai,* AIR 1946 PC 123 .

54 *Raja* *v.* *Emp.,* AIR 1940 Cal 321 .

55 *Tribhuwan* *v.* *R.,* AIR 1849 Oudh 74 .

56 *Bir* *Bhadra* *v.* *D.M.,* AIR 1959 All 384 [LNIND 1958 ALL 170](para 15).

57 *Bhola,* 2 Pat 379.

58 *Ally* *Md.,* AIR 1922 All 457 .

59 *Keshav* *v.* *Emp.,* ILR (1937) Bom 127 .

60 *Gopal,* (1913) 36 All 6 .

61 *Ratna,* in re. (1917) 40 Mad 1028.

62 *Gopal,*
(1913) 36 All 6 .

63 *Kali Charan v. State,*
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64 *Pagla Baba v. State,*
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65 *Fasih v. Tripura Admn,*
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66 *Charuchandra* in re.,
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67 *Delhi Judicial Service Association v. State of Gujarat,*
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LNIND 1991 SC 446]:
1991 Crlj 3086 :
(1991) 4 SCC 406 [
LNIND 1991 SC 446].

68 *Pandya,* (1884) 7 Mad 436.

69 *Raghuni v. Emp.,*
AIR 1936 Pat 249 .

70 *Bhawoo v. Mulji,* (1888) 12 Bom 377.

71 *Emp. v. Dalip,*
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72 *Emp. v. Dalip,*
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74 *Avinash v. State of Maharashtra,*
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75 *State v. Fundan,*
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LNIND 1957 BOM 197](para 6).

77 *Pandya,* (1884) 7 Mad 436.

78 *Pandya,* (1884) 7 Mad 436.

79 *Kalai,*
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82 *Roshan* *v.* *Supdt.,*
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83 *Varghese* *v.* *Emp.,*
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2 *Kishun* *v.* *Emp.,*
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16 Rep. of the Joint Committee on the Bill of 1970, p. xi (under Cl. 109).

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28 *Jay* *Engineering* *v.* *State,*
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29 *Kulandaivelu,* in re.,
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30 *Kulandaivelu,* in re.,
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31 *Mulla* *Singh* *v.* *State,*
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LNIND 1966 ALL 26].

32 *Taik* *Pyu,*
(1909) 10 Crlj 118 .

33 *Bhawoo v. Mulji,* (1888) 12 Bom 377.

34 *Muppan,* (1895) 18 Mad 401.

35 *Maheswar,* (1953) Cut 751.

36 *Ganga* *v.* *Emp.,* (1893) 21 Cal 337 .

37 *Ganga* *v.* *Emp.,* (1893) 21 Cal 337 .

38 *Ganga* *v.* *Emp.,* (1893) 21 Cal 337 .

39 *State* *v.* *Indra,* AIR 1960 Or 23 (para 7).

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66 *R. v. Ram Dayal,* AIR 1950 All 134 [*LNIND 1949 ALL 72*].

67 Cf. *Bir Bhadra,* AIR 1959 All 384 [*LNIND 1958 ALL 170*].

68 *R. v. Ram Dayal,* AIR 1950 All 134 [*LNIND 1949 ALL 72*].

69 *Yusuf v. Secy. Of State,* (1903) 30 Cal 872.

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72 *Yusuf v. Secy. of State,* (1903) 30 Cal 872.

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74 *Pande v. Pande,* (1905) 29 All 44.

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76 *Pande v. Gupta,* AIR 1969 Pat 194 202.

77 *Joginder v. State of U.P.,* (1994) Crlj 1981 (paras 24-28) SC—3 Judges.

78 *Joginder v. State of U.P.,* (1994) Crlj 1981 (paras 24-28) SC—3 Judges.

79 *Joginder v. State of U.P.,* (1994) Crlj 1981 (paras 24-28) SC—3 Judges.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

[82] [S. 41A. Notice of appearance before police officer

(1) [83] [The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

[(4) [84] Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.]

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82 New Sections 41A to 41D inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 6 (w.e.f. 01-11-2010).

83 Substituted for the words "The police officer may", by *CrPC* (Amendment) Act, 2010 (41 of 2010), S. 3 (w.e.f. 2-11-2010,*vide* S.O. 2689(E), dated 1-11-2010).

84 Substituted by *CrPC* (Amendment) Act, 2010 (41 of 2010), S. 3 (w.e.f. 2-11-2010 *vide* S.O. 2689(E), dated 1-11-2010). Prior to substitution it read as under : "(4) Where such person, at any time, fails to comply with the terms of the notice, it shall be lawful for the police officer to arrest him for the offence mentioned in the notice, subject to such orders as may have been passed in this behalf by a competent Court."

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 41B.

Procedure of arrest and duties of officer making arrest

Every police officer while making an arrest shall—

(a) bear an accurate, visible and clear identification of his name which will facilitate easy identification;

(b) prepare a memorandum of arrest which shall be—

(i) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;

(ii) countersigned by the person arrested; and

(c) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 41C.

Control room at districts

(1) The State Government shall estab lish a police control room—

(a) in every district; and

(b) at State level.

(2) The State Government shall cause to be displayed on the notice board kept outside the control rooms at every district, the names and addresses of the persons arrested and the name and designation of the police officers who made the arrests.

(3) The control room at the Police Headquarters at the State level shall collect from time to time, details about the persons arrested, nature of the offence with which they are charged, and maintain a database for the information of the general public.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 41D.

Right of arrested person to meet an advocate of his choice during interrogation

When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.]

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 42

Arrest on refusal to give name and residence.

(1) When any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required :

Provided **that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India.**

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

1. Scope of s. 42. —

This section reproduces *old* s. 57, with a verbal change only in the marginal note.

2. Conditions for application of s. 42.—

1. Under the present section, a person may be arrested, without warrant, by a Police officer, only if the following conditions are satisfied; [85]

   (a) Such person must (i) have committed a non-cognizable offence in the presence of such police officer, or (ii) have been accused before such officer of having committed a non-cognizable offence.

   (b) On demand by such Police officer, such person (i) refuses [86] to give his name and address or (ii) gives a name or residence which such officer has reason to believe to be false.

2. Hence, there can be no arrest under this section—

   (a) Where there is no demand by the Police officer or no refusal by such person to give his name of residence. [87]

   (b) Where the offence is cognizable. [88]

   (c) If the person in whose presence the offence is committed or the allegation is made, is not a 'police officer' (see *ante*).

   (d) The object of arrest under the present section being to ascertain the name and address of such person, [89] if the police officer was already aware of the name and address of such person, he cannot arrest the person under this section; in such a case, he can be arrested only after obtaining a warrant. [90]

   (e) Even though the arrest be justified under this section, the Police officer may be liable if he commits any other offence, *e.g.* , under s. 504, I.P.C., for using abusive language.

3. Under s. 152(2), a Police officer cannot investigate into a *non*- cognizable offence without the order of a Magistrate. The present section empowers a Police officer to arrest a person on charge of a *non*-cognizable offence, provided, *only,* he refuses to give his name and address or give it falsely. [91] Unless the case falls under the present section, a Police officer has no power to arrest without warrant a person on the ground of his having committed a *non* -cognizable offence. [92] The rules of English common law cannot be invoked outside s. 42. [93]

4. The object of the section being to ascertain the identity of the person, he is to be released on execution of a bond for appearance, as soon as his name and address are ascertained after arrest. [94] On the other hand, if, even after the arrest, it is not possible to ascertain his name and address, he cannot be kept under police custody beyond 24 hours, but should be produced before a Magistrate, according to s. 57,*post.*

3. 'Reason to believe to be false' .—

Where the person refuses to produce some document in his possession (*e.g.* , a license under the *Motor Vehicles Act*), from which his identity could be verified, the Police officer may be said to have reason to suspect that the name and address given by the person were false; but if the name and address give in the licence produced by him are the same as given out by such person, the Police officer shall have no authority to arrest the person on the present ground.

85 *State* *v.* *Fateh,* (1980) ALJ 9 (12).

86 *Emp.* *v.* *Goolab,* (1903) 5 Bom LR 597 .

87 *Devki* *v.* *Emp.,* AIR 1941 Lah 422 425 .

88 *Devki* *v.* *Emp.,* AIR 1941 Lah 422 425 .

89 *Gopal v. Emp.,* (1922) 46 Mad 605 625 FB.

90 *Gopal v. Emp.,* (1922) 46 Mad 605 625FB ; *Maiku v. Emp.,* (1919) 41 All 483 .

91 *Gopal v. Emp.,* (1922) 46 Mad 605 625FB ; *Maiku v. Emp.,* (1919) 41 All 483 ; *Goolab,* 5 Bom LR 597.

92 *Gopal v. Emp.,* (1922) 46 Mad 605 625FB ; *Maiku v. Emp.,* (1919) 41 All 483 .

93 *Golal v. Emp.,* (1922) 46 Mad 605 625FB.

94 *Gopal v. Emp.,* (1922) 46 Mad 605 625FB ; *Maiku v. Emp.,* (1919) 41 All 483 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 43

Arrest by private person and procedure on such arrest.

(1) Any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of Section 41, a police officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of Section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

1. Scope of s. 43: Arrest by private person.—

This section reproduces *old* s. 59, with the following changes :

(a) In sub-sec. (1)—

(i) the words 'or cause to be arrested' have been added after the word 'arrest', according to the recommendation of the Commission, [1] in order to make it clear that the private person who sees the commission of the offence may take the help of other person in effecting the arrest. [2]

(ii) Similarly, the words 'cause to be made over' have been inserted after 'make-over'.

(iii) The words 'in his presence' have been substituted for the words 'in his view' to obviate judicial speculation [3] as to the meaning of the latter words.

(b) In sub-secs. (2)-(3), the reference to the sections has been altered, according to the numbering in the *new* Code.

2. Ss. 37 and 43.—

1. While s. 37 (*ante*) imposes a *duty* upon a private person to aid a Police officer in the execution of his duty, the present section empowers the private person himself to arrest, without warrant, a person who is a proclaimed offender or who commits a non-bailable and cognizable offence in the presence of the private person.

2. If the conditions specified in s. 43 are fulfilled, private person need not depend on any direction or presence of a Police officer for exercising his power of arrest. On the other hand, under s. 37, a Police officer, seeking to arrest an accused must himself be present and require the *aid* of the private person. Otherwise, the arrest by such private person would be illegal. [4]

3. Conditions for exercise of the power under s. 43(1)—

1. A private person may lawfully arrest a person without warrant only if the following conditions are fulfilled :

(i) Either such person is a proclaimed offender, [5] or

(ii) Such person commits in his presence an offence, which is non-bailable or cognizable. [6] If the offence be bailable or non-cognizable or it is not committed in his presence, [7] the arrest would be illegal.

2. Outside these two cases the English common law right of a private person to arrest another to prevent a breach of the peace, does not exist in India. [8]

' *Cause to be arrested'* : Under *old* s. 59, there was a serious controversy as to whether a private person, who was entitled to arrest another person without warrant under the section, could exercise his power of arrest through a third person, *e.g.* , where he was himself under a physical disability.

The words 'cause to be arrested' have, therefore, been inserted into the *new* section, adopting the view taken in *Gouri Prasad's case,* [9] that he may authorise a third person to make the arrest.

'Offence' . This word includes not only a substantive offence, but also an abetment [10] or conspiracy [11] to commit an offence and also an attempt, when such attempt is an offence [12] under the law.

4. Power of private person to arrest without warrant.—

1. A private person may arrest without warrant any person who in his presence commits (i) a non-bailable *and* [13] cognizable offence, or (ii) is a proclaimed offender.

   Such arrest is made subject to the condition that—

   (i) he shall without any unnecessary delay, make over the arrested person to a police officer or, in the absence of a police officer, take such person to the nearest police station [s. 43(2)];

   (ii) after the arrested person is taken to a police officer or to the officer in charge of a police station, the police officer shall re-arrest the person if the arrested person comes within any of the categories enumerated in s. 41 who may be arrested without warrant by a police officer, or proceeded against under s. 42 if he refuses to give his name and residence, where he is believed to have committed a non-cognizable offence. If, however, the police officer has no sufficient reason to believe that the arrested person has committed any offence, he shall be at once released [s. 43(3)].

2. Section 43 is an enabling provision and does not make it obligatory upon any private person to make an arrest without warrant. [14]

'In his presence'.

1. These words mean that the right of the private person to arrest, under this sub-section, arises not out of his suspicion or information, [15] but his knowledge derived from seeing the crime being committed before his eyes. [16]

2. But the words 'in his presence' are not confined to visual knowledge. It would cover cases where the person cannot see the thief or burglar but can feel his presence, *e.g.* , because he is blind or there is darkness in the room or place of occurrence. [17]

3. The expression, on the other hand, suggests that the power of arrest cannot be exercised *long after* the offence was committed, [18] unless the offence is a continuing one. [19]

4. It is to be noted that the same expression 'in his presence' is used in s. 42(1),*ante.*

5. Whether a person who sees the offender to escape after commission of the offence, would be entitled to arrest.—

1. There was a conflict of judicial opinion under *old* s. 59(1) on the question whether a person who does not witness the actual commission of the offence would be entitled to arrest under this sub-section, if he sees the offender to escape.

2. If the commission of the offence and the escape are dissociated from each other by a gap of time or events, there is little doubt that the answer to this question should be in the negative, because even a person who has been the commission of the offence, would not be entitled to arrest the offender after any considerable lapse of time, because the statute uses the word 'commits' and not 'had committed'. [20]

3. If, however, the offender is chased in course of his escape immediately after the commission of the offence, the question becomes more nice, namely, whether those who merely see him being chased or escaping would be entitled to arrest him under s. 43(8) [*old* s. 59(1)].

4. The stricter view was that the language of the *old* s. 59(1) did not empower any person other than those who have seen the actual commission of the offence. [21] , [22]

5. A contrary view was that since the section codifies the common law on the point, [23] a person who sees the offender escaping *immediately* after committing the offence [24] should also be entitled to arrest without warrant, provided the commission of the offence and the escape may be said to be parts of the same transaction, by 'continuity of purpose and continuity of act ion'. [25]

The difficulty in the face of this interpretation was, however, the plain language of the sub-section—"who in his view commits .....offence", and hence, the Patna High Court [26] suggested an amendment of the provision, if persons other than the persons who see the actual commission of the offence were intended to be empowered.

Taking up that cue, the words *'or cause to be arrested'* have been inserted after the words 'may arrest' in *new* s. 43(1). [27]

6. Arrest of Special Police party of Andhra Pradesh outside the State.—

The arrest by the Andhra Pradesh Special Police party of the petitioners outside the State would assume the character of arrest by the private person when causing arrest outside the State. So, only authority of law to arrest in such a case is to be found in Section 43 of the Code. [28]

7. Effects of the change made by the new Code. We should, therefore, analyse the effects of the change made by the insertion of the words 'or cause to be arrested':

(i) Under the *old* s. 59(1), it was held that the section did not empower the person who witnessed the commission of the offence to authorise any other person to make the arrest. [29]

The foregoing view was inconsistent with s. 46(2) which empowers a third person to assist a private person (who is entitled to arrest without warrant) in effecting the arrest of a person who 'forcibly resists...or attempts to evade the arrest'. The insertion of the words 'cause to be arrested' would now enable the person who has seen the commission of an offence to require the assistance of others [30] or to raise an alarm so that persons who gather on hearing such alarm may come to his assistance, irrespective of any use of force by the offender to avoid arrest, [31] as under s. 46(2).

(ii) In view of the above change, it may reasonably be concluded that a liberal interpretation should now be given to the words 'in his presence commits..... an offence', to include all act s which may be said to be a part of the commission of the offence, by reason of 'continuity of purpose and continuity of purpose and continuity of action', *e.g.* , the escape of the offender immediately after commission of the offence. Hence, those who gather on hearing a hue and cry of the pursuers of the offender after commission of the offence, would also be entitled to assist in the arrest, whether such assistance is specifically asked for or not, [32] and the person who is chased or sought to be arrested shall have no right of private defence against such persons who might not have themselves witnessed commission of the offence. [33]

(iii) If the person who sees the commission of the offence is for physical or other reasons unable to himself arrest the offender, he may authorise some other person to make the arrest. [34] The words 'cause to be arrested' are wide enough to include to include the taking of assistance from another person, but also to delegate the power to arrest to such person, which was not possibly under the *old* Code. [35]

(iv) The words 'cause him to be taken in custody' were already introduced, in the latter part of *old* s. 59(1) [*new* Sections 43(1)], by the *Amending Act* of 1923. That power is extended by the *new* Code to the making of the arrest itself.

' *Cause to be made over ...police officer'.*

1. Prior to the insertion of the words 'or cause to be made over' by the amendment of 1923, it was held that a chowkidar not being a 'police officer', a private person, making an arrest under this section, could not hand over the arrested person to be taken to the police station.

Since 1923, it is clear that the person making the arrest may make over the arrested person to *any other* person for taking him to a police officer or to the police station. [36]

2. But the arrested person must be made over to the police without unnecessary [37] delay [38] otherwise the private person who made the arrest would be liable under s. 342, I.P.C, [39] But he would be protected by s. 79, I.P.C. if, instead of taking to the Police, he takes him to a Magistrate, under a *bona fide* mistake. [40]

8. Punishment for obstruction or escape.—

1. Where the arrest by a private person is lawful, escape or rescue from his custody or the custody of the man deputed by him to take the arrested person to the Police [41] would be punishable, [42] under ss. 224-225, I.P.C. [43]

2. Simple evading of arrest would not amount to illegal obstruction. [44] It is for the prosecution to prove that the resistance or obstruction was intentional and also that the arrest was lawful in every way. [45]

3. But 'escape' would be punishable even though he was kept unguarded [46] after a lawful arrest.

9. Rights of the person arrested by a private person.—

1. Where the person who arrests had no legal right to arrest under the present section, the arrested person may have the right of private defence if the conditions specified in s. 100, I.P.C., are present. The person arresting may also be guilty of wrongful confinement [s. 340, I.P.C.] [47] [See, further under s. 70,*post.*]

2. The arrested person may also escape, with impunity, where the arrest is illegal. [48] The rescue of the arrested person from the custody of the arresting person would also not be any offence. [49]

3. If the person arresting keeps the arrested person in his own custody without making any effort to take him to a police officer or the nearest police station, he may be liable for wrongful confinement under s. 340, I.P.C. [50]

4. Where the arrest is illegal, the arrested person would be entitled to be set at liberty, on an application for *habeas corpus* under *Art. 226 of the Constitution* . [51]

10. Rights of the person making the arrest.—

1. Where the conditions of the present section are not satisfied, the arrest of a person by a private person would constitute the offence of wrongful confinement'. But he would be protected if he was act ing under a *bona fide* impression that the offence committed in his presence was a cognizable and non-bailable offence, though eventually it turns out to be otherwise. [52]

2. The person making the arrest may use all means to effect the arrest, if the person to be arrested offers 'forcible resistance' [s. 46(2),*post*].

3. When for causing obstruction to the lawful apprehension by the witnesses to the alleged occurrence to arrest the accused, the accused persons have been convicted under Section 225 I.P.C. the High Court has held that the accused was not arrested by the witnesses at the time of commission of offence but much later. There was no eye witness to the occurrence. Therefore, none of the alleged witnesses had

authority to arrest the accused under Section 43 of the Code and he was not lawfully detained by the alleged witnesses. So, the conviction of the accused persons under Section 225 I.P.C. is not proper. [53]

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1 41st Rep., Vol. I, p. 38 (para 5.6).

2 This supersedes the view to the contrary, taken in *Fakiro v. Sarup,* (1946) Kar 443 .

3 Cf. *Nazir v. R.,* AIR 1951 All 3 [LNIND 1950 ALL 254](FB) .

4 *Emp. v. Hafiz* AIR 1937 Sind 258 260 .

5 Cf. *Murid,* 38 CrLJ 1101 (1104) Mad.

6 *State v. Indra,* AIR 1960 Orissa 23 (para 6).

7 *Durga Singh v. Isa,* (1963) 1 Crlj 827 (Pat) .

8 *Gopal v. Emp.,* (1922) 46 Mad 605 625FB.

9 *Gouri Prasad v. Chartered Bank,* AIR 1925 Cal 884 885 .

10 *Raghunath v. Emp.,* AIR 1920 Pat 52 .

11 *Gouri Prasad v. Chartered Bank,* AIR 1925 Cal 884 885 .

12 *Dost Md. v. Emp.,* AIR 1945 Lah 334 335 .

13 *Abdul v. State,* (1974) Crlj 248 (paras 9-10).

14 *Emp. v. Potadu,* (1888) 11 Mad 480.

15 *Kartar,* AIR 1956 Punj 122 .

16 *Abdul* *v.* *State,* (1974) Crlj 248 (paras 9-10).

17 Cf. *Nazir* *v.* *R.,* AIR 1951 All 3 [LNIND 1950 ALL 254](FB) .

18 *Kolavennu,* in re., AIR 1956 Andhra 156 .

19 *Bolai,* (1907) 35 Cal 361 .

20 *Abdul* *Aziz* *v.* *Emp.,* AIR 1933 Pat 508 .

21 Cf. *Nazir* *v.* *R.,* AIR 1951 All 3 [LNIND 1950 ALL 254](FB) .

22 *Kolavennu,* in re., AIR 1956 Andhra 156 .

23 *Nazir* v. R., AIR 1951 All 3 [LNIND 1950 ALL 254](7-8)FB .

24 Cf. *Halsbury,* 2nd Ed., Vol. IX, p. 86.

25 *Bolai,* (1907) 35 Cal 361 .

26 *Bolai,* (1907) 35 Cal 361 .

27 41st Rep. of the Commission, Vol. I, para 5.6 (p. 38).

28 *Kurra* *Rajaiah* *v.* *Government* *of* *A.P.,* 2007 Crlj 2031 AP .

29 *Fakiro* *v.* *Emp.,* AIR 1947 Sind 107 .

30 *Sheo Balak v. Emp.,* AIR 1984 All 103 106 .

31 Contrary view in *Alawal v. Emp.,* AIR 1922 Lah 73 , is no longer good law.

32 *Kolavennu,* in re., AIR 1956 Andhra 156 .

33 *Nazir v. R.,* AIR 1951 All 3 [*LNIND 1950 ALL 254*](7-8)FB .

34 This adopts the view in *Gouri v. Chartered Bank,* AIR 1925 Cal 884 , rejecting the view taken in *Bolai v. Emp.,* (1907) 35 Cal 361 ; *Fakiro v. Emp.* AIR 1947 Sind 107 .

35 *Nazir v. R.,* AIR 1951 All 3 [*LNIND 1950 ALL 254*](7-8)FB .

36 *Chotu v. Emp.,* AIR 1932 Pat 214 215 .

37 Cf. *Arumuga* , in re., AIR 1924 Mad 384 .

38 *Amarendra v. State of Bihar,* AIR 1955 Pat 106 107 .

39 *Legal Remembrancer v. Bhagirath,* AIR 1943 Cal 610 .

40 *Raghunath v. Emp.,* AIR 1920 Pat 502 .

41 *Johri,* (1901) 23 All 266 (268).

42 *Parsidhan,* (1907) 29 All 575 .

43 *Johri,* (1901) 23 All 266 (268).

44 *Bati,* (1951) Crlj 1931 .

45 *Retta,* (1975) Crlj 1284 (Mad) .

46 *Kalia,* AIR 1927 Bom 96 .

47 *Abdul* *v.* *State,* (1974) Crlj 248 (All) (para 10).

48 *Bojjigan,* (1882) 5 Mad 22 (23).

49 *Legal* *Remembrancer* *v.* *Bhagirath,* AIR 1943 Cal 610 .

50 *Anant,* (1926) 27 CrLJ 1378 (1380-81) Pat.

51 *Abdul* *v.* *Emp.,* AIR 1933 Pat 508 .

52 *Anant,* (1926) 27 CrLJ 1378 (1380-81) Pat.

53 *Radha* *Sah* *v.* *State* *of* *Jharkhand,* 2007 Crlj 2805 Jhar .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 44

Arrest by Magistrate.

(1) When any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

(2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

1. Scope of s. 44 : Arrest by Magistrate.—

1. This section combines *old* ss. 64-65, by making it clear that this power would belong to all Magistrates,—Executive or Judicial.
2. The *news* section comprehends the two classes of cases where a Magistrate would be competent to himself arrest or order another person to make the arrest, without issuing a warrant—

(a) Any person who has committed an offence in the presence of the Magistrate [sub-sec. (1)].

(b) Any person for whose arrest, such Magistrate is competent, at the time and in the circumstances, competent to issue a warrant [sub- sec. (2)].

3. Apart from s. 44, there is no other provision empowering a Magistrate himself to arrest an offender. [54] It has, however, been held by some High Courts that it would be anomalous that a Magistrate should not have that power which belongs to a Police officer [55] under s. 41,*ante;* and that a Magistrate should, therefore, be competent to arrest a person who is reasonably suspected to have committed an offence or who surrenders before him. [56] , [57]

2. Power of Magistrate to arrest.—

1 A Magistrate can arrest or order the arrest of a person within the local limits of his jurisdiction, in the following cases—

(a) Where such person has committed an offence in the presence of the Magistrate within the local limits of his jurisdiction.

(b) Where the Magistrate is competent to issue a warrant for the arrest of a person. In other words, in cases where the Magistrate is competent to issue a warrant to the police to arrest a person, the Magistrate is competent to make the arrest himself, even though the offence has not been committed in his presence, and even though he has not received any complaint in this behalf.

2. In either case, instead of making the arrest himself, he can order *any* other person to arrest the offender.

3. Analogous provisions : Arrest under order of Magistrate.—

Apart from s. 44, a Magistrate may *cause* an arrest in some other cases, without issuing a warrant, *e.g.* ,—

Ordering an officer of the armed forces required to disperse an unlawful assembly [ss. 130(2); 131, *post*].

4. Aiding Magistrate in making arrest.—

Under s. 37 (*ante*) any person is bound to aid a Magistrate, if so required, to arrest a person whom such Magistrate is competent to arrest.

5. Consequences of arrest by Magistrate.

An arrest made under the present section is made by a Magistrate in his ministerial, and not judicial, capacity. Hence, even when the arresting Magistrate is a Judicial Magistrate, he cannot exercise any judicial powers over the arrested person. Consequently,

(a) The arrested person must be produced before another Magistrate within 24 hours. [58]

(b) The arresting Magistrate cannot himself pass an order of remand or detain the person under such order, it must be obtained from another Magistrate under s. 167(2). [59]

(c) He cannot himself try the offender, according to the prohibition under s. 479 [*old* s. 556] *post.*

6. Sub-sec. (1) : 'Offence committed in the presence'.—

1. It would comprise any offence which comes under the definition in s. 2(n),*ante,* whether cognizable or non-cognizable, whether punishable under the I.P.C. or under any special law, and even though cognizance of the offence cannot be taken without a complaint, *e.g.* , under s.196. [60]

2. No complaint is necessary for the exercise of this power by the Magistrate. The only conditions are (i) that the offence must be committed 'in his presence'; for the meaning of that expression, see *ante* ; (ii) that the offence must be committed within his local jurisdiction.

7. Sub- sec. (2) : Where 'competent to issue a warrant'.—

1. The power under this sub-section extends to all cases where the Magistrate is empowered to issue a warrant for arrest to a Police officer, including cases under a special law, such as the Bombay Gambling Act, [61] Suppression of Immoral Traffic in Women and Girls Act, 1956. [62]

2. Under the *new* Code, a Judicial Magistrate [s. 3(1)(a)(i)] may issue a warrant for causing the arrest of the accused to be brought before him, after taking cognizance of a warrant-case [s. 204(1)(b)]; or, in certain contingencies mentioned in s. 87, after taking cognizance of a summons-case. Hence, in such cases instead of issuing the warrant, the Magistrate may himself arrest or direct another to make the arrest in his presence, without issuing a warrant.

3. Even apart from the foregoing cases, the Supreme Court has held that though there is no express provision, a Magistrate may also issue a warrant before taking cognizance, in cases where a Police officer would be competent to arrest without warrant, under s. 41 (*ante*) [63] for, it would be unreasonable to hold that a Magistrate cannot do what a Police officer can, namely, to arrest a person *suspected* of having committed an offence specified in s. 41.

8. Magistrate's power to commit to custody the arrested person.—

1. The power to commit the arrested person is expressly conferred upon the Magistrate, in case of arrest under sub-sec. (1). Such order of remand to jail custody cannot be considered as an order under s. 167 which relates to arrest by the Police [64] , [65] but is an order made under the express provision in s. 44(1).

2. But since the words 'commit the offender to custody' are absent from sub- sec. (2), the Magistrate can have no power to commit to custody a person whom he arrests under sub- sec. (2),*e.g.* , an offender who surrenders himself before the Magistrate. [66] Nor can he make an order committing him to custody under s. 309,*post,* because that section gives a Magistrate the power to remand to custody only after he has taken *cognizance* of the offence committed by a person. [67] Nor can such power be exercised as an 'inherent power' unless conferred by law. [68] In cases of arrest under s. 44(2), therefore, the arrested person must be released on bail. [69]

54 *Ram Chandra v. State of U.P.,* (1977) Crlj 1783 (para 6) All.

55 *Cf. Chari v. State,* AIR 1951 SC 207 [*LNIND 1951 SC 21*]: 1951 SCR 312 [*LNIND 1951 SC 21*] : 1951 Crlj 775 .

56 *Ram Chandra v. State of U.P.,* (1977) Crlj 1783 (para 6) All.

57 *Ramnarain v. Sen,* AIR 1958 All 785 ; *Velu v. State,* (1971) Crlj 725 (Ker) .

58 *Hariharanand v. Jailor,* AIR 1954 All 601 [*LNIND 1954 ALL 78*].

59 *Hariharanand v. Jailor,* AIR 1954 All 601 [*LNIND 1954 ALL 78*].

60 *Brahmanand v. Emp.,* AIR 1939 All 682 683 .

61 *Fernand,* (1906) 31 Bom 438.

62 *Prem,* AIR 1959 All 206 [*LNIND 1958 ALL 174*].

63 Cf. *Chari v. State,* AIR 1951 SC 207 [*LNIND 1951 SC 21*]: 1951 SCR 312 : 1951 Crlj 775 .

64 Cf. *Chari v. State,* AIR 1951 SC 207 [*LNIND 1951 SC 21*]: 1951 SCR 312 : 1951 Crlj 775 .

65 *Kedar* *v.* *State,*
(1977) Crlj 1230 (All) .

66 Cf. *Chari* *v.* *State,*
AIR 1951 SC 207
LNIND 1951 SC 21
1951 Crlj 775 .
[ ]: 1951 SCR 312 :

67 Cf. *Chari* *v.* *State,*
AIR 1951 SC 207
LNIND 1951 SC 21
1951 Crlj 775 .
[ ]: 1951 SCR 312 :

68 *Natabar* *v.* *State* *of* *Orissa,*
AIR 1975 SC 1465
LNIND 1975 SC 159
(1975) 2 SCC 220
LNIND 1975 SC 159
1975 Crlj 1212 .
[ ]: 1976 Supp SCR 137 :
[ ] :

69 Cf. *Chari* *v.* *State,*
AIR 1951 SC 207
LNIND 1951 SC 21
1951 SCR 312
LNIND 1951 SC 21
1951 Crlj 775 .
[ ]:
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V
ARREST OF PERSONS

S. 45
Protection of members of the Armed Forces from arrest.

(1) Notwithstanding anything contained in Sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

(2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Force charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

STATE AMENDMENTS

Assam. — *The following amendments were made by Assam (President's) Act 3 of 1980, S. 2 (w.e.f. 5-6-1980).*

S. 45 (2). —In its application to State of Assam for S. 45(2) substitute the following :—

"(2) The State Government may, by notification, direct that the provisions of sub-section (1) shall apply—

(a) to such class or category of the members of the Forces charged with the maintenance of public order, or

(b) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) apply) charged with the maintenance of public order.

as may be specified in the notification wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression 'Central Government' occurring therein, the expression 'State Government' were substituted."

1. Scope of s. 45.—

This section is *new,* having been added by the Joint Select Committee. [70] The object and scope of this provision and the analogous provision in s. 197(2),*post* [corresponding to Cls. 485-486 of the Bill of 1970] can be best explained in the words of the Notes on Clauses of the Bill of 1970: [71]

"When a member of the Armed Forces of the Union or the State is deputed for the protection on public property in a State or for other such purposes, it may happen that one or more persons may do or attempt to do something in regard to which such member may be called upon to take act ion in good faith. Such action may expose him to the possibility of being arrested and prosecuted by the police. To meet such or similar situations, a qualified protection is being given to such member requiring the previous consent of the Central Government or the State Government, as the case may be, for the arrest of any such member and for the previous sanction of such Government for taking cognizance of any such member."

2. 'Anything done .....in the discharge of his official duties'.—

1. It is to be noted that the scope of s. 45 is limited by these words, so that no previous sanction of the Government would be required where the act out of which the alleged offence arises was not 'done or purported to be done' in the discharge of the official duties of the member of the Armed Force in question. The meaning of this expression will be fully explained under s. 197,*post.*
2. Suffice it to say in the present context, an act will come under the protection of this expression only where there is a *reasonable* connection between the act and the discharge of official duty and not a mere pretended or fanciful claim that he did it in the performance of his duty. [72] Following are some instances of acts which would not be protected by the expression—

(i) Taking bribe. [73]

(ii) Cheating. [74] , [75]

(iii) Offence committed by the officer while going to witness a search. [76]

(iv) Abusing a person or threatening him, while not on duty. [77]

70 Rep. of the Joint Committee, p. ix.

71 On Cls. 485 and 486 (p. 256).

72 *Satwant v. State of Punjab,* AIR 1960 SC 266 [*LNIND 1959 SC 191*]: (1960) 2 SCR 89 [*LNIND 1959 SC 191*] : 1960 Crlj 410 ; *Bhagwan Prasad v. Mishra,* AIR 1970 SC 1661 [*LNIND 1970 SC 218*]: (1970) 2 SCC 56 [*LNIND 1970 SC 218*] : 1970 Crlj 1401 .

73 *Gill,* AIR 1984 PC 128 ; *Ronald v. State of W.B.,* (1955) 1 SCR 216 [*LNIND 1954 SC 76*].

74 *Satwant v. State of Punjab,* AIR 1960 SC 266 [*LNIND 1959 SC 191*]: (1960) 2 SCR 89 [*LNIND 1959 SC 191*] : 1960 Crlj 410 .

75 *Bakhshish Singh v. State of Punjab,* AIR 1967 SC 752 [*LNIND 1966 SC 165*]: (1967) 1 SCR 211 [*LNIND 1966 SC 165*] : 1967 Crlj 656 ; *Arul v. State of Madras,* AIR 1967 SC 776 [*LNIND 1966 SC 163*]: 1967 Crlj 665 .

76 *Dhananjay v. Upadhyaya* AIR 1960 SC 745 [*LNIND 1960 SC 75*]: 1960 Crlj 1153 : 1960 SCJ 1223 .

77 *Prabhakar v. Shankar,* AIR 1969 SC 686 [*LNIND 1968 SC 367*]: (1969) 2 SCR 1013 [*LNIND 1968 SC 367*] : 1969 Crlj 1057 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 46

Arrest how made.

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or act ion:

[[78] ***Provided*** **that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.]**

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

[(4) [79] **Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.]**

1. Legislative changes.—

The notes on clause 6 of the *Code of Criminal Procedure* (Amendment) Bill, 2005 indicate that a new sub-section (4) is being added to Section 46 to prohibit arrest of a woman after sunset and before sunrise except in unavoidable circumstances.

2. Scope of s. 46.—

1. This section reproduces *old* s. 46, without any change.
2. It governs all persons making an arrest,—a Police officer, Magistrate or private person, who is empowered by the Code to make an arrest with [80] or without a warrant. [81]

3. Sub-sec. (1) : Arrest how made.—

1. Arrest means a restraint of the liberty of the person. When a person is arrested by a police officer, he is taken into 'custody' of such officer, within the meaning of *s. 27 of the Evidence Act* . The point of time when a person has been arrested is material for various purposes, *e.g.* , if after an arrest has been effected in law, [82] such person escapes or attempts to escape, he commits an offence, [83] under ss. 224, 225B, I.P.C., [84] or for the application of *s. 27 of the Evidence Act* . [85]
2. Arrest may be affected in any of the ways mentioned in this section [86] :

(a) *Submission to the custody of the officer empowered to arrest.* No formality is necessary for this purpose; it may be made by action or word of mouth. A person directly giving to a police officer by word of mouth information that he has done certain act s which amount to an offence, he is deemed to have submitted to the Police officer from that point of time. [87] There is submission to custody also where the accused proceeds to the police station, as directed by the police. [88]

A person may be in 'custody' of the police in other circumstances as well. [89]

(b) *Touching or confining the body of the arrested person.* In the absence of voluntary submission to custody, as aforesaid, the person may be arrested only if the officer actually *touches* or confines the body of such person; a mere oral declaration by the officer is not sufficient. [90] On the other hand, touching the body is enough; it is not essential that the officer must posses the power of act ual capture. [91]

(3) Where the arrest has *not* been made in either of the foregoing modes, a detention of the person would be illegal and the Police officer or other person who restrains such person would be punishable for wrongful restraint or confinement, for, the code does not authorise any informal detention. [92]

(4) The arrest is affected when a person is confined or kept in the police station or his movements are restricted within the precincts of the police station. [1]

(5) In consists of taking into custody any person by another person having an authority of law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of the offence. [2]

(6) However, it is not always necessary to touch or confine the body of the person. It is sufficient if that person submits to the custody by word or action. [3]

As to distinction between 'arrest' and 'custody', see *post.*

4. Persons authorized to make arrest.—

Sections 46- 47 are general provisions which apply whenever an arrest is made by a Police officer or other person authorised by law to make an arrest. Hence, it would be useful to mention the different persons [4] who are authorised to make an arrest, under various provisions of the Code.

(a)

(i) Persons who are authorised to arrest *without a warrant* . These have already been mentioned [s. 41,*ante*]. It Should further be mentioned that a person, from whose lawful custody an arrested person escapes, is empowered by s. 60 to re-arrest that person without warrant.

(ii) A Police officer in whose presence a person is alleged to commit a non-cognizable offence and who refused to give his name and residence or gives a name or residence which such officer has reason to believe to be false (s. 42). [5]

(iii) A private person may arrest a person who is a proclaimed offender, or who in his presence commits a non-bailable and cognizable offence [s. 43(1)].

(iv) A Magistrate in whose presence or within whose local jurisdiction an offence has been committed (s. 44). [6]

(b) Persons who are competent to arrest *under a warrant issued by Court are*—

(i) Any Police officer to whom the warrant is directed [s. 72].

(ii) Any other Police officer to whom it is endorsed by the Police officer to whom the warrant is directed [s. 74].

(iii) Any private person to whom it is directed [ss.72(1), 73(1)].

5. Exemption from arrest.—

1. The exemptions from arrest, allowed by the *Civil Procedure Code* are not available under the *CrPC* . Thus, a person on his way to and from Court on business in connection with litigation is exempted from civil process but not from arrest under this Code.[7]

2. Even the privilege of a member of Parliament or State Legislature is available only against arrest under civil process, and not under the criminal law. [8]

3. But under *Art. 361(3) of the Constitution* , which overrides all ordinary law, the President or Governor is immune from arrest under any process issued by any Court during the term of his office.

6. Handcuffing, if necessary for arrest.—

Even without handcuffing a person can be held to be in custody. So far as production before the Magistrate is concerned, the handcuffing is not necessary. [9] The practice of handcuffing of the accused when such handcuffing is not necessary has been condemned by the Supreme Court and held that the only valid principle in the matter of handcuffing the prisoner is provided by the *need* to prevent the prisoner from escaping or becoming violent. Directions have been issued to the State Governments for laying down rules for the guidance of the Police officers for resorting to handcuffing only in the circumstances indicated in the above. [10] Handcuffing of a Judicial Officer has been severely condemned by the Supreme Court and guidelines have been laid down for the procedure to be adopted by a Police officer while arresting a judicial officer and in what circumstances and under what conditions handcuffing of a judicial officer may be resorted to by the police. [11]

7. Arrest of judicial officer's guidelines.—

The Supreme Court has laid down the guidelines to be followed if a judicial officer is to be arrested in *Delhi Judicial Service Association v. State of Gujarat (supra).* It is pointed out that such arrest should be done under intimation to the District Judge of the High Court, as the case may be, that ordinarily there should not be handcuffing and he should not be taken to the police station without prior order or direction of the District and Sessions Judge of the District, if available. Other guidelines have been laid down which are not exhaustive.

8. Arrest not a must in every cognizable case.—

No arrest can be made because it is lawful to do so. The existence of power of arrest is one thing but the justification for the exercise of it is quite another. Except in heinous offences, an arrest must be avoided if a police officer issues a notice to a person to attend the police station and not to leave the station without permission. [12] The discretion of a police officer for arrest cannot be arbitrary but must be guided by the principle laid down by the Supreme Court in *Joginder Singh's* case (*supra*). [13]

The power of arrest is neither absolute nor is it to be exercised in a mechanical manner. [14]

9. 'Arrest' and 'Custody'.—

1. The word 'custody' is wider than the word 'arrest'. Even arrest involves custody, but there may be cases of custody without arrest. [15]

2. The word ‘custody’ signifies that the person has been brought under the control of the law. [16] This may happen in various ways:

(a) The Police arrests him [s. 46(1)].

(b) The person submits to the custody of the Police, without any formal arrest [s. 46(1)].

(c) The person surrenders to the Court itself and submits to its directions. [17]

Hence, a person who is detained by a Customs Officer for the purpose of inquiry or investigation cannot be held to have been either arrested or taken into custody. [18]

10. Police custody and Judicial custody.—

1. So long as a person arrested by the Police is not produced before the Court and the Police does not get orders of the Court, the person is in ‘police custody’. [19]

2. But after the police produces the person before the Court or the person himself surrenders to it, and the Court orders a remand to judicial custody, the person comes under ‘judicial custody’. In short, the taking of a person into judicial takes place only after the person is arrested and brought before the Magistrate, or such person himself appears before the Magistrate.

3. It follows that while s. 167(2) expressly confers direction on the Magistrate to grant police custody or judicial custody, under s. 309, the accused can in no circumstances be remanded to police custody, even where investigation is not yet over. The *only* custody which can be ordered under s. 309 is judicial or jail custody. [20]

An exception to the foregoing proposition is offered by s. 20 of the Terrorists and Disruptive Act ivities (Prevention) Act, 1987 [TADA], which empowers the Designated Court under that Act to transfer an accused from judicial to police custody, for investigation, on sufficient grounds. [21]

11. S s. 46 and 167 .—

To invoke s. 167(1), it is not an indispensable pre-requisite condition that in all circumstances, the arrest should have been effected only by a Police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorised officer or an officer empowered to arrest (notwithstanding the fact that he is *not* a Police officer in its *stricto sensu)* on a reasonable belief that the arrestee "has been guilty of an offence punishable" under the provisions of the special Act is sufficient for the Magistrate to take that person into custody on his being satisfied of the three preliminary conditions, namely, (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and the production of the arrestee serve the purpose of s. 167(1) of the Code. [22]

2. A Magistrate can himself arrest or order any person to arrest any offender if that offender has committed an offence in his presence and within his local jurisdiction or on his appearance or surrender or is produced before him, and take that person (offender) into his custody subject to the bail provisions. If a case is registered against an offender arrested by the Magistrate and a follow up investigation is initiated, or if an investigation has emanated *qua* the accusations levelled against the person appearing or surrendering or being brought before the Magistrate, the Magistrate can, in exercise of the powers conferred on him by s. 167(2) keep that offender or person under judicial custody in case the Magistrate is not inclined to admit that offender or person to bail. [23]

3. In fine, a Magistrate has jurisdiction under s. 167(2) of the Code, to commit to custody a person arrested by any authorised officer under Sections 35 of F.E.R.A., 1973, and *s. 104 of the Customs Act, 1962* , and produced before the Magistrate [para. 136]. [24]

12. S s. 46 and 438.—

Anticipatory bail under s. 438 offers immunity from arrest under s. 46. But the principles governing anticipatory bail *before* arrest are different from those which govern the granting of bail *after* arrest, in the course of investigation. [25]

13. S s. 46 and 439(1).—

A person may be in custody not only where the Police arrests him and gets a remand to judicial or other custody, but also where he surrenders before the Court and submits to its directions. [26]

14. Sub-sec (2): Arrest in case of resistance.—

1. This sub-section authorises the officer or private person entitled to arrest without warrant, to use "all means necessary to effect the arrest", in case of forcible resistance.

2. The expression ‘all means...’ is very wide and would include the taking of assistance from others. [27] It would include any means, including violence [subject to sub-sec. (3), *below*] [28] which "an ordinary prudent man, who had no intention of doing any serious injury, would make use of ". [29] Thus, the use of handcuffs or a shot over the head of the suspect may be justified. [30] It must not be in excess of the requirement, as provided in s. 491.

3. Hence, It would be illegal for a Police officer to treat the person with rough handling where he submits to custody and offers no forcible resistance, to attract the present sub-section [31] [see, further, under s. 49,*post*].

15. Sub-sec. (3): Immunity for causing death when available.—

This sub-section is in the nature of an exception of sub- sec. (2), and provides that ‘all means’ under sub- sec. (2) will not include causing the death of the person to be arrested, except where he is accused of an offence punishable with death or imprisonment for life, [32] *e.g.* , murder, mutiny, waging war against the Government of India; but not theft or any other offence which is *not* punishable [33] with

death or imprisonment for life.

16. Death in police act ion and compensation by the State.—

In case of death of the accused in *police act* ion, victim's family is entitled to compensation both under public law and private law. It is not *sine qua non* that death should be in police custody so that the State can be liable for compensation. When the police officers were public servants being police officer had authority to cause death of a surrendered militant and the police officers had to fire gun shots while he was fleeing away, the police officers are absolved of the liability to pay compensation. But the State has such liability to pay compensation to victim's family. [34]

17. Proof of arrest—

1. Arrest should be provided by adducing evidence as to the date and place of arrest. [35]
2. The best evidence is the testimony of the investigating officer or station officer. [36] An entry in the Police calendar is not evidence. [37]
3. Where the warrant is signed by an officer of the Court, the prosecution must prove that such officer was duly authorised to sign a warrant of arrest. [38]

18. Irregularity in making arrest.—

The validity of taking cognizance of an offence [39] or its trial or conviction is not affected by any irregularity in making arrest [40] or non-compliance with the provisions of this Chapter. [41]

19. Obstruction to illegal arrest.—

1. Where the arrest is lawful, intentional obstruction or resistance thereto constitutes an offence punishable under s. 224, I.P.C., [42] and there would be no right of private defence available against such arrest. [43]
2. But there will be no such offence where the arrest is unlawful, [44] being made in contravention of the requirements of the relevant section of the Code, *e.g.* ,—

(i) Where it does not comply with the requirements of s. 55(1), in a case of requisition by another Police officer, [45] and s. 41 cannot be relied upon, in the facts of the case. [46]

(ii) Where the warrant of arrest is *illegal, e.g.* , where it gives a wrong description of the accused or is not addressed to the person who is to execute it [47] or it does not contain the seal of the Court; [48] or the warrant is endorsed by a Police officer to a person other than a Police officer; [49] or the endorsement is made by a person who has no authority to do so [s. 74,— *old* s. 79]. [50]

(iii) Where the person making the arrest has not got the warrant in his possession or does not show it to such person, if so required [s. 5-*old* s. 80]. [51]

(iv) Where he fails to notify the substance of the warrant before making the arrest [52] [s. 75,*post*], except where the accused offers immediate resistance before the Police officer could notify the substance of the warrant. [53]

(v) Where the arrested person is not forthwith communicated the particulars of the offence for which he has been arrested or other grounds for such arrest; or is not informed of his right to be released on bail, [54] where the offence is bailable [*new* s. 50, *post*].

20. Punishment for escape from custody.—

1. As stated earlier once a person has been arrested lawfully, his escape from custody would be punishable under s. 224, I.P.C.

2. But where the arrest has not been effected according to the requirements of this section, *e.g.* , where the officer merely declared that the person was under arrest, and thereafter the latter slipped away, he could not be convicted for escape; [55] or where the person knows that the officer does not possess the authority to arrest which he asserts. [56] , [57]

21. Right of private defence against illegal arrest.—

1. Section 99 of the I.P.C. protects a public servant or a person act ing under this direction, where the public servant acts 'in *good faith* under colour of his office' though that act may not be strictly justifiable in law, [58] *e.g.* , where the arrest is made by a constable to whom the warrant has been endorsed not by name but by his number. [59] There would be no right of private defence of the arrested person in such a case.

2. Section 79, I.P.C., protects the Public officer or other person from making the arrest, in case of *mistake of fact.* In such a case, the arresting person was not liable for any offence, [60] and there would be no right of private defence, if it was *bona fide.* [61]

3. But where the act is wholly without jurisdiction, s. 99 shall have no application, so that the person sought to be arrested would not be liable for anything done by him in exercise of his right of private defence under s. 97,[62] including use of violence. [63]

22. Sub-section (4).—

Sub-section (4) inserted by the *Code of Criminal Procedure* (Amendment) Act, 2005 with effect from 23.06.2006 provides that except in exceptional circumstances, no woman shall be arrested after sunset and before sunrise. Even when such exceptional circumstances exist, the following safeguards have to be taken for arresting woman involved in any cognizable offence as follows:

(1) the woman police officer shall be making a report to the Judicial Magistrate, first class having jurisdiction that exceptional circumstances exist to arrest a woman during night time *i.e.* after sunset and before sunrise; and

(2) Obtain a prior permission from such Judicial Magistrate, first class, within whose local jurisdiction the offence is committed or arrest is to be effected.

Prior to this amendment, the Supreme Court has also laid down the guidelines to be followed by the police before arresting a female. It is pointed out that while arresting a female person, all efforts would be made to keep a lady constable present but in circumstances when the arresting person is reasonably satisfied that such presence of a lady constable is not available, or possible and/or the delay in arresting a female person caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest, be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable. [64]

However, the impact of the above guidelines have now to be read along with the amendment made to the Code with effect from 23.06.2006. The mandate of sub-section (4) is that no woman shall be arrested after sunset and before sunrise except in exceptional circumstances and in exceptional circumstances that can be done only by a lady police officer.

Even the lady police officer in case of arrest of a female person after sunset and before sunrise, can cause such arrest if exceptional circumstances exist to arrest a female person after sunset and before sunrise only after obtaining prior permission from the Judicial Magistrate, first class within whose local jurisdiction, the offence is committed or the arrest is to be effected.

For arrest after sunrise and before sunset, the mandate of sub-section (4) may not apply. But it would be fit and proper in the light of mandate of sub-section (4), that a female person should be arrested in presence of a lady police officer, wherever possible and otherwise the mandate of the Supreme Court in the above would apply that the arresting officer ordinarily shall secure the presence of a lady constable, except when the lady constable be not available and delay in procuring the lady constable would impede investigation and the arresting officer has to record reasons either before or immediately after the arrest as to why he could not procure the presence of lady constable. So, ordinarily there must be a lady constable even during day time arrest of a female person.

But the arrest after sunset and before sunrise must be made by a lady police officer in exceptional circumstances on obtaining the necessary permission from the Judicial Magistrate, first class of the area where the offence is committed or arrest is to be caused.

23. High Court direction relating to arrest.—

When in a writ petition filed by the respondent, the High Court directed not to arrest the respondent without prior notice to him, the Supreme Court has held that the High Court in writ jurisdiction cannot pass such an order and consequently the order was set aside. [65]

24. Interference with arrest by the Supreme Court under Article 32 of the Constitution.—

In *Sanjib Kumar v. Om Prakash Chawtala* [66] the Supreme Court initially issued order prohibiting filing proceedings against the petitioner by the C.B.I. except with the leave of the Supreme Court. But subsequently the said order dated 21.02.2005 has been vacated by the Supreme Court and it is directed that the petitioner shall not be arrested or called for interrogation except after apprising the Director, C.B.I. It is also further directed that no harassment shall be caused to him and any act ion taken against him shall be promptly brought to the notice of competent court having jurisdiction over the matter. [67]

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78 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 7 (w.e.f. 31-12-2009).

79 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 6. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

80 *Kesar v. State of J.&K.,* AIR 1963 J. & K. 23 (24).

81 *Roshan v. Jt. Secy.,* (1984) Crlj 134 (paras 16, 29, 41) (Mad) FB.

82 *Appaswami,* (1924) 47 Mad 442.

83 *Kaloo,* AIR 1948 Cal 68 .

84 *Sulaiman v. State of Kerala,* AIR 1964 Ker 185 (para 9).

85 *Murugul,* in re., AIR 1963 AP 87 [*LNIND 1960 AP 226*](para 12).

86 *Roshan v. Jt. Secy.,* (1984) Crlj 134 (paras 16, 29, 41) (Mad) FB.

87 *State of U.P. v. Deoman,* AIR 1960 SC 1125 [*LNIND 1960 SC 161*](para 12) : (1961) 1 SCR 14 [*LNIND 1960 SC 161*] : 1960 Crlj 1504 .

88 *Kaloo,* AIR 1948 Cal 68 .

89 *Harbans* *v.* *State,*
AIR 1970 Bom 79 82 .

90 *Harmohanlal,*
(1929) 30 Crlj 128 (Nag) .

91 *Thwe* v *Kim,*
AIR 1930 Rang 131 .

92 *Roshan* *v.* *Jt.* *Secy.,*
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AIR 1994 SC 1775 (paras 49-50) :
(1994) 3 SCC 440 : 1994 Cr1-J 2269 :
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9 *State of U.P.* *v.* *Deoman,*
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11 *Delhi Judicial Service Assn . v State of Gujarat* , AIR 1991 SC 2176 [*LNIND 1991 SC 446*]: (1991) 4 SCC 406 [*LNIND 1991 SC 446*].

12 *Joginder Kumar* v *State of U.P.*, AIR1994 SC : (1994) 4 SCC 260 [*LNINDORD 1994 SC 51*] : 1994 Crlj 1981 : (1994) 2 Crimes 106 [*LNINDORD 1994 SC 51*].

13 *Amarawati v. State of U.P.*, 1996 Crlj 1347 All .

14 *State of Rajasthan v. Bhera,* 1997 Crlj (Raj) (DB).

15 *Roshan v. Jt. Secy.*, (1984) Crlj 134 (para 29) Mad (FB).

16 *Niranjan v. Prabhakar*, AIR 1980 SC 785 787 : (1980) 2 SCC 559 ; 1980 Crlj 426 .

17 *Cf. State of U.P. v. Deoman*, AIR 1960 SC 1125 [*LNIND 1960 SC 161*]: (1961) 1 SCR 14 [*LNIND 1960 SC 161*] : 1960 Crlj 1504 .

18 *Roshan v. Jt. Secy.*, (1984) Crlj 134 (para 29) Mad (FB).

19 *Cf. State of U.P. v. Deoman*, AIR 1960 SC 1125 [*LNIND 1960 SC 161*]: (1961) 1 SCR 14 [*LNIND 1960 SC 161*] : 1960 Crlj 1504 .

20 *Gourishankar v. State of Bihar,* AIR 1972 SC 711 [*LNIND 1972 SC 39*](para 12) : (1972) 1 SCC 564 [*LNIND 1972 SC 39*] : 1972 Crlj 505 ; *Mohd. v. State of Maharashtra,* (1994) Crlj 1854 (para 17) Bom.

21 *Kosanapu Ramreddy v. State of A.P.,* AIR 1994 SC 1447 (paras 2, 4) : 1994 Crlj 2121 .

22 *Directorate of Enforcement v. Deepak,* AIR 1994 SC 1775 (paras 49-50) : (1994) 3 SCC 440 : 1994 Crlj 2269 .

23 *Directorate of Enforcement v. Deepak,* AIR 1994 SC 1775 (paras 49-50) : (1994) 3 SCC 440 : 1994 Crlj 2269 .

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25 *Pokar v. State of Rajasthan,* AIR 1985 SC 1175 (para 6).

26 *Niranjan v. Prabhakar,* AIR 1980 SC 785 [*LNIND 1980 SC 112*]: (1980) 2 SCC 559 [*LNIND 1980 SC 112*] : 1980 Crlj 426 .

27 *R.* v *Nazir,* AIR 1951 All 3 7 [*LNIND 1950 ALL 254*](FB) .

28 *Dakhi Singh v. State,* AIR 1955 All 379 [*LNIND 1955 ALL 14*]; *Protap,* (1865) 2 WR 9 (Cr) .

29 *Dakhi Singh v. State,* AIR 1955 All 379 [*LNIND 1955 ALL 14*]; *Protap,* (1865) 2 WR 9 (Cr) .

30 *Newaz v. Emp.,* AIR 1933 Sind 193 196 .

31 *Pandhi* *v.* *Emp.,* AIR 1948 Sind 67 74 .

32 *Dakhi Singh* *v.* *State,* AIR 1955 All 379 [*LNIND 1955 ALL 14*]; *Protap,* (1865) 2 WR 9 (Cr) .

33 *Nga Nam,* 21 Crlj 97 (Rang).

34 *N. Mungsong* *v.* *T.O. Gambhini Devi,* 2007 Crlj 1491 Gau .

35 *Thambi,* in re., AIR 1944 Mad 483 484 .

36 *Manohar* *v.* *Emp.,* AIR 1945 Oudh 149 .

37 *Manohar* *v.* *Emp.,* AIR 1945 Oudh 149 .

38 *Dy Legal Remembrancer v. Sarwar,* 6 CWN 845.

39 *Yusufuddin* *v.* *Emp.,* (1897) 25 Cal 20 PC .

40 *Prabhu* *v.* *Emp.,* AIR 1944 PC 73; *Mabarak,* AIR 1957 SC 857 [*LNIND 1957 SC 81*].

41 *Joseph* *v.* *Emp.,* AIR 1925 Bom 131 133 .

42 Ratan, *in re.,* (1917) 40 Mad 1028.

43 *R..* v *Nazir,* AIR 1951 All 3 7 [*LNIND 1950 ALL 254*](FB) .

44 *Jogendra,* (1897) 24 Cal 320 (324).

45 *State of Ramchandra,* AIR 1955 All 438 [LNIND 2014 ALL 271]; *Supdt. v. Sona Mia,* 48 Crlj 742.

46 *Sulaiman v. State of Kerala,* AIR 1964 Ker 185 (para 9).

47 *Debi Singh v. Emp.,* (1901) 28 Cal 309 .

48 *Mahajan,* (1892) 19 CWN 224 .

49 *Durga Charan v. Kali,* (1899) 26 Cal 727 .

50 *Kanju v. State of Kerala,* (1962) 2 Crlj 437 .

51 *Emp. v. Ganeshi,* (1904) 27 All 258 ; *Appasami* , (1924) 47 Mad 444 (446); *Anand v. Emp.* , (1883)

52 *Emp. v. Ganeshi,* (1904) 27 All 258 ; *Appasami,* (1924) 47 Mad 444 (446); *Anand v. Emp.,* (1883) 10 Cal 18 .

53 *Ranjit v. Emp.,* AIR 1938 All 120 .

54 Cf. *Shyama Charan* , (1611) 16 CWN 549 .

55 *Aludomal,* (1916) 17 Crlj 87 .

56 *Emp. v. Ganeshi,* (1904) 27 All 258 ; *Appasami* , (1924) 47 Mad 444 (446); *Anand v. Emp.,* (1883) 10 Cal 18 .

57 *Kartick,* (1931) 33 Crlj 706 .

58 *Munshi* , (1927) 29 Crlj 69 .

59 *Ouseph v. State of Kerala,* ILR (1963) 1 Ker 220 .

60 *Bhawoo v. Mulji,* (1888) 12 Bom 377; *Kanai,* (1897) 24 Cal 885 .

61 *P.P. v. Amritham,* *(1939) 2 MLJ 776* [*LNIND 1938 MAD 127*].

62 *Pagla Baba v. State,* AIR 1957 Orissa 130 ; *Sukar,* AIR 1941 Pat 560 ; *Deoman,* (1959) Crlj 825 (Bom) .

63 *Pedda,* in re., AIR 1948 Mad 472 [*LNIND 1948 MAD 91*].

64 *State of Maharasthtra v. Christian Community Welfare Council of India,* AIR 2004 SC 7 [*LNIND 2003 SC 886*]: (2003) 8 SCC 546 : : 2004 Crlj 14 : (2003) 4 Crimes 367 [*LNIND 2003 SC 886*].

65 *State of Maharashtra v. Mohammed Rashid,* (2005) 7 SCC 56 [*LNIND 2006 SC 11*] : : 2005 SCC (Cri) 1598 2005 Crlj 946 .

66 *Sanjiv Kumar v. Om Prakash Chautala,* (2005) 5 SCC 510 [*LNIND 2005 SC 510*] : : 2005 Crlj 4911 AIR 2005 SC 2571 [*LNIND 2005 SC 510*].

67 *Sanjiv Kumar v. Om Prakash Chautala,* AIR 2005 SC 2571 [*LNIND 2005 SC 510*]: (2005) 5 SCC : 510 : 2005 Crlj 4911 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 47

Search of place entered by person sought to be arrested.

(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, any person residing in, or being in charge of, such place shall, on demand of such person act ing as aforesaid or such police officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress to such place cannot be obtained under sub-section (1), it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance :

Provided **that, if any such place is an apartment in the actual occupancy of a female (not being the person to be arrested) who, according to custom, does not appear in public, such person or police officer shall, before entering such apartment, give notice to such female that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.**

(3) Any police officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

1. Scope of s. 47 : Search of place for person to be arrested.—

This section combines *old* ss. 47-49, with verbal changes. Sub-section (1) reproduces *old* s. 47; sub- sec. (2) corresponds to *old* s. 48 and sub-sec. (3) reproduces *old* s. 49.

2. Search of premises under different provisions of the Code.—

There are several categories of provisions in the Code authorising a search of premises :

I. *Search of place entered by person sought to be arrested.* This is dealt with by s. 47, under which a police officer having authority to arrest (with or without a warrant), or any person act ing under a warrant of arrest, can search a place, if he has reason to believe that the person to be arrested is within such place.

II. *Search under warrant issued by Court.* This is dealt with by ss. 93-95, 97 of the Code :

(i) Search for production of certain document or thing [s. 93].

(ii) Search of place suspected to contain stolen property etc. [s. 94].

(iii) Search for publications forfeited by Government [s. 95].

(iv) Search for recovery of person wrongfully confined [s. 97].

III. *Search without warrant for false weights and measures* . An officer in charge of police station may search any place, without warrant if he has reason to believe that there are in such place any weights, measures, etc., which are false [s. 153].

IV. *Search by a police officer without warrant, for purposes of investigation.* An officer in charge of a police station or any other police officer making an investigation may search a place if he has reasonable grounds for believing that anything necessary for the purpose of investigating an offence which he is authorised to investigate may be found in such place [s. 165].

3. Search of person.—

See under s. 51,*post.*

4. Object of s. 47. —

The object of this provision is to compel a house-holder as well as other persons residing in a house to afford facilities to the Police or other person acting under a warrant of arrest in carrying out their duties. In case of obstruction, the Police officer or other person executing the warrant may use force, under sub- sec. (2), to obtain ingress. [68]

5. Sub-sec. (1) : Who can make the search.—

The search of a place entered by a person sought to be arrested, under this section, can be made by—

(a) A Police officer to whom a warrant of arrest for such person has been directed;

(b) Any Police officer having authority to arrest, *e.g.* , under s. 41; an officer in charge of a police station under s. 41(2).

(c) A person other than a Police to whom a warrant of arrest have been directed, *e.g.* , under ss. 72(1); 73.

(d) A person from whose custody an arrested man escapes or is rescued [s. 60].

6. Duty of house-holder.—

Sub-section (1) imposes a duty on any person residing in or having charge of a place to allow the arresting officer or person facilities for arresting the person who has entered into the place.

7. Punishment for breach of duty.—

1. If the house-holder or other inmate offers obstruction or resistance, in breach of his duty under sub-sec. (1), he may render himself liable under s. 186 or 225., I.P.C., if the conditions laid down therein are present.

2. Causing hurt to the officer or person authorised to enter under this section would be punishable under s. 332, I.P.C. [69]

‘ *On demand’.* An entry into another person’s house by any person without his permission constitutes trespass. This section exonerates the arresting officer or person from that liability if he is refused entry, after demand for that purpose is made. But no such demand is necessary if the arresting officer or person enters the place through an *open* door. [70] , [71] The section is not intended to restrict the powers of the police which they may otherwise have under the law to enter the place to be searched, without any demand. [72] , [73] The significance of the word ‘on demand’ in this sub-section is that the duty imposed by it upon the house-holder arises on such demand being made. [74]

The Supreme Court has held that the Government has a discretion to direct the Police *not* to enter into a place of worship even if criminals have been harboured therein, having regard to the anticipated repercussion that the entry of the Police might have on the maintenance of law and order. Of course, it would be open to the Court to interfere with such direction where it is necessary to prevent wanton destruction of life. [75] But the Court cannot issue general directions in the absence of specific instances. [76]

8. Sub- sec. (2) .—

1. This sub-section does not extend to a private person even though authorised to arrest or to enter under sub-sec. (1).

2. A police officer is empowered by this sub-section to use force in obtaining ingress; without such authority, he would have been liable for trespass. [77]

3. This extraordinary power of forcing his entry by breaking open any door or window of the house or place belonging to the person to be arrested or any other person shall be available to a Police officer on the following conditions—

   (i) He is refused entry on demand under sub-sec. (1) or it is not possible to make an entry through such procedure;

   (ii) He is act ing under a warrant of arrest or the case is such that warrant of arrest could have been available but cannot be obtained without affording the person to be arrested an opportunity to escape;

   (iii) Before breaking he notifies his authority and purpose and makes a demand for admittance.

4. If the foregoing conditions are not present, the breaking of doors or entry by the Police officer shall be illegal, *e.g.* , where the Police officer enters by breaking open the backdoor, without making any demand for entry, while the main gate of the premises, in the front, remained open. [78]

9. Proviso.—

1. The Proviso imposes additional obligation upon the officer or person when the apartment which he has to break open for his entry is in the actual occupancy of a female, other than the person to be arrested (when she is a female), such female being a ‘purdanashin’ woman,—who does not appear in public, according to custom.

2. An officer who knowingly violates the requirements of this Proviso would be punishable under s. 166, I.P.C. But he would not be liable if the room, which he breaks open, without observing the formalities required by this Proviso, namely, notice and reasonable facility for the female occupant to withdraw, is a room facing the village road,—in the absence of proper evidence to the effect that the room was act ually set apart for the occupation of females. [79]

10. Special treatment of women.—

See under s. 51,*post.*

11. Sub-sec. (3): Breaking open for liberation.—

1. This sub-section empowers a Police officer as well as private person, to break open any door or window,—not for the purpose of entry, but for liberating himself if he finds that, after having made a lawful entry, it is not possible for him to liberate himself from detention in the house, without breaking open a door or window thereof.

2. This power cannot be used for any other purpose.

12. Constitutional remedy.—

1. If the Police refuse to enter into a premises where wanton destruction of life is going on, or the Government forbids it from doing so, the Court may, in a suitable case, issue *mandamus* to compel them to perform their duty to maintain law and order. [80]

2. But Government has a discretion to take a policy decision as to whether, in the overall situation of law and order, the Police should enter a place of worship where criminals are alleged to be hiding. In the exercise of such discretion. It is a relevant consideration whether in solving one problem, others more acute might arise. In such a case, the court may decline to issue *mandamus.* [81]

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68 *Romesh* *v.* *Emp.,* (1914) 41 Cal 350 (376).

69 *Lachman* *v.* *Emp.,* AIR 1942 Pat 281 .

70 *Romesh* *v.* *Emp.,* (1914) 41 Cal 350 (376).

71 *Daitari* *v.* *Emp.,* AIR 1956 Or 97 99 .

72 *Romesh* *v.* *Emp.,* (1914) 41 Cal 350 (376).

73 *Clarke* v *Brojendra,* (1909) 36 Cal 433 .

74 *Romesh* *v.* *Emp.,* (1914) 41 Cal 350 (376).

75 *Hindustani Andolan* *v.* *State of Punjab,* (1984) Crlj 299 : AIR 1984 SC 582 [

LNIND 1983 SC 351]:
(1984) 1 SCC 204 :
(1984) 1 Crimes 336 .

76 *Hindustani Andolan v. State of Punjab,* :
(1984) Crlj 299 [
AIR 1984 SC 582]: (1984) 1 SCC 204 :
LNIND 1983 SC 351
(1984) 1 Crimes 336 .

77 *Clarke v. Brojendra,*
(1909) 36 Cal 433 .

78 *Pagla Baba v. State,*
AIR 1957 Or 130 .

79 *Daitari v. State,*
AIR 1956 Or 97 99 .

80 *Hindustani Andolan v. State of Punjab,* :
(1984) Crlj 299 [
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LNIND 1983 SC 351
(1984) 1 Crimes 336 .

81 *Hindustani Andolan v. State of Punjab,* :
(1984) Crlj 299 [
AIR 1984 SC 582]: (1984) 1 SCC 204 :
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(1984) 1 Crimes 336 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 48

Pursuit of offenders into other jurisdictions.

A police officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest, pursue such person into any place in India.

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1. Analogous law. —

Similar provision is to be found as to the power to retake, in s. 60,*post* .

2. No power to arrest in foreign territory.—

The Code does not and cannot authorise the Indian Police to make any arrest in a foreign territory, though if any such arrest is actually made and the arrested person is brought to trial before an Indian Court, the jurisdiction of the Court cannot be challenged on the ground of illegality of the arrest. [82]

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82 *Prabhu* *v.* *Emp.,* AIR 1944 PC 73 .

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CHAPTER V

ARREST OF PERSONS

S. 49

No unnecessary restraint.

The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

1. Scope of s. 49: No unnecessary restraint on arrested person.—

1. This section reproduces *old* s. 50.
2. The words 'more restraint' relate to the *manner* in which a person is kept in custody after arrest. The obligations arising out of arrest in the matter of production before a Magistrate, for instance, are dealt with in other sections [s s. 56-57,*post*].

2. Punishment.—

A violation of the present section would be punishable under s. 220, I.P.C., provided the excess was made with knowledge that the person making the arrest was act ing contrary to law. [83]

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83 Cf. *Afzalur,* (1943) FCR 7 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 50

Person arrested to be informed of grounds of arrest and of right to bail.

(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

(2) Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

1. S. 50 : Right to be informed of grounds of arrest and of the right to bail. —

This section is *new* and has been inserted on the recommendation of the Joint Committee. [84]

2. Sub-sec. (1).—

It relates to the right to be informed of the grounds of arrest, in a case where a Police officer arrests a person without warrant. It brings the law in conformity with the provisions of *Art. 22(1) of the Constitution* , [85] and must be strictly complied with. [86] The object of the safeguard is to enable the person arrested to move for *habeas corpus* to obtain his release. [87] This requirement is not dispended with by giving him bail, [88] which is a separate right under sub- sec. (2).

As to the contents of the information to be given, sub-sec. (1) has two parts:

(a) When the person has been arrested on charge of an offence, full particulars of such offence must be communicated to him. [89]

But there is no requirement that such communication must be in *writing* . [90] The Supreme Court has inferred such communication from the circumstances. [91]

(b) Where he has been arrested, not for an offence, but for other reasons, *e.g.* , under the Maintenance of Internal Security Act or under r. 30(6A) of the Defence of India Rules, such grounds of arrest should be communicated to the person arrested, though full details need not be given. In The *Author's* opinion, this provision relating to 'other grounds' repels the doubt, if any, as to whether the arrested person has any right to be informed of the grounds of his arrest under the law of preventive detention which itself provides that the provisions of *CrPC* shall be applicable as to the manner of execution of an order under the law,*as if* such order was a warrant of arrest. Section 50 of the Code makes the provision for communication even though *Art. 22(1) of the Constitution* does not extend to cases of preventive detention.

3. Duty of Police to inform relatives and friends.—

Presumably, having regard to the wider implications of *Art. 21 of the Constitution* , the Supreme Court has directed [92] that as soon as a person is arrested by the Police, the Police must obtain from him the name of any relative or friend whom he would like to be informed about his arrest and then the Police should get in touch with such relative or friend and inform him about the arrest.

The object evidently is to give such relative or friend to take steps for securing release of the arrested person through the writ of *habeas corpus* or the like.

4. Sub- sec. (2).

Provides for information as to the right to bail where the person is arrested on charge of a bailable offence. This provision thus codifies the principle which was laid down by judicial decisions under the *old* Code. [93] The right to bail for a bailable offence comes from the definition in s. 2(a),*ante.* What the present sub-section adds is that as a condition of making the arrest without warrant valid, the Police officer must inform the arrested person of his right to be released on bail. [94]

5. Effects of non-compliance with s. 50.—

The section being mandatory, noncompliance with the requirements of sub-sec. (1) would render the arrest and detention of the person illegal and the bond executed by him for bail would also be a nullity. [95] , [96]

6. Right to legal aid.—

In view of

Art. 39A of the Constitution , the Supreme Court has directed [1] that whenever a person is arrested by the Police and taken to the Police lock-up, the Police must immediately give intimation of the fact of such arrest to the nearest Legal Aid Committee and such Committee must take immediate steps for providing legal assistance to the arrested person at *State cost,* provided he is willing to accept such legal assistance. [2]

7. [3] Obligation of the person making arrest to inform about the arrest, etc. to a nominated person.—

(1) Every police officer or other person making any arrest under this Code shall forthwith give information regarding such arrest and place when the arrested person is being held to any of his friends, relatives or such other persons, as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The Police Officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) Any entry of the fact as to who has been by *Code of Criminal Procedure* (Amendment) Act, 2005 (w.e.f. 23.06.2006) informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before when such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.

8. Legislative change.—

Section 50A has been inserted in the Code by the *Code of Criminal Procedure* (Amendment) Act, 2005 which has come into force with effect from 23.06.2006.

Notes on Clause 7 by which this amendment is brought in the Code by the Amendment Bill reads as follows:

> "Clause 7—This clause seeks to insert a new Section 50A to require the police to give information about the arrest of the person as well as the place where he is being held to any one of his friends, relatives or such as other persons who may be nominated by him for giving such information etc."

9. New right to arrested person.—

Over and above the constitutional safeguard of *Article 22(1) of the Constitution* which is part of fundamental right of a person arrested and Section 50 of the Code re-iterating such fundamental right of a person arrested, additional safeguards have been provided in Section 50A. The following such safeguards:

(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and the place at which he is being held to any of his friends, relatives or any other persons as may be disclosed or nominated by him by the arrested person for the purpose of giving his information.

(2) In order to give such information to any person whose name is disclosed or who is nominated by the arrested person for the purpose of giving such information, the first duty of the person arresting a person is to enquire of the person arrested as to whom he intends to be informed of his arrest and the place of detention. On getting such information, the duty of the police officer or other person, arresting a person is to immediately inform such person of the arrest of the person and the place of his detention.

(3) It shall be the duty of the person so arresting to make an entry in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) The Magistrate before whom such person arrested has also the duty to be satisfied that the person arresting the person who has been brought before has complied with the sub-section (2) and sub-section (3) of Section 50A.

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84 Rep. of the Joint Committee, p. ix.

85 Quoted in *Govind v. State of W.B.,* (1975) Crlj 1249 (para 5) Cal.

86 *Ajit v. State of Assam,* (1976) Crlj 1303 (para 6) Gau.

87 *Madhu Limaye,* in re., AIR 1969 SC 1014 (1019) : (1969) 1 SCC 292 : 1969 Crlj 1440 .

88 Cf. *State of M.P. v. Shobharam,* AIR 1968 SC 1910 1917 .

89 *Ajit v. State of Assam,* (1976) Crlj 1303 (para 6) Gau.

90 *Natvarlal v. State of Gujarat,* (1983) Crlj 1124 (paras 51, 53) Guj.

91 *Pranab v. State of Bihar,* (1970) 3 SCC. 926.

92 *Sheela* *v.* *State* *of* *Maharastra,* AIR 1983 SC 378 [*LNIND 1983 SC 57*](para 4) : (1983) 2 SCC 96 [*LNIND 1983 SC 57*] : 1983 Crlj 642 .

93 Cf. *Daulat* , 14 All 45 (47).

94 *Sheela* *v.* *State* *of* *Maharashtra,* AIR 1983 SC 378 [*LNIND 1983 SC 57*](para 4) : (1983) 2 SCC 96 [*LNIND 1983 SC 57*] : 1983 Crlj 642 .

95 *Ajit* *v.* *State* *of* *Assam,* (1976) Crlj 1303 (para 6) Gau.

96 *Govind* *v.* *State* *of* *W.B.,* (1975) Crlj 1249 (para 9) Cal; *Ashok v. State,* 1985 Crlj 1750 MP .

1 *Sheela* *v.* *State* *of* *Maharashtra,* AIR 1983 S C 378 [*LNIND 1983 SC 57*](para 4) : (1983) 2 SCC 96 [*LNIND 1983 SC 57*] : 1983 Crlj 642 .

2 *Sheela* *v.* *State* *of* *Maharashtra,* AIR 1983 S C 378 [*LNIND 1983 SC 57*](para 4) : (1983) 2 SCC 96 [*LNIND 1983 SC 57*] : 1983 Crlj 642 .

3 Inserted by *Code of Criminal Procedure* (Amendment) Act, 2005 (w.e.f. 23-06-2006).

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CHAPTER V

ARREST OF PERSONS

[4] S. 50-A.

Obligation of person making arrest to inform about the arrest, etc., to a nominated person.

Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.]

1. Legislative changes.—

Section 50A has been inserted in the Code by the Cr.P.C (Amendment) Act, 2005 (25 of 2005) which has come into force with effect from 23-06-2006.

2. Scope and application.—

Section 50A requires the police to give information about the arrest of the person as well as the place when he is being held to anyone who may be nominated by him to sending such information. It further requires the

Magistrate concerned to satisfy himself about the fulfillment of the requirement of this section when the accused is produced before him in order to ensure about compliance of Section 50A of the Act which as a mandatory provision and any violation thereof can be a ground available to such arrested person to question correctness and *bona fides* of his arrest by aforesaid procedure. It is therefore imperative for the investigating agency not to apprehend a person and further for the Magistrate to satisfy himself that the investigating agency had proceeded with in accordance with law which would ensure the safety and liberty of a person from being abused and from preventing any unwarranted arrest. [5]

Sections 41-B, 50-A and 54 taken together lay down the procedure to regulate the arrest of a person and his legal rights at the time of arrest and thereafter. Section 41-B lays down the procedure of arrest of a person and the duties of officer making the arrest. Apart from preparing a memorandum of arrest, which shall be attested either by a member of the family of the arrested person or a respectable member of the locality, it is the duty of the police officer to inform the arrested person that he has a right to have a relative or a friend named by him to be informed of his arrest. Section 50 further confers the right to the arrested to have full particulars of the offence and other grounds of arrest. Further Section 50-A casts an obligation on the person making the arrest to inform about the arrest, the place where the arrested person is being held and the right of the arrested person to be brought to police station, to the person so nominated by the arrested person. Under s. 54 it is obligatory for the arresting authority to ensure that the arrested person is examined by a government doctor or a registered medical practitioner.

Thus, in a case, where a juvenile was tried as an adult and in course of the pendency of his appeal in the Supreme Court his juvenility could be detected, it was held that if the above mentioned provisions are followed, the probability of a juvenile being tried as an adult would be greatly minimized. [6]

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4 New Sections 50A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 7. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

5 *Ajeet Singh v. State of U.P.*, 2007 Crlj 170 (177) : (2006) 6 ALJ 110 [*LNIND 2006 ALL 61*](All) (FB) .

6 *Jitendra Singh v. State of U.P.*, 2013 (9) SCALE 18 [*LNIND 2013 SC 635*].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 51

Search of arrested person.

(1) Whenever a person is arrested by a police officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant and cannot legally be admitted to bail or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him and where any article is seized from the arrested person, a receipt showing the articles taken in possession by the police officer shall be given to such person.

(2) Whenever it is necessary to cause a female to be searched, the search shall be made by another female with strict regard to decency.

1. Scope of s. 51 : Search of arrested person.—

1. This section combines *old* ss. 51-52 with the following changes—

(a) Sub-sec. (1) corresponds to *old* s. 51, with the addition of the words ‘and where.... to such person’ at the end of the sub-section to ensure that the

seized articles are properly accounted for, where in course of search of the arrested person articles have been seized from him,—as recommended by the Joint Committee (Rep., p. ix).

(b) Sub- sec. (2) reproduces *old* s. 52, with the substitution of the word 'female' for the word 'woman'.

2. Power to search arrested person.—

1 A police officer making the arrest or the police officer to whom a person arrested by a private person is made over, may search the arrested person and place in custody all articles other than the wearing apparel found upon him in the following cases—

(a) When a person is arrested by police officer under a warrant which does not provide for the taking of bail or under a warrant which provides for taking of bail but the person arrested cannot furnish bail;

(b) When a person who is arrested without warrant or by a private person under a warrant cannot legally be admitted to bail or is unable to furnish bail.

2. Whenever it is necessary to cause a woman to be searched the search shall be made by another woman with strict regard to decency [s. 51(2)].

3. Where any articles are seized from the arrested person on search the Police officer must give the person a receipt for such articles, and place the articles in safe custody.

4. Though a private person has been given the power to arrest another person in certain cases, already mentioned, the power of search has not been conferred upon a private person. It is only the officer to whom a private person brings the arrested person, who is competent to make search, as stated above.

5. The present section empowers a Police officer to make a search of a person. This power can be exercised only after a person has been *arrested.* [7]

3. Analogous Provisions.—

Another provision empowering the Police to search a person [s. 100(3),*post*], where the officer executing a search warrant of a *place,* may search any *person* in or about such place if he is reasonably suspected of concealing about his person any article for which search should be made.

The power under s. 102 [s. 550] is a general power to seize any property suspected to be stolen, which may also be used by a Police officer after arresting the suspect under s. 41 and searching him under the instant provision. [8]

4. Object of the search and seizure.—

1. *Anything* found with the arrested person may be seized, excepting his necessary wearing apparel.

2. The object of the search is not merely to find incriminating articles, but also look for any other thing which may be useful for the investigation, *e.g.* , marks of injuries on his person. [9]

5. Formalities for search of person.—

1. The section does not prescribe any formalities for the search of a person, except when such person is a woman, which is dealt with in the sub sec. (2). Hence, the search cannot be challenged as illegal for want of respectable and independent witnesses. [10] The procedure under s. 100 [*old* s. 103] does not extend to a search under this section. [11]

2. But the Police Regulations require the presence of two witnesses and the same course has been suggested by the courts as proper, [12] apart from the Regulations.

3. Another condition is that the searching officer should allow the person of himself and the witnesses by the accused, before searching the person of the accused. [13] This rule is meant to avoid the possibility of implanting the object which was brought out by search. [14] In the absence of compliance with this rule, the search would be illegal and a conviction founded on such search would be liable to be set aside. [15]

6. Punishment for obstruction to search.—

Voluntary obstruction to a search made under this section is punishable under s. 186, I.P.C. [16]

7. Medical examination of the arrested person.—

See *new* s. 53, *post* .

8. Seizure and custody of offensive weapons.—

See s. 52 [*old* s. 53], *post.*

9. Procedure on seizure of other property.—

1. Articles other than offensive weapons are to be kept by the police in ‘safe custody’.

2. Section 457 [*old* s. 523] says that if the seizure of such property has been reported [17] to a Magistrate under any provisions of the Code but *not* produced during any inquiry or trial before any Criminal Court, such Magistrate shall make proper orders as regards delivery or disposal of such property. [18] Where such property is produced before any Criminal Court during inquiry or trial, it is that Court which will make proper orders under s s. 451-456,*post.*

3. Whenever any movable is seized from the arrested person, the Police officer must give him a receipt showing the articles seized.

10. Remedy for recovery of seized property.—

1. The remedy of the person from whom the articles have been seized is to apply to the Magistrate or the Court [under s s. 451-457], as may be appropriate.

2. Such order of the Magistrate or Court is final unless set aside in appeal or revision. Nevertheless, a civil suit would lie for recovery of the articles from the person to whom it may have been delivered by such order, on establishing the plaintiff's *title* to the articles. [19] Damages against the Police officer cannot be claimed in such suit. [20]

11. Sub- sec. (2) : Search of woman.—

The words 'with strict regard to decency' suggest that not only should the search of a woman be made by another woman, but that no male person should be present at such search. [21] But the Supreme Court has taken the view that where a male person says that he saw from some distance something being produced from the person of the woman searched, the search should not necessarily be illegal nor such evidence be inadmissible. [22]

12. Analogous Provision.—

See s. 100(3),*post,* providing for search of a person, in course of search of a premises under a search warrant.

13. Special provisions under the Code relating to women.—

1. Under the Code, a woman is entitled to special treatment as regards various matters :

   i. Search of place in occupation of woman [s. 47(2), Prov.].

   ii. Search of person of woman [s. 51(2)].

   iii. Examination of person of woman accused by medical practitioner [s. 53(2)].

   iv. Attendance of woman witness required by Police officer [s. 160(1), Prov.].

   v. Bail of woman suspect for non-cognizable offence [s. 437(1), Proviso 1].

2. The Court also insists upon the privacy of a woman in police custody. [23]

14. Constitutionality of search and seizure.—

It is now settled that the search of a person and the seizure of incriminating articles from his person or the use of such articles in evidence against him do not violate the guarantee against testimonial compulsion in Art.

20(3). [24]

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7 *Raman* *v.* *Emp.*, AIR 1942 All 424 ; *R.K. Dolansana v. State of Manipur*, 1971 Crlj 1756 .

8 Cf. *Kastrui Lal v. State of U.P.*, AIR 1965 SC 1039 [*LNIND 1964 SC 245*](para 8) : (1965) 2 Crimes 144 : (1965) 1 SCR 375 [*LNIND 1964 SC 245*].

9 *Bhondar*, AIR 1931 Cal 601 .

10 *Sundar* *v.* *State of U.P.*, AIR 1956 SC 411 415 : 1956 Crlj 801.

11 *Sundar* *v.* *State of U.P.*, AIR 1956 SC 411 415 : 1956 Crlj 801.

12 *Dwarka* *v.* *State*, AIR 1954 All 106 [*LNIND 1953 ALL 179*].

13 *State of Bihar v. Kapil*, AIR 1969 SC 53 [*LNIND 1968 SC 415*](para 10) : (1968) 3 SCR 810 [*LNIND 1968 SC 415*] : 1969 Crlj 279 .

14 *Rabindranath* *v.* *State of Orissa*, (1984) Crlj 1392 (para 10).

15 *Rabindranath* *v.* *State of Orissa*, (1984) Crlj 1392 (para 10).

16 *Thaver*, (1911) 12 Crlj 457 (Bom) .

17 A Single Judge of the Madras High Court [*Supdt* .v. *Sundar*, (1993) Crlj 956 (para 16)] has pointed out the lacuna that, in reproducing *old* s. 523(1) in *new* s. 457(1), the framers of the 1973 Code has inadvertently omitted those words which

made it obligatory or the Police officer to forthwith *report* to a Magistrate the factum of seizure. A Single Judge, of the Orissa High Court has, however, held that even where the Police Officer does not report, the party affected may report it to the Magistrate upon which the Magistrate may exercise his powers under s. 457(1). Apart from the legitimacy of such a construction in a criminal statute, it does not solve the problem of arbitrary act ion by the Police officer where the person aggrieved fails to report. It would be better to amend s. 457(1), restoring the words—'shall be forthwith reported'.

18 Cf. *Kastrui Lal v. State of U.P.,* AIR 1965 SC 1039 (para 8) : (1965) 2 Crimes 144 : (1965) 1 SCR 375 [*LNIND 1964 SC 245*].

19 *Premchand v. State of W.B.,* (1961) 66 CWN 470.

20 *Premchand v. State of W.B.,* (1961) 66 CWN 470.

21 *Motilal v. State,* (1958) 24 Cut LJ 445 (447).

22 *Kamalabai v. State of Maharashtra,* AIR 1962 SC 1189 [*LNIND 1962 SC 15*](para 3) : 1962 Supp (2) SCR 632 : (1962) 2 Crimes 273.

23 *Nawal v. State of H.P.,* (1985) Crlj 1729 (paras 10-11) HP (DB).

24 *State of Bombay v. Kathi Kau,* AIR 1961 SC 1808 [*LNIND 1961 SC 259*]: (1962) 3 SCR 10 [*LNIND 1961 SC 259*] : (1961) 2 Crimes 856. See *Casebook* , pp. 440-44, where the topic is elaborately discussed.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 52

Power to seize offensive weapons.

The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

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1. Scope of s. 52 : Seizure of offensive weapons.—

1. This section reproduces *old* s. 53, without any change.
2. This provision, like s. 51, is also consequential upon the arrest of a person under the preceding provisions. Where a person has been arrested, the person making such arrest is empowered to seize any offensive weapons found about his person, irrespective of the provision for search under s. 51. Hence, offensive weapons may also be seized by a private person who is authorised to make an arrest but not to search the person [s. 51].
3. The seized weapons are to be delivered by the arresting person, to the Court or officer before whom he is required by the Code to produce the person arrested [*e.g.* , under s s. 43(1), 56].
4. But there is no provision in the Code requiring that the seized article or weapon must be sealed on the spot, and the failure to do so cannot be challenged as a defect in investigation. [25]

2. Evidentiary value of seized weapons.—

If the evidence of the investigating officer as to recovery of the objects is convincing, the evidence is not to be rejected on the ground that seizure witnesses do not support the prosecution version. [26]

3. Procedure as to seizure.—

See under s. 51,*ante.*

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25 *Parmeshwar* *v.* *State,* (1963) 1 Crlj 342 (All) .

26 *Madan* *v.* *State* *of* *Rajasthan,* AIR 1978 SC 1531 (para 9).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 53

Examination of accused by medical practitioner at the request of police officer.

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of police officer not below the rank of sub-inspector, and for any person act ing in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

[27] **[*Explanation*.—In this section and in sections 53-A and 54,—**

(a) "examination" shall include the examination of blood, bloodstains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of *Sections 2 of the Indian Medical Council Act, 1956* (102 of 1956) and whose name has been entered in a State Medical Register.]

1. Legislative changes.—

The 'Explanation' as originally stood has been substituted by a new Explanation which comes into effect from 23.06.2006. Original explanation only defined the expression 'registered medical practitioner'.

It is new clause (b) of the Explanation.

In Clause (a) of Explanation 'examination' for the purpose of Sections 53, 53A and 54 has been explained very elaborately taking into account, the medical examination in respect of sexual offences and DNA test for determination of paternity. Such examination has to be made regard being had to be by use of modern scientific techniques including DNA and such other tests which the registered medical practitioner thinks fit and proper in the facts of each such examination.

2. Sections 53, 53A and 54.—

1. S. 53 and 54 have been incorporated in new Code. S. 53A has been inserted by the *Code of Criminal Procedure* (Amendment) Act, 2005 (w.e.f. 23.6.2006) specially for examinations of the accused in a rape case. S. 53 was recommended by commission[28] and s. 54 has been inserted by the Joint Committee [29] for analogous but different reasons.
2. S. 53 is intended to remove the lacuna in the *old* Code, by reason of which it was not possible to subject an arrested person to medical examination, without his consent. The new section makes this possible:

> "To facilitate effective investigation, provision has been made authorising an examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or the circumstances under which it was alleged to have been committed, there is reasonable ground for believing that an examination of the person will afford evidence". [30]

3. S. 54, on the other hand, has been inserted on the recommendation of the Joint Committee [31] as follows:

> "The Committee considers that a person who is arrested should be given the right to have his body examined by a medical officer when he is produced before a Magistrate or at any time when he is under custody, with a view to enabling him to establish that the offence with which he was charged was not committed by him or that he was subjected to physical injury. In the view of the Committee a person in custody is in need of this protection". [32]

4. Thus, while s. 53 is inculpatory and imposes an *obligation* upon the arrested person to be subject to medical investigation at the instance of the police, to help the investigation, s. 54 is exculpatory, and

confers upon the arrested person a *right* to have himself medically examined to establish his innocence, if necessary, or to show that he was subjected to injury while in police custody.

5. Sections 53A has been inserted in the Code by *Code of Criminal Procedure* (Amendment) Act, 2005 to provide for detailed medical examination of the accused in an offence of rape or attempt to rape.

3. Scope of s. 53: Medical examination of the accused at the instance of the Police.—

This section, which is *new,* was inserted at the recommendation of the Commission. [33]

I. Under the *old* Code, it was held that in the absence of any provision such as the present one, an accused person could be medically examined only with his consent. [34] The position became more controversial after the adoption of the *Constitution* because of Art 20(3), under which it was held by various High Courts that a medical examination of the accused person without his consent would amount to compulsion within the purview of Art 20(3), and hence, unconstitutional. This view was, however, repelled by the Supreme Court, in *Kathi Kalu's case.* [35]

II. The Supreme Court having held that there was nothing unconstitutional in holding the medical examination of the accused against his will, the commission [36] recommended that a provision such as the present one should be adopted for 'effective investigation'. Sub-section (1) of the present section, therefore, authorises such examination by a registered medical practitioner even if it is necessary to use *reasonable* force for that purpose.

4. Conditions for the use of this power.—

A person may be subjected to medical examination against his will, under the *new* section only if the following conditions exist:

(i) The person must have been arrested before such examination. [37]

(ii) The arrest must have been on a charge of having committed an offence of such nature and under such circumstances that there are reasonable grounds for believing that the examination of his person will afford evidence as to the commission, *e.g.* , in the case of arrest on a charge of murder or arson.

(iii) The request for such examination must come from a police officer not below the rank of sub-inspector.

(iv) The examination is made by a registered medical practitioner with the aid of any other person, act ing in good faith. [38]

(v) The examination must be such as is reasonably necessary to ascertain the facts which may afford evidence as to the commission of an offence, and no more force is used as is reasonably necessary for that purpose. [39]

(vi) Where the person to be examined is a female, the examination must be made only by or under the supervision of a female registered medical practitioner.

5.Medical examination.—

It will not be proper to give a restricted meaning to the word "examination" in s. 53. Taking of sample of blood for blood testing, examination by testing the blood, sputum, urine etc. or taking of sample of hair all come within medical examination. [40]

According to Calcutta and Bombay High Courts, taking of sample of blood during investigation is not permissible under Section 53 of the Code. [41]

Delhi High Court has held that the Court has power to direct the accused to give blood sample at any stage of enquiry or trial when the I.O. fails in his duty to take blood sample of the accused. [42]

6. Use of reasonable force.—

In the absence of a provision such as s. 53. it was held under the *old* Code that a medical examination of the arrested person against his will would constitute the offence of assault. [43] This will no longer be good law, provided the use of force does not exceed 'reasonable' limits. This expression would include the use of force to take the arrested person to a medical practitioner for the purpose of the examination and there to obtain from him samples of blood, etc. [44]

7. Constitutionality of s. 53.—

It is now settled that the protection of Art. 20(3) extends only to *testimonial* compulsion [45] and would not therefore invalidate s. 53 which relates to examination of the person. [46]

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27 Substituted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 8. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006. Prior to its substitution, the *Explanation* read as under : " *Explanation.*— In this section and in section 54, 'registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (*h*) of *Sections 2 of the Indian Medical Council Act, 1956* (102 of 1956), and whose name has been entered in a State Medical Register."

28 37th Rep., para 183; 41st Rep. of the Commission, Vol. I, para 5.1.

29 Rep. of the Joint Committee on the Bill of 1970, p. ix, on Cl. 54.

30 Notes on Clauses on the Bill of 1970, p. 241.

31 Rep. of the Joint Committee on the Bill of 1970, p. ix, on Cl. 54.

32 Rep. of the Joint Committee on the Bill of 1970, p. ix, on Cl. 54.

33 37th Rep., para 183; 41st Rep. of the Commission, Vol. I, para 5.1.

34 *Deoman,* AIR 1959 Bom 284 [LNIND 1958 BOM 128].

35 *State of Bombay v. Kathi Kalu,* AIR 1961 SC 1808 [LNIND 1961 SC 259]: (1962) 3 SCR 10 [LNIND 1961 SC 259] : (1961) 2 Crimes 856. See *Casebook,* pp. 440-44, where the topic is elaborately discussed.

36 37th Rep., para 183; 41st Rep. of the Commission, Vol. I, para 5.1.

37 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (paras 10, 13-16); *Jamshed v. State of U.P.,* (1976) Crlj 1680 (para 12) All; *Amit v. State of Maharashtra,* (1981) Crlj 125 (132) Bom (DB); *Neeraj v. State of U.P.,* (1993) Crlj 2266 (All) .

38 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (parars. 10, 13-16); *Jamshed v. State of U.P.,* (1976) Crlj 1680 (para 12) All; *Amit v. State of Maharashtra,* (1981) Crlj 125 (132) Bom (DB); *Neeraj v. State of U.P.,* (1993) Crlj 2266 (All) .

39 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (paras 10, 13-16), *Jamshed v. State of U.P.,* (1976) Crlj 1680 (para 12) All; *Amit v. State of Maharashtra,* (1981) Crlj 125 (132)Bom (DB) ; *Neeraj v. State of U.P.,* (1993) Crlj 2266 (All) .

40 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (paras 10, 13-16); *Jamshed v. State of U.P.,* (1976) Crlj 1680 (para 12) All; *Amit v. State of Maharashtra,* (1981) Crlj 125 (132) Bom (DB); *Neeraj v. State of U.P.,* (1993) Crlj 2266 (All) .

41 *Gobinda v. State,* 82 Cal WN 970; *State of Maharashtra v. Dnyanoba,* 1979 Crlj 277 .

42 *Sanjeev Nanda v. State,* 2007 Crlj 3786 Del .

43 *Deoman,* AIR 1959 Bom 284 [*LNIND 1958 BOM 128*].

44 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (paras 10, 13-16); *Jamshed v. State of U.P.,* (1976) Crlj 1680 (para 12) All; *Amit v. State of Maharashtra,* (1981) Crlj 125 (132) Bom (DB); *Neeraj v. State of U.P.,* (1993) Crlj 2266 (All) .

45 *State of Bombay v. Kathi Kalu,* AIR 1961 SC 1808 [*LNIND 1961 SC 259*]: (1962) 3 SCR 10 : (1961) 2 Crimes 856 . See *Casebook,* pp. 440-44, where the topic is elaborately discussed.

46 Cf. *Narayanaswami v. Yangaltana,* AIR 1975 AP 88 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

[47] S. 53-A. Examination of person accused of rape by medical practitioner

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person act ing in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the accused and of the person by whom he was brought;

(ii) the age of the accused;

(iii) marks of injury, if any, on the person of the accused;

(iv) the description of material taken from the person of the accused for DNA profiling; and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.]

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1. Legislative history.—

Section 53A has been inserted in the code by *Section 9 of the Code of Criminal Procedure* (Amendment) Act, 2005 (25 of 2005) with effect from 23.06.2006. This new section brought in the Code through the amendment of 2005, seeks to provide statutory sanction to the medical examination of a person accused of sexual offence. Often due to lack of foresight on the part of the Investigating Officer, conclusive scientific evidence, which could be obtained through forensic examination of the accused or the victim's clothes, is lost.

2. Notes on Clause 9 of the Code of Criminal Procedure (Amendment) Bill, 2005.—

Notes on clause 9 to the above Amendment Bill enacted as *Section 9 of the Code of Criminal Procedure* (Amendment) Act, 2005 (25 of 2005) reads as follows:

"Clause 9 seeks to insert a new Section 53A to provide for a detailed examination of a person accused of an offence of rape or an attempt to commit rape by the registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place when the offence has been committed by any other registered medical practitioner."

3. Scope.—

1. Section 53A comes into play where a person is arrested on a charge of committing rape or an attempt to commit rape.

2. There has to be reasonable ground for believing that an examination of the person of the accused will afford evidence as to the commission of such offence. It is for the investigating officer while holding investigation of the offence of rape or attempt to commit rape to have to be satisfied that there are reasonable grounds for believing that the medical examination of such an accused will afford evidence as to the commission of offence.

3. Request for medical examination of such an accused has to come from a police officer not below the rank of sub-inspector of police. Naturally, the said request has to come from the investigating officer of the offence who is ordinarily of a rank not below the rank of sub-inspector of police.

4. The request by such officer has to be made to any registered medical officer employed in a hospital run by the Government or by a local authority.

5. If the offence of rape or attempt to rape has been committed at a place within sixteen kilometers of which there is neither any Government hospital or any hospital run by the local authority, then the concerned police officer shall have to make such request for medical examination of an accused arrested on a charge of offence of rape or for an offence of attempt to commit rape.

6. As soon as such a request is made by the concerned police officer to make such an examination of the arrested person the registered medical officer has held the examination promptly.

7. If at the time of such examination the accused arrested for the above offence offers any resistance reasonable force may be used as is necessary to conduct such examination.

4. Examination and report by the registered medical practitioner.—

As soon as such request is made and the accused is brought before such registered medical practitioner for such medical examination, such registered medical practitioner shall have to conduct such examination without any delay.

On such examination of such an offence, the registered medical practitioner shall prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) the marks of injury, if any, on the person of the accused,

(iv) the description of the material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable details.

The exact time of commencement and completion of examination shall also be noted in the report.

5. Duty of the registered medical officer after report prepared.—

After preparation of such report as indicated in the above, it shall be the duty of the registered medical practitioner to forward the report to the investigating police officer without delay.

6. Duty of the investigating police officer.—

The investigating officer on receiving such report shall keep it in diary of the case and when he files a report to the Magistrate on conclusion of investigation under Section 173 of the Code, he shall forward such report as part of the documents which he is duty bound to submit along with his report as part of the documents referred to in Clause (a) of sub-section (5) of Section 173 of the Code.

7. A salutary provision.—

Section 53A inserted in the Code with effect from 23.06.2006 is a very salutary provision which will go a long way for assisting the investigating police officer in investigating an offence under Section 376 I.P.C. or under

Section 376/511 I.P.C.

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47 New Section 53A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 9. Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

[48] S. 54

Examination of arrested person by medical officer.

(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided **that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.**

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.]

1. Amendment Act of 2008.—

1. The Amendment Act of 2008 (5 of 2009) which has come into force with effect from 31-12-2009 has substituted Section 54 of the Act . Prior to this substitution,

(1) Section 54 as originally stood was renumbered as sub-section (1) thereof and sub-section (2) enjoined upon the Medical Officer examining the accused person to furnish a copy of such report to the accused or to the person nominated by him. This provision came into force with effect from 21-06-2006.

(2) However, sub-section (1) of Section 54 as substituted by the Amendment Act of 2008 (5 of 2009) makes it mandatory, the medical examination of any person arrested by police by a medical officer in the service of the Central or State Government and in case such medical officer is not available by a registered medical practitioner soon after the arrest is made. Proviso to sub-section (1) provides that when the arrested person is a female such examination of the body of the female accused shall be done by or under the supervision of a female medical officer, and in case a female medical officer is not available, by a female registered practitioner.

(3) Section (2) enjoins upon such medical officer or registered medical practitioner, as the case may be, so examining the arrested person to prepare the record of such examination, mentioning therein any injuries or marks of voidance upon the person arrested, and approximate times when such injuries or marks may have been inflicted.

(4) Sub-section (3) corresponds to sub-section (2) of Section 54 as inserted in original Section 54 of the Code by *Cr.P.C.* (Amendment) Act, 2005. It enjoins upon the medical officer or the registered medical practitioner to furnish the copy of such report to the arrested person or any person nominated by him to receive such copy of the report.

2. Scope of Amendment Act, 2008.—

The substituted s. 54 makes it obligatory for the State for medical examination of the person arrested soon after his arrest. Such examination is by the medical officer of the Central or State Government and in the absence of such medical officer, by a registered medical practitioner. Special safeguards have been given to the arrested female. She has to be examined by either female medical officer or by a female registered practitioner. It becomes obligatory for such medical officer or registered medical practitioner to record any injuries or marks of voidance upon the person so arrested and make a report thereof and a copy of such report has to be furnished either to the person arrested or to any person nominated by the arrested person to receive such copy on his behalf.

Under substituted Section 54, there is no question of any person arrested to seek for his medical examination and for the Magistrate or being satisfied above the genuineness of his request to direct his medical examination through a registered medical practitioner. If the Magistrate did not consider such examination necessary he could refuse such medical examination. This new provision is a mandatory provision for medical examination of any person arrested by the police which the State has to undertake whether person arrested desires it or not.

Following notes on the old provisions are retained as the same would guide the cases which arose prior to the enforcement of the substituted Section 54 with effect from 31-12-2009.

3. Scope of s. 54: Medical examination at the request of the arrested person .—

1. This section is *new,* having been inserted by the Joint Select Committee. As has been already explained, this section confers a right upon the arrested person and for his protection.

(i) The person must have been arrested, whether on a charge of committing an offence, or otherwise, *e.g.* , on suspicion.

(ii) The right to make the request is exercised by *the arrested person* either at the time when he is produced before a Magistrate or at any time during the period of his detention in custody.

(iii) The right is to be exercised by making a request to a Magistrate to the effect that an examination of his body will afford evidence which will (a) disprove the commission of any offence by him or (b) establish the commission by any other person of any offence against his body.

(iv) The Magistrate must accede to this request unless he considers the request to have been made for the purpose of vexation or delay or defeating the ends of justice.

(v) The medical examination is to be made by a registered medical practitioner. [49]

4. Magistrate's Duty .—

1. Section 54 confers a *right* upon the arrested person to have his body examined by a medical practitioner so that (a) he may prove by such examination that he is not guilty of the offence alleged against him; or (b) he may establish that some other person has committed an offence against his body, say, at the time of arrest or while in police custody. [50]
2. It is the duty of the Magistrate to inform the arrested person about this right, so that he may utilise this right in case he has any complaint of torture or maltreatment in the Police lock-up. [51] It is also the duty of the Magistrate to inquire from him whether he has any such complaint against the Police. [52]

   So, the accused has the right to inform the Court about torture or assault by police during custody. [53]

3. Under s. 54, the power to order medical examination belongs to the Magistrate, while under s. 53, it belongs to a Police officer. [54]

5. Analogous provision.—

The right conferred by this provision is analogous to the right under s. 315 [*old* s. 342A] which an accused person has to offer himself as a witness for the defence, which was introduced for the first time only in 1955. No question of compulsion arises under these provisions because the testimony is offered by the accused at his own instance.

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48 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 8 (w.e.f. 31-12-2009). Prior to

substitution, S. 54 stood as under:— " S. 54. Examination of arrested person by medical practitioner at the request of the arrested person.—[(1)] When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice. $[(2) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the registered medical practitioner to the arrested person or the person nominated by such arrested person.]" STATE AMENDMENT Uttar Pradesh.—*The following amendments were made by U.P. Act 1 of 1984, S. 7 (w.e.f. 1-5-1984).* (1) S. 54.—In Section 54 the following sentence inserted at end namely— "The registered medical practitioner shall forthwith furnish to the arrested person a copy of the report of such examination free of cost." (2) S. 54-A.—After Sec. 54 insert the following section :— "54-A. Test identification of the accused.—When a person is arrested on a charge of committing an offence and his test identification by any witness is considered necessary by any Court having jurisdiction, it shall be lawful for an Executive Magistrate act ing at the instance of such Court, to hold test identification of the person arrested." S. 54 re-numbered as sub-sec. (1) of that section by the *CrPC* (Amend.) Act, 2005 (25 of 2005), S. 10 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006. $ Sub-section (2) inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 10 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

49 *Ananth v. State of A.P.,* AIR 1977 AP 1797 (1976) Crlj 1680 (1981) Crlj 125 (1993) Crlj 2266 (All.) . (paras 10 13-16); *Jamshed v. State of U.P.,* (para 12) All; *Amit v. State of Maharashtra, (132)* Bom (DB); *Neeraj v. State of U.P.,*

50 *Sheela v. State of Maharashtra* AIR 1983 SC 378 [*LNIND 1983 SC 57*](para 4) (1983) 2 SCC 96 [*LNIND 1983 SC 57*] 1983 Crlj 642 .

51 *Sheela v. State of Maharashtra* AIR 1983 SC 378 [*LNIND 1983 SC 57*](para 4) (1983) 2 SCC 96 [*LNIND 1983 SC 57*] 1983 Crlj 642 .

52 *Sheela v. State of Maharashtra* AIR 1983 SC 378 [*LNIND 1983 SC 57*](para 4) (1983) 2 SCC 96 [*LNIND 1983 SC 57*] 1983 Crlj 642 .

53 *Shakila (Abdul Gafar Khan) v. Vasant Rahunath Dhoble,* (2003) 7 SCC 749 [*LNIND 2003 SC 653*] 2003 SCC (Cri) 1918 [*LNIND 2003 SC 653*] AIR 2003 SC 4567 [*LNIND 2003 SC 653*]: 2003 Crlj 4548 .

54 *State of Maharastra v. Dyanoba,* (1979) Cr LJ 277 (paras 7-8) Bom.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

[55] S. 54-A.

Identification of person arrested

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit:]

[56] [*Provided* that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with:

***Provided further* that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed].**

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1. Legislative history.—

Sections 54A is the new section inserted in the Code by the *Code of Criminal Procedure* (Amendment) Act, 2005 (25 of 2005) with effect from 23.06.2006. This empowers the Court to direct specifically the holding of identification of the arrested person at the request of the prosecution.

This section has been amended *vide* the *Criminal Law (Amendment) Act, 2013* which has inserted two provisos to

the section. The first proviso provides that if the person identifying the person arrested is mentally or physically disabled the process of identification shall take place under the supervision of a Judicial Magistrate. The second proviso further provides that if the person identifying the person arrested is mentally or physically disabled, the identification process shall be videographed.

2. Identification of the person arrested in doubtful cases.—

During investigation, question may arise before the investigating police officer as to whether the arrested person is the real culprit or not. This doubtful identification may cause great difficulty during investigation, enquiry or trial. That is why a new power has been conferred upon the Court, having jurisdiction to cause an enquiry as to the proper identification of the person arrested.

3. At the request of officer-in-charge of the Police Station.—

The Court having jurisdiction shall hold such enquiry, only when the officer-in-charge of police station makes a request to such Court to cause such enquiry into the proper identification of the person arrested.

4. Mode of enquiry.—

The Court having jurisdiction shall direct the person arrested to submit himself to identification by any person or persons in such manner as the Court may think fit. For the purposes of such identification of the person arrested the Court may call upon the arrested accused either to name any person who knows him and the Court can summon such person for the identification of the person arrested. The officer-incharge of police station may produce any person in the locality who knows the person arrested to identify him.

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55 New S. 54A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 11 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

56 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 12 (w.e.f. 3-2-2013).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 55

Procedure when police officer deputes subordinates to arrest without warrant.

(1) When any officer in charge of a police station or any police officer making an investigation under Chapter XII requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made and the officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) Nothing in sub-section (1) shall affect the power of a police officer to arrest a person under Section 41.

1. Scope of s. 55 : Deputation by superior police officer of subordinate to arrest without warrant .—

1. This section corresponds to *old* s. 57, with verbal changes in sub-sec. (1) and the substitution of sub- sec. (2) by a *new* provision which clarifies the relation between the present section and s. 41 (1)(i) [*old* s. 54, Ninthly], the controversy regarding which [57] has already been explained (see *ante*).

2. Though the object of the power to arrest without warrant is to provide for cases where the obtaining of a warrant would cause unnecessary delay or defeat the arrest, [58] the power conferred by this section is not controlled by the power of Magistrate to issue a warrant, and can, therefore, be exercised even where a warrant has already been issued by a Magistrate. [59] Of course, the position would be different where the request of the police to issue a warrant has been rejected by the Magistrate, directing that a summons should issue in the particular case. [60]

2. Requisites of valid arrest under sub-sec. (1).—

The arrest of a person by an officer on the requisition of another Police officer shall be valid under this provision only if the following conditions are present :

(i) The officer who issues the requisition must be either the officer in charge of a police station or a police officer making an investigation under chap. XII.

(ii) The officer to whom the requisition is issued must be an officer subordinate to the issuing Police officer, though the former need not be a police officer, *e.g.* , a *chowkidar.* [61]

(iii) Unless the arrest is to be made in the presence of the requisitioning [62] officer, there must be an order in writing. [63] A mere endorsement on the back of the warrant mentioning the name of the subordinate officer would not comply with this requirement. [64]

(iv) The written order must be delivered to the subordinate officer; but his name need not be specified in the order. [65] The written order is the authority to the subordinate police officer to make an arrest which the superior police officer, if present, would himself make on his own responsibility. [66] But he must not be a private person. A private person's power to arrest without warrant is provided in s. 43, he cannot be authorised in that behalf by a Police officer.

(v) The written order must specify—

(a) The name of the person to be arrested;

(b) The offences or other cause for which he is arrested (without warrant), *e.g.* , to which category of persons specified in s. 109 or 110, he belongs [67] [see s. 41(2)— *old* s. 55].

(vi) The person to be arrested belongs to a category of persons who may be lawfully arrested without warrant.

(vii) The requisitioned officer must, before making the arrest, notify to the person to be arrested, the substance of the requisition order, [68] and, if so required [69] by such person, show him the order.

It is to be noted that the order need not be shown where the subordinate police officer purports to act on his own authority under s. 41. [70] In fact, where a police officer is deputed for the purpose of investigation (not for making any arrest) and, in course of that investigation, he makes an arrest, under s. 41 the legality of the arrest cannot be challenged on the ground that he had no written order with him, under s. 55. [71]

3. Effect of non-compliance.—

1. If any of the foregoing requirements of s. 55(I) are not present or complied with, the arrest will be illegal, so that obstruction or resistance thereto will not be an offence. [72]

2. But, in view of sub- sec. (2),*below,* non-compliance with the requirements of sub-sec. (1) of this section will not render invalid an arrest without warrant by a subordinate Police officer, if he is competent to arrest without warrant on his independent authority, under s. 41 [*old* s. 54]. He may also be asked by a superior Police officer, under s. 55(1) [*old* under sub- sec. (2),*below*]. [73]

3. Even where the requirements of s. 55(1) are not complied with, if the subordinate officer was act ing *bona fide* under colour of his office, causing hurt to him would be punishable under s. 323, I.P.C. [74]

4. Sub-sec. (2) : S. 55(1) does not control s. 41. —

Any Police officer has the power to arrest without warrant, on his own initiative, a person falling under any of the categories specified in s. 41(1) [*old* s. 54]. He may also be asked by a superior Police officer, under s. 55(1) [*old* s. 56]; to arrest a person without warrant. Where, therefore, he is ordered by a superior officer under s. 55(1), but that order does not comply with the requirements of s. 55(1) and is, accordingly, invalid, the question arises whether in such a case, the subordinate police officer can rely on his own power under s. 41(1), so that arrest made cannot be resisted as unlawful.

Under the *old* Code, there was a controversy on the point. [75] , [76]

New Code. This present sub-section was inserted in s. 55 [*old* s. 56] to obviate the above uncertainty or controversy. The effect of this *new* provision will be as follows:

(a) Where the subordinate officer has independent information as to a person being concerned in any cognizable offence, he may arrest such person on his own initiative [s. 41(1)(a)], irrespective of the fact that he has asked to make such arrest by another Police officer which is defective because of non-compliance with s. 55(1). [77]

(b) At the same time, it is legitimate to conclude that s. 55(2) can be invoked only where the subordinate Police officer, in making the arrest *purported to act* on his independent power under some clause of s. 41(1). [78] Where he *professes* to arrest under a written order of a superior officer, and fails to produce that order, when asked to do so, he cannot fall back on the provision in s. 41(1), claiming that such order was oral, or that he had arrested the person on his own authority, for otherwise, s. 55(1) would be rendered nugatory or redundant [79] [see *ante*].

If, however, the Police officer was deputed to make *investigation* and in course of that investigation he arrests the accused on receiving information that he was concerned in a cognizable offence, the subordinate Police officer makes the arrest on his own initiative under s. 41(1) and not under any professed authority of a superior officer to make the arrest. [80] In such a case, the arrest would be valid even though there is no order under s.

55(1). [81] , [82]

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57 41st Rep. of the Commission, parars. 5.2,4.

58 *Bir Bhadra v. D.M.,* AIR 1959 All 384 [*LNIND 1958 ALL 170*](para 15).

59 *Emp. v. Dalip,* (1896) 18 All 246 (248).

60 *Emp. v. Dalip,* (1896) 18 All 246 (248).

61 *Bahubal v. Emp.,* 10 CWN 287.

62 *Rameshwar v. Emp.,* AIR 1934 All 879 .

63 *Supdt. v. Sona Mia,* AIR 1948 Cal 95 ; Cf. *Bir Bhadra v. D.M.,* AIR 1959 All 384 [*LNIND 1958 ALL 170*](para 15).

64 *Emp. v. Dalip,* (1896) 18 All 246 (248).

65 *Rameshwar v. Emp.,* AIR 1934 All 879 .

66 *Basant,* (1899) 27 Cal 320 .

67 *Hardayal,* AIR 1926 Sind 190 .

68 *Bir Bhadra v. D.M.,* AIR 1959 All 384 [*LNIND 1958 ALL 170*](para 15).

69 *State v. Indra,* AIR 1960 Or 23 25 .

70 *Thangapandian* , in re., AIR 1943 Mad 280 281 .

71 *Gandharba* *v.* *Aparti,* AIR 1960 Or 33 35 .

72 *Gulabi* , AIR 1940 Pat 361 ; *Supdt.* v. *Sona Mia,* AIR 1948 Cal 95 96 .

73 *Kishun* *v.* *Emp.,* AIR 1926 Pat 424 425 .

74 *Appaswami,* AIR 1924 Mad 555 .

75 *Gandharba* *v.* *Aparti,* AIR 1960 Or 33 35 .

76 *Appaswami,* AIR 1924 Mad 555 .

77 *Sulaiman* v. S *tate of Kerala,* AIR 1964 Ker 185 (para 9) DB.

78 *Sulaiman* *v.* *State of Kerala,* AIR 1964 Ker 185 (para 9) DB.

79 Cf. *State* *v.* *Ramchandra,* AIR 1955 All 438 [LNIND 2014 ALL 271].

80 *Gandharba* *v.* *Aparti,* AIR 1960 Or 33 35 .

81 *Gandharba* *v.* *Aparti,* AIR 1960 Or 33 35 .

82 *Sulaiman* *v.* *State of Kerala,* AIR 1964 Ker 185 (para 9) DB.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

[83] S. 55-A.

Health and safety of arrested person

It shall be the duty of the person having the custody of an accused to take reason able care of the health and safety of the accused.]

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1. Legislative change. —

Section 55A has been inserted in the Code by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009. Under the new s. 55A, it has been made obligatory for the person having the custody of the accused to take reasonable care of the health and safety of the accused (*vide* Notes on Clauses).

This will obviate the danger of the accused being subjected to torture in police custody which in the past resulted in custodial death of the accused.

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83 New S. 55A inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 9 (w.e.f. 31-12-2009).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 56

Person arrested to be taken before Magistrate or officer in charge of police station.

A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station.

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1. Scope of s. 56.—

This section corresponds to *old* s. 60.

2. S s. 56-57 and Art. 22(2) of the Constitution.—

1. The safeguard in s s. 56-57 was embodied by the makers of our *Constitution* in Art. 22(2), in order to guarantee it against legislative encroachment, with liberalisation on important points, [84] firstly, that while s. 56 does not specify any definite time-limit for the production before a Magistrate, beyond providing that it must be 'without unnecessary delay', s. 57 and Art. 22(2) lay down the definite period of 24 hours plus the duration of the unnecessary journey, for this purpose [see, further, under s. 167]. [85]

   In view of that provision, little scope is left for interpreting what is meant by 'unnecessary delay', in s. 56, and the Court has to see whether the constitutional mandate has been complied with. If 24 hours have passed without compliance with the requirement of the clause, the arrested person is entitled to be released forthwith. [86]

Of course, there may be cases, where detention for less than 24 hours, without a reasonable justification, may be illegal, for contravention of s. 56. [87]

2. The *second* important point of advance of the constitutional provision is that while s. 56 is confined to cases of arrest without warrant, Art. 22(2) extends the right to persons arrested in pursuance of a warrant as well. [88] Under the Code, the case of a person arrested under warrant is dealt with in s. 76 [*old* s. 81], the *new* proviso to which has now incorporated the 24 hours-limit.

3. The *third* point of difference is that s. 56 is complied with if, instead of producing the arrested person before a Magistrate, he is, in the first instance, produced before the officer in charge of a police station. But even in such a case, the arrested person must be produced before a Judicial Magistrate [s. 3(1)(a)], within the period of 24 hours, as required by s. 57. [89]

4. The *fourth* point of difference is that Art. 22(2) would be satisfied if the arrested person is produced before the 'nearest Magistrate'; s. 56 requires production before a Magistrate 'having jurisdiction in the case', which means the Magistrate who has jurisdiction to try the offence on charge of which the person has been arrested. [90]

Of course, even under Art. 22(2), it has been held that the words 'court of the Magistrate' refer to a Magistrate vested with judicial powers, [91] though he may not necessarily be the Magistrate empowered to try the case.

5. It is clear from s s. 56-57 that these provisions do not apply to an arrest on conviction. [92] The same view has been taken under *Art. 22(2) of the Constitution* . [93]

6. Neither provision shall apply to cases of arrest under the law of preventive detention. [94]

3. ' A Police officer'.—

1. In the present section it means a police officer other than the officer in charge of a police station, for, there is no sense in requiring an officer in charge of a police station to take the arrested person to 'the officer in charge of a police station'. As regards an officer in charge of a police station, the relevant provisions are—

(i) S. 436 [*old* s. 496], which makes it obligatory upon an officer in charge to release the arrested person on bail where such person is accused of a *bailable* offence.

(ii) Even where the offence is *non-bailable,* he has a discretionary power to grant bail, under s. 437 [*old* s. 497].

(iii) Whether bail has been granted or not, the officer in charge must report to the District Magistrate (or S.D.M.) All cases of persons arrested without warrant within the limits of his station [s. 58,— *old* s. 62].

2. The present section makes it obligatory upon a police officer, other than an officer in charge of a police station to take or send the arrested upon either before the officer in charge of a police station or before a Magistrate having jurisdiction in the case.

4. 'Subject to the provisions....as to bail'.—

1. An officer in charge of a police station is empowered to grant bail, under s., 436(1) [*old* s. 496], which provides that when any person is arrested without warrant on a charge of a *bailable* offence, by an officer in charge of a police station himself, or he is arrested without warrant by some other police officer and brought before him (under s. 56), the officer in charge *shall* release the arrested person on bail when such person is prepared to give bail. [1] There is no discretion to refuse bail in such cases, [2] or to fetter it with any condition. [3]

2. Where, however, the person has been arrested on charge of a *non-bailable offence* by the officer in charge, he has the *power* [4] to grant bail, except in cases where there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life [s. 437(1),*post*].

3. As to the power of a police officer, other than an officer in charge of a police station, the relevant provisions are in s s. 42(2) and 43(3).

   Under these provisions, where a person is arrested without warrant by a police officer on charge of having committed a non-cognizable offence, or by a private person for a non-bailable and cognizable offence, in either case, the police officer may release the arrested person on bail when he gives his true name and residence.

4. When the police officers of the State of A.P. arrested the petitioner Nos. 2 to 5 for wilfully obstructing them in apprehending the petitioner No. 1 at a place within the State of U.P., it is the incumbent duty of such police officers to produce them to the Court of nearest Magistrate in U.P. and when without doing so, they brought them to the State of Andhra Pradesh, they have contravened the provisions of Section 56 of the Code. [5]

5. 'A Magistrate having jurisdiction in the case'.—

A. Under the *old* Code, it was opined [6] that under s s. 56-57, the bail may be granted, where bail has not already been granted by the Police, only by a Magistrate having jurisdiction to try the case, and not by any Magistrate, as follows from the words 'Magistrate having jurisdiction' in s. 56 and the words 'special order of a Magistrate under s. 167' in s. 57. [7]

B. But under the *new* Code it has been held by a Division Bench of the Calcutta High Court, [8] upon a consideration of the new provisions introduced by the Code of 1973, that the expression 'having jurisdiction' in this context may not confine its application to a Magistrate having jurisdiction to try the case, who has got the power also to cancel the bail, but extends to any Magistrate before the Police officer may properly produce the arrested person. [9]

   The reasons assigned are [10] —

(i) The words 'subject to ... as to bail' make the provisions of Chap. XXXIII of the *new* Code applicable to cases under s. 56 and s. 436(1) of that Chapter refers to 'a Court'.

(ii) S. 56 should be read with *Art. 22(2) of the Constitution* which enjoins a Police officer to produce the arrested person before 'the nearest Magistrate'.

(iii) It is possible to read the words 'having jurisdiction in s. 56 as referring to the Magistrate having jurisdiction over the 'place of arrest'. [11]

6. Effects of contravention of s. 56.—

1. Any contravention of s. 56 makes the detention of the person by the police illegal, *e.g.* ,—

(a) If a Police officer does not send the arrested person to a Magistrate or the officer in charge of a police station for an hour more than is reasonably necessary, even though it may be short of 24 hours. [12]

(b) If, instead of sending him to the police station, he keeps the arrested person at any place of his choice. [13]

(c) Where the police officer produces the arrested person before a Magistrate but does not comply with the order of the Magistrate to send the person to the judicial lock-up. [14]

2. If the Police officer negligently suffers the person in his custody to escape, he would be punishable under s. 223, I.P.C. [15]

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84 Quoted in *Govind v. State of W.B.,* (1975) Crlj 1249 (para 5) Cal.

85 *Gouri v. State of Bihar,* AIR 1972 SC 311 (para 11).

86 *State of .U.P. v. Abdul Samad,* AIR 1962 SC 1506 [LNIND 1962 SC 120]]: 1962 Supp (3) SCR 915 : (1962) 2 Crimes 499 .

87 *State v. Ram Autar,* AIR 1955 All 138 [LNIND 1954 ALL 181]]; *Rajani v. State of Orissa,* (1975) Crlj 83 (Or) .

88 *Ganapati* *v.* *Nafisul,*
AIR 1954 SC 637 : 1954 Crlj 1656.

89 *Hariharanand* v *Jailor,*
AIR 1954 All 355 [
LNIND 1953 ALL 229].

90 *Azimuddin* *v.* *State,*
AIR 1959 MP 147 [
LNIND 1958 MP 45](para 3).

91 *Hariharanand* v *Jailor,*
AIR 1954 All 355 [
LNIND 1953 ALL 229].

92 *State* *v.* *Santokh* *Singh,*
AIR 1956 MB 130 ; *Bhagwan v. State,*
AIR 1955 Pepsu 33 .

93 *State* *of* *Punjab* *v.* *Ajaib,*
(1953) SCR 254 [
LNIND 1952 SC 68] :
AIR 1953 SC 10 [
LNIND 1952 SC 68]:
1953 Crlj 180 .

94 *Ratan* *v.* *State* *of* *Bihar,*
AIR 1950 Pat 332 ; *Hans Muller v. Supdt.,*
(1955) 1 SCR 1284 [
LNIND 1955 SC 14] :
AIR 1955 SC 367 [
LNIND 1955 SC 14]:
1955 Crlj 876 .

1 *Raghunandan,*
(1904) 32 Cal 80 (83).

2 *Raghunandan,*
(1904) 32 Cal 80 (83).

3 *Kata,* in re.,
AIR 1942 Mad 740 [
LNIND 1942 MAD 291].

4 *Nagendra,*
(1923) 51 Cal 402 (417).

5 *Kurra* *Rajaiah* *v.* *Government* *of* *A.P.,*
2007 Crlj 2031 AP .

6 *Gulam* *v.* *State,* [AIR 1959 MP 147 149 *LNIND 1958 MP 45*].

7 *Gulam* *v.* *State,* [AIR 1959 MP 147 149 *LNIND 1958 MP 45*].

8 Quoted in *Govind* *v.* *State* *of* *W.B.,* (1975) Crlj 1249 (para 5) Cal.

9 Quoted in *Govind* *v.* *State* *of* *W.B.,* (1975) Crlj 1249 (para 5) Cal.

10 Quoted in *Govind* *v.* *State* *of* *W.B.,* (1975) Crlj 1249 (para 5) Cal.

11 Quoted in *Govind* *v.* *State* *of* *W.B.,* (1975) Crlj 1249 (para 5) Cal.

12 *State* *v.* *Ram* *Autar,* [AIR 1955 All 138 *LNIND 1954 ALL 181*]; *Rajani v. State of Orissa,* (1975) Crlj 83 (Or) .

13 *R.* *v.* *Behari,* (1867) 7 WR 3 .

14 *Bhagwan* *v.* *State* *of* *Pepsu,* AIR 1955 Pepsu 33 .

15 *Ashraf,* (1883) 6 All 129 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 57

Person arrested not to be detained more than twenty-four hours.

No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

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1. Scope of s. 57 : Detention of person arrested by Policy officer and powers of Magistrate before whom he is produced.—

1. This section corresponds of *old* s. 61, without any change. But changes have been introduced in s. 167*(post)* which is to be read as supplementary to the provisions of s. 57. [16]

2. Section 57 provides that no person shall be detained in custody by a policy officer without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under s. 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. If, therefore, the police want a longer period for the purpose of investigation, they have to follow the procedure prescribed in this behalf by s. 167,*post.*

3. The requirement as to production of the person arrested within 24 hours before the nearest Judicial Magistrate should be scrupulously followed. [17]

The Police has, therefore, no jurisdiction to detain the accused for more than 24 hours. However, when the explanation has been given for the delay in production before the Magistrate and unconditional apology has been tendered, the Magistrate may accept it and remand the accused custody under Section 167 of the Code. [18]

4. Section 167 provides that when any person is arrested and detained in custody and it appears that the investigation cannot be completed within a period of twenty-four hours fixed by s. 57 and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police station or the police officer making the investigation shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary relating to the accused and shall at the same time forward the accused to such Magistrate. The Magistrate to whom the accused person is thus forwarded may, whether he has or has not jurisdiction to try the case, from time to time authorise detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days on the whole, unless he is satisfied that there are adequate grounds, in which case, he may authorise detention up to 60 days, in the custody of a person other than the Police [see *new* Proviso to s. 167,*post*].

5. If the Magistrate before whom the arrested person is produced has no jurisdiction to try the case, he must also order the accused to be forwarded to Magistrate having jurisdiction.

2. Object of s. 57.—

This section has the same object as *Art 22(2) of the Constitution* [19] (which extends the right also to persons arrested in pursuance of a warrant), [20] *viz.*

(a) It ensures to the arrested person the immediate application of a judicial mind to the legality of the arrest and the regularity of the procedure adopted. [21]

(b) It prevents the arrest and detention of a person with a view to extract confessions or to compel him to give information. [22]

(c) It prevents police stations to be used as a prison. [23]

3. Police officer.—

Sections 57 and 167 have no application to detention under the Army or *Air Force Act* which cannot be said to be the custody of a 'Police officer'.[24]

4. 'Detain in custody'.—

1. This section is not attracted unless there is an 'arrest' and thereafter the person arrested is kept in police custody. Hence, there is no question of production before a Magistrate where the person, alleged to have been detained, is an under-trial prisoner or a convict in jail. [25] A person in jail would be governed by the provisions of the *Prisons Act* and the *Prisoners Act* .

2. On the other hand, the section would be attracted not only where the person is arrested by a police officer but also by some other person, without warrant, or he is compelled to attend the police station, [26] and thereafter detained there. [27]

5. 'Special order of a Magistrate under s. 167'.—

1. Though in the case of an under-trial prisoner, a remand order under s. 167 may, in special circumstances, be passed by a Magistrate, without insisting on the production of the accused before him, *e.g.* , where he is ill, [28] or he refuses to appear in Court for the purpose of remand, [29] production of the arrested person before the Magistrate is essential for obtaining a remand order, in case of an arrest without warrant, where detention for more than 24 hours in the police custody may be necessary for the purpose of completion of the investigation. [30]

   Under s. 167(2), if the Magistrate before whom the arrested person is produced has *no* jurisdiction to try the case himself, he can remand him (i.e., authorise his detention) only for a period of 15 days. Any detention beyond 15 days shall, in this case be illegal and the accused shall be entitled to be released thereafter, unless that Magistrate, forwards the accused to a Magistrate having such jurisdiction. [31] The period of 15 days is to be computed from the date when the accused is produced before the Magistrate, under s. 167. [32] Where the same person is arrested under different provisions of law on different dates, each arrest should be treated as an independent transaction for this purpose. A remand order would be illegal if the Magistrate passes it mechanically, without applying his mind. [33]

2. 'The Magistrate' in Proviso (a) means the Magistrate having jurisdiction to try the case. [34]

3. If the Magistrate before whom the accused is produced has jurisdiction to try the case, [35] he can after the expiry of the period of 15 days authorised by s. 167(2), order further remand for a period of 15 days by each order under s. 309(2), Proviso [*old* s. 344], not exceeding a total period of 60 days,—even if the investigation be still pending. [36] But an order of remand under s. 309 shall only be to 'jail custody' and not 'police custody'—the object being that once an inquiry or trial begins it is not proper to let the accused remain under police influence. [37] , [38]

4. An order of a Magistrate authorising detention by the Police for an *indefinite* period would be illegal. [39]

6. 'Exclusive of the time necessary for the journey...'.—

The expression is to be reasonably construed, having regard to the physical possibilities in a particular case, *e.g.* , where the arrested person is taken to the local Magistrate, but he is not available and the Police have to travel to a distant place in order to reach another Magistrate. [40]

7. Legality of detention beyond 24 hours. —

1. As detention by the Police, without orders of a Magistrate under s. 167, crosses 24 hours, the detention becomes illegal, and the arrested person is entitled to be released forthwith. [41]

2. If however, the arrested person is produced before a Magistrate after the expiry of 24 hours, and the Magistrate nevertheless passes an order of remand, the earlier illegal detention becomes legalised by

such remand order and the judicial custody cannot be challenged on the ground that detention at an earlier point of time had been illegal. [42]

3. Detention by the Police ceases from the date when the person is produced before the Magistrate and an order of remand is obtained. [43]

4. So, it is clear that the production of the accused before the Magistrate after 24 hours of arrest does not render the custody illegal so as to entitle him to be set at large on the ground of alleged illegality of arrest and the order remanding him to judicial custody is no error of law. [44]

8. Punishment for violation of s. 57.—

1. A Police Officer who fails to produce an arrested person before a Magistrate within 24 hours, as required by this section, would be liable for wrongful confinement, under s. 340, I.P.C., [45] or Sections 203, Bombay *Police Act* . [46]

9. S s. 57 and 167.—

These two sections have to be read as supplementary to each other. Their object is to see that a person arrested by the Police is brought before a Magistrate with the least possible delay, in order to enable the latter to judge if such person has to be further kept in custody and also to enable the person to make any representation he likes, to the Magistrate. These sections are intended to prevent the possible abuse by the Police of their powers, and also to provide for expeditious investigation and to enable the person arrested to be released on bail, if the investigation cannot be completed with the period specified in s. 167. [47]

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16 *P.P.* *v.* *Satyanarayana,* (1986) Crlj 1134 (para 13) AP.

17 *Khatri* *(III)* *v.* *State* *of* *Bihar,* AIR 1981 SC 928 [*LNIND 1980 SC 473*]: (1981) 1 SCC 635 [*LNIND 1982 SC 16*].

18 *Kultez* *Singh* *v.* *C.I.* *of* *Police,* 1992 Crlj 1172 Kant DB .

19 See Author's *Shorter Constitution of India* , Latest Edition.

20 *State* *of* *U.P.* *v.* *Lakshmi,* AIR 1983 SC 439 [*LNIND 1983 SC 82*](para 4) :

(1983) 2 SCC 372 [
LNIND 1983 SC 82] :
1983 Crlj 839 .

21 *State of Punjab v. Ajaib,*
(1953) SCR 254 [
LNIND 1952 SC 68] :
AIR 1953 SC 10 [
LNIND 1952 SC 68]:
1953 Crlj 180 .

22 *Suleman,*
(1925) 30 CWN 985 987FB.

23 *Saptawana v. State of Assam,*
AIR 1971 SC 813 (para 3) :
(1972) 2 SCC 45 (N) :
1971 Crlj 679 : 1971 SCC (Cr) 247.

24 *Nair v. State of Punjab,*
(1984) Crlj 1090 (P&H).

25 *Ratan v. State of Bihar,*
AIR 1950 Pat 332 .

26 *Sham Lal v. Emp.,*
(1902) 4 Bom LR 79 .

27 *Madar,* (1885) AWN 59.

28 *Raj Narain v. Supdt.,*
AIR 1971 SC 178 [
LNIND 1970 SC 366](paras 8, 30) :
(1970) 2 SCC 750 [
LNIND 1970 SC 366] :
1971 Crlj 244 .

29 *Gouri Shankar v. State of Bihar,*
AIR 1972 SC 711 [
LNIND 1972 SC 39](para 7) :
(1972) 1 SCC 564 [
LNIND 1972 SC 39] :
1972 Crlj 505 ; *S.K. Dev v. Officer-in-charge,*
AIR 1974 SC 871 : (1974) 4 SCC 273 :
1974 Crlj 740 .

30 *Raj Narain v. Supdt.,*
AIR 1971 SC 178 [
LNIND 1970 SC 366](paras 8, 30) :
(1970) 2 SCC 750 [
LNIND 1970 SC 366] :
1971 Crlj 244 .

31 *Bidhindra,* (1944) 50 Crlj 231 AIR 1975 SC 1465 *LNIND 1975 SC 159* (1975) 2 SCC 220 *LNIND 1975 SC 159* 1975 Crlj 1212 (Cal) ; *Natabar v. State of Orissa,* [ ](paras 6, 8) : [ ] : .

32 *Niranjan v. Manipur Admn.,* AIR 1958 Mani 33 (paras 6-7).

33 *Madhu Limaye,* in re., AIR 1969 SC 1014 (1969) 1 SCC 292 1969 Crlj 1440 (para 14) : : .

34 *Natabar v. State of Orissa,* AIR 1975 SC 1465 *LNIND 1975 SC 159* (1975 2 SCC 220 *LNIND 1975 SC 159* 1975 Crlj 1212 [ ](paras 6,8) : [ ] : .

35 *Natabar v. State of Orissa,* AIR 1975 SC 1465 *LNIND 1975 SC 159* (1975) 2 SCC 220 *LNIND 1975 SC 159* 1975 Crlj 1212 [ ](paras 6,8) : [ ] : .

36 *Natabar v. State of Orissa,* AIR 1975 SC 1465 *LNIND 1975 SC 159* (1975) 2 SCC 220 *LNIND 1975 SC 159* 1975 Crlj 1212 [ ](paras 6,8) : [ ] : .

37 *Gouri Shankar v. State of Bihar,* AIR 1972 SC 711 *LNIND 1972 SC 39* (1972) 1 SCC 564 *LNIND 1972 SC 39* 1972 Crlj 505 AIR 1974 SC 871 1974 Crlj 740 [ ](para 7) : [ ] : ; *S.K. Dev v. Officer-in-charge,* : (1974) 4 SCC 273 : .

38 *Natabar v. State of Orissa,* AIR 1975 SC 1465 *LNIND 1975 SC 159* (1975) 2 SCC 220 *LNIND 1975 SC 159* 1975 Crlj 1212 [ ](paras 6, 8) : [ ] : .

39 *Krishnaji,* (1879) 23 Bom 32.

40 Cf. *State of Hyderabad v. Kankadu,* AIR 1954 Hyd 89 .

41 *Rajani v. State of Orissa,* (1975) Crlj 83 (para 7) Or.

42 *Rajani v. State of Orissa,* (1975) Crlj 83 (para 7) Or.

43 Cf. *Sharifbai,* AIR 1961 Bom 42 [*LNIND 1960 BOM 55*]; *State v. Ram Autar,* AIR 1955 All 138 150 [*LNIND 1954 ALL 181*].

44 *Manoj Kumar Agrawal v. State of U.P.,* 1995 Crlj 646 All ; *Surjeet Singh v. State of U.P.,* 1984 All LJ 375FB .

45 Cf. *Sharifbai,* AIR 1961 Bom 42 [*LNIND 1960 BOM 55*]; *State v. Ram Autar,* AIR 1955 All 138 150 [*LNIND 1954 ALL 181*].

46 Cf. *Sharifbai,* AIR 1961 Bom 42 [*LNIND 1960 BOM 55*]; *State v. Ram Autar,* AIR 1955 All 138 150 [*LNIND 1954 ALL 181*].

47 *P.P. v. Satyanarayana,* (1986) Crlj 1134 (para 13) AP.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER V

ARREST OF PERSONS

S. 58

Police to report apprehensions.

Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

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1. Scope of s. 58 : Duty of officer in charge to report arrests without warrant. —

1. This section reproduces *old* s. 62.

2. It imposes a duty upon the officer in charge of a police station to report all cases of arrests without warrant made within the limits of his station, whether made by himself or by any other police officer or by a private person. The object of this section is to enable the Magistrate to whom the report is made, to prevent illegalities in such arrests, by examining the reports made to him.

Comment. Under *old* s. 62, the report had to be made to the District Magistrate or the Sub-Divisional Magistrate (if so directed by the District Magistrate). That provision has been retained in the *new* section, even though the power under *new* s. 167 can be exercised only by a *Judicial* Magistrate. Though, of course, the power to grant a bail under s s. 436-437 can still be exercised by an Executive Magistrate as well, a person's liberty being at stake, it would have been better to provide, in s. 58, that the report should be directed to the Chief Judicial Magistrate or other Judicial Magistrate competent to exercise the power under s. 167, instead of adopting a circuitous procedure which involves more time and also more trouble to the arrested person.

Moreover, the report under this section being a 'police report' under s. 190(1), it was possible under the *old* Code, for the District Magistrate or sub-divisional Magistrate to take cognizance of the case on the basis of the report received under this section. They have lost that power under the *new* Code.

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CHAPTER V

ARREST OF PERSONS

S. 59

Discharge of person apprehended.

No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

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1. Scope of s. 59 : Discharge of arrested person.—

1. This section reproduces *old* s. 63 without any change. It is a general provision relating to all arrests made by a police officer, with or without warrant.

2. It enjoins that no person who has been arrested by a police officer shall be discharged except—(a) on his bond, or (b) on bail, or (c) under the special order of a Magistrate. The present section, however, does not provide in what circumstances these modes of discharge may take place. For that the relevant provisions of the Code have to be referred to. [48]

3. In the result, the arrested person may obtain his release in any of the following ways:

A. *On himself executing a bond* :

(i) A person accused of committing a non-cognizable offence, when arrested for refusing to give his name and residence may obtain his release on executing a bond for appearance before a Magistrate, after giving his true name and residence [s. 42(2),*ante*].

(ii) The provision in s. 43(3) is similar relating to arrest by a private person of a person on a charge of having committed a non-cognizable offence, when the latter refuses to give his name and residence.

(iii) Under s. 169, an officer in charge of a police station must release the arrested person on his executing a bond for appearance before the Magistrate, if required, where, on investigation it appears to him that there is no sufficient evidence against such person to justify his being forwarded to the Magistrate for trial [under s. 170(1)].

(iv) Even where the result of the investigation is that there is sufficient evidence for trial, the officer in charge has the power to release the accused on his executing a bond for appearance before the Magistrate as directed [s. 170(2)].

(v) Under s s. 436(1), Proviso and 437(2), the Police officer or Court has the discretionary power to release on execution of a bond even in cases of non-bailable offence.

(See, further, under s s. 441-442,*post*).

B. *On giving bail bond with sureties* : In case of bail, the bond has to be executed not only by the accused himself but also by one or more sureties [s. 441(1)], undertaking that the accused shall attend at the time and place mentioned in the bond. The power to grant bail belongs to a Police officer who has arrested the accused without warrant as well as the Court before whom he is produced, in bailable [s. 436(1)], and non-bailable [s. 437(1)] cases, in the circumstances specified in those sections.

C. *Special order of a Magistrate* : These words refer to the order of a Judicial Magistrate under s. 167(2) [see. s. 57,*ante*], under which such Magistrate shall release the accused on his furnishing bail, on the expiry of 60 days since the date of his detention, unless he has been released on bail earlier.

Under s. 167(6),*post,* the Sessions Judge has the power to grant bail where he vacates an order of a Magistrate to suspend investigation after 6 months, in summons-case.

Comment. The use of the word ‘discharged’ in the instant section is not happy, for, the word ‘discharge’ has a technical meaning under ss. 239, 245 which enable a trying Magistrate to discharge the accused (as distinguished from ‘acquittal’), in a warrant case, where he finds the charge against the accused to be groundless. Such discharge differs from acquittal in the matter of application of s. 300 [*old* s. 403], which provides that in the case of acquittal, there can be no fresh trial for the same offence or for any other offence on the same facts. There is no such bar to a fresh trial, on better evidence, in the case of ‘discharge’, under the foregoing sections.

Under s. 59, the word ‘discharge’ has no such implication. It simply means that the arrested person obtains a ‘release’ from detention in custody, without any implication as to the accusation, and the word ‘release’ is, in fact, used in the relevant sections—42(2); 43(3); 169; 441, 442. It would have been consistent and conducive to a better understanding if the word ‘released’ were used in s. 59 as well.

48 *Gulam* *v.* *State,* [AIR 1959 MP 147 *LNIND 1958 MP 45*].

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CHAPTER V

ARREST OF PERSONS

S. 60

Power, on escape, to pursue and re-take.

(1) If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India.

(2) The provisions of Section 47 shall apply to arrests under sub-section (1) although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest.

1. Scope of s. 60.—

1. This section combines *old* ss. 66-67, with verbal changes.
2. The effect of this section is to extend the powers of a Police officer under s. 41(1)(e) to arrest an escaped offender (subsequent arrest) in any place in India, and also confer similar power on a private person making an arrest under s. 43, and any other person in whose custody the arrested person may have been lawfully kept.
3. In making such pursuit the police officer or private person shall have all the powers conferred by s. 47, to search any place where the escaped person may have taken shelter.

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CHAPTER V

ARREST OF PERSONS

[49] [S. 60A. Arrest to be made strictly according to the Code

No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest.]

Legislative change.—

A new Section 60A has been inserted in the Code by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009. New Section 60A has been added with a view to prohibiting arrest except in accordance with the Code or any other law for the time being in force providing for arrest (*vide* Notes on clauses).

The upshot of this new section is to caution the police officer not to resort to arrest not authorized by the Code or by any other law for the time being in force providing for arrest. Any arrest in violation of section 60A shall be declared as illegal arrest resulting in discharge of such arrested person and may result in the person arresting illegally to be liable for compensation for illegal arrest.

49 New Section 60A inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 10 (w.e.f. 31-12-2009).

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CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

1. Processes to compel attendance and production of documents.—

A condition precedent to a trial is securing the attendance of the accused, witnesses or other necessary persons before the Court and also the production of the documents necessary for the trial.

A. *Processes to compel appearance of persons.*

1. Appearance is required not only of the accused but also witnesses. The Code prescribes several kinds of process to compel the attendance of such persons,—summons (The milder form) s. 61; warrant for arrest s. 70; proclamation and attachment, s s. 82-83; security for attendance [s. 88].
2. Under the *old* Code, whether a summons or warrant should be issued against the *accused,* in the first instance, was to be determined with reference to col. 4 of Schedule II, which tabulated the offences, according to their nature and gravity. But that column has been *omitted* by the *new* Code, according to the recommendation of the Commission, [1] which observed that the provisions in col. 4, relating to the various offences, were not based on any principle. *In lieu* thereof, the *new* Code has adopted general rules in this behalf, in the enacting portion of the Code itself. These rules are—

(i) In all summons-cases, a summons should issue, in the first instance [s. 204(1)(a)].

(ii) In a warrant-case, a warrant should ordinarily issue; but even in such a case, the Court has the power to issue summons "if he thinks fit" [s. 204(1)(b)].

(iii) Whether in a summons-case or a warrant-case, if the summons has been issued in the first instance, the Court may, *in lieu* of or in addition to summons, issue a warrant where there are reasons to believe that the person will not obey the summons, or where he does not attend, without any reasonable excuse, after service of summons [s. 87,— *old* s. 90].

(iv) A warrant may also be issued for the arrest of a person who fails to appear in Court, after having executed a bond in that behalf [s. 89,— *old* s. 92].

3. The Court may issue a summons to any *witness,* on the application of the prosecution or the accused [ss. 243(2),— *old* s. 251A(9); 244(2),— *old* s. 252(2); 247,— *old* s. 257; 254(2),— *old* s. 244(2)]. In case of avoidance, a warrant may be issued, under s. 87, in this case also.

4. A notice in the nature of summons may be issued against the opposite party in a proceeding for maintenance, under s. 126(2) [*old* s. 488(6)], [2] but if he does not appear after service, the Court may proceed *ex parte.*

5. In any case where a warrant cannot be executed owning to the person having absconded or concealed himself, a proclamation [s. 82] and an attachment of his property, followed by sale [s s. 83, 85] may be made, as a means of compelling his attendance.

6. If any person against whom a summons or warrant may be issued is present in the Court, he may be required to execute a bond with or without sureties, for his appearance in such Court [s. 89].

B. *Processes to compel production of documents.*

1. The ordinary process is a summons to produce [s. 91(1),— *old* s. 94].

2. But the Court may issue a search-warrant *in lieu* of summons or after failure of summons, where the Court has reason to believe that the person would not produce the document required by such summons [s. 93,— *old* s. 96].

2. Summons and warrant of arrest .—

(a) A summons is ordinarily issued for directing the appearance of a person in Court for the purpose specified in the summons. It may be issued to the accused or to a witness or to a person for production of a document to show cause against some proceeding or order. While a summons is served by delivering or tendering to the person named in the summons a copy thereof, a warrant of arrest directs a police officer to take into custody the person against whom it is issued and to bring him to the Court unless the Court has endorsed on the warrant that such person may be released on his executing a bond with sufficient sureties for his attendance before the Court at the time specified. Like a summons, a warrant of arrest may be issued against the accused, a witness or other person required to show cause against the order of the Court or for breach of a bond taken under the Code to appear before a Court. As Woodroffe put it—

"A summons is a call served upon a person to attend for a purpose. It is addressed to the person whose attendance is required, whereas a warrant is not a call upon any person, but an order to the police to arrest a person."

(b) It must not be supposed that in a warrant case, a warrant and not summons, should necessarily issue. Even in a warrant case, a summons should, ordinarily issue if appearance can be secured by it. But a Court, in any case in which it is empowered to issue a summons for the appearance of any person other than a juror, may, after recording its reasons in writing, issue a warrant for his arrest either *in lieu* of or in addition to summons in two exceptional classes of cases [s. 87]:

(i) If either before the issue of such summons or after the issue of the same but before the time fixed for his appearance, the Court sees reasons to believe that he has absconded or will not obey the summons; or

(ii) If at such time he fails to appear and the summons has been proved to be duly served and no reasonable excuse is offered for such failure.

3. Duty of prosecution .—

It being the duty of the prosecution to produce all material witnesses for examination, the prosecution would be failing in this duty if, after summons fails, the prosecution does not pray to Court for a warrant of arrest and proclamation to compel the production of a material witness. [3]

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

2 Cf. *Revappa* *v.* *Gurusanthawaia,* AIR 1960 Mys. 198 ; *Pahilajrai v. Jethi,* AIR 1959 Pat 433 .

3 *Raj Kishore* *v.* *State,* AIR 1969 Cal 321 [*LNIND 1968 CAL 66*](para 69).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 61
Forms of summons.

Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court.

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1. Scope of s. 61.—

This section reproduces *old* s. 68(1), with the addition of the words 'and shall bear the seal of the Court' in place of 'and sealed'.

2. Form of summons.—

In order to direct the person against whom a summons is issued as to what he is to do in compliance with it and to make him liable in case of noncompliance, [4] the summons must clearly State—

(i) The title of the Court at which, together with the date and time of the day when, such attendance is required. [5]

(ii) It should also say that such person is not to depart from the Court without leave of the Court, and without ascertaining the date to which the case may be adjourned. [6]

(iii) It must be in writing and signed by the Presiding Officer of the Court of such other officer as directed by the Rules made by the High Court. [7]

(iv) It must bear the seal of the Court. That is now made clear by the verbal change in the section.

(v) In view of s. 476 [*old* s. 555], the Court must use [8] one of the relevant Forms in the 2nd Sch. (*old* such. V), *e.g.* : Form No. 1—summons to an accused person; form No. 30—similar summons in case of petty offence; Form No. 33—summons to witness, with such variations as the circumstances of the particular case might require.

(vi) As Form No.1 (2 nd Sch., *post*) provides, the summons must also shortly state the *offence,* in the case of summons to an accused. [9] In the absence of this requirement, the accused may disobey the summons. [10]

3. How issued by a Court.—

1. The different circumstances under which a summons can be issued are dealt with in various sections, which have already been referred to (*ante*). The present section governs all such cases. [11]
2. There is no form for application to issue summons; a verbal prayer would suffice. [12]
3. When an application is made to the Court to issue a process to compel appearance of a witness, the Court must either grant the prayer or reject it. It cannot simply order it to be 'filed'. [13]

4. Punishment for non-compliance with summons.—

1. The penalty for disobedience to a summons, without 'just excuse', is a fine not exceeding Rs. 100, which may be awarded by the Court before which the person was summoned to appear, on a *summary* trial, under s. 350 [*old* s. 485A]. This section would not, however, be applicable it the Court which issued the summons had no power to issue it, [14] or there is no proof that the summons had been duly served and that the person had knowledge of it. [15]
2. In case of intentional disobedience, it would also be punishable under s. 174, I.P.C., [16] provided it is legally valid and he is legally bound to attend. [17] Hence, a conviction would be bad where—

   (i) the summons does not bear the seal of the Court; [18]

   (ii) the summons directs the person to appear at a place outside India; [19] or before a Police officer; [20]

   (iii) the summons does not mention the place, date or time when the attendance was required; [21]

   (iv) the summons to an *accused* person does not mention the offence. [22]

3. Section 174, I.P.C., would be attracted also where the person appears in Court, but finding the Magistrate temporarily absent leaves the Court without waiting for a reasonable time, [23] or leaves the Court before the case against him is over without leave of the Court. [24]
4. Section 174, I.P.C., is applicable to an accused, [25] witness or any other person who is legally bound to attend in obedience to a summons, and includes even a verbal order.

5. Effect of defects in summons on the trial.—

Any defect or omission in the summons shall not vitiate the trial, [26] unless it has occasioned a failure of justice [s. 465], *e.g.* , where the summons on the accused did not mention the offence and he objected to it in proper time. [27]

6. Duty of executing officer.—

1. A Summons may be directed for service to (a) a Police officer; (b) an officer of the Court; or (c) other public servant, subject to rules made by the State Government [s. 62].
2. It is the business of such officer to execute it; he cannot sit in judgment over the validity of the summons. [28]

7. Analogous provision.—

1. While s s. 61-69 deal with summons issued by a Court, an order in writing, requiring, the attendance of a person, may be issued by an investigating police officer, under s. 160(1),*post.*
2. Summons under the *Motor Vehicles Act* is governed by the present section. [29]

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4 *Emp.* *v.* *Ram Saran,* (1882) 5 All 7 ; *Santhamurthy v. State,* (1973) 79 Crlj 355 (Mys) .

5 *Emp.* *v.* *Ram Saran,* (1882) 5 All 7 ; *Santhamurthy v. State,* (1973) 79 Crlj 355 (Mys) .

6 *Emp.* *v.* *Ram Saran,* (1882) 5 All 7 ; *Santhamurthy v. State,* (1973) 79 Crlj 355 (Mys) .

7 Cf. *Revappa* *v.* *Gurusanthawaia,* AIR 1960 Mys. 198 (para 3).

8 *Monoranjan* *v.* *State,* AIR 1970 Tri 84 85 .

9 Further particulars have been prescribed by the Criminal Rules & Orders, Calcutta High Court, and other High Courts, in exercise of the power conferred by s. 476 (*post*), real with *Art. 227 of the Constitution* .

10 *Gajraj* *v.* *Emp.,* AIR 1936 All 761 ; *Hafiz v. Emp.,* 38 Crlj 947.

11 *Sudhir,* (1948) 52 CWN 44 FC .

12 *Gul* *v.* *Fazley,* (1929) 33 CWN 446 (449).

13 *Bhomar* *v.* *Digambar,* (1902) 6 CWN 548 .

14 *McLennan* *v.* *State,* AIR 1968 Cal 195 [*LNIND 1967 CAL 11*](para 9).

15 *Anand* *v.* *State* *of* *A.P.,* AIR 1959 AP 144 [*LNIND 1958 AP 114*]; *Govind,* in re., AIR 1959 AP 428 [*LNIND 1958 AP 140*].

16 *Kishan,* (1885) 10 Bom 93.

17 *Behari,* AIR 1920 All 304 .

18 *Mahajan* *v.* *Emp.,* (1914) 42 Cal 708 ; *Abdul,* 37 MLJ 588.

19 *Emp. v. Puranga,* (1893) 16 Mad 463.

20 *Jogendra,* (1897) 24 Cal 320 (324).

21 *Hukum* *Singh,* AIR 1926 All 474 ; *Latoor,* (1947) All 848 .

22 *Gajraj* *v.* *Emp.,* AIR 1936 All 761 .

23 *Kishan Bapu,* (1885) 10 Bom 93.

24 *Balroop* *v.* *State* *of* *U.P.,* [AIR 1956 All 270 271 *LNIND 1955 ALL 185*].

25 *Rishbud* *v.* *State* *of* *Delhi,* AIR 1955 SC 196 204 : (1955) 1 SCR 1150 : 1955 Cri_J 526.

26 *Rishbud* *v.* *State* *of* *Delhi,* AIR 1955 SC 196 204 : (1955) 1 SCR 1150 : 1955 Cri_J 526.

27 *Lal* *Chand* *v.* *Emp.,* AIR 1934 Oudh 370 371 .

28 *Emp.* *v.* *Horniman,* AIR 1945 All 1 5 .

29 Cf. *Ranjan,* AIR 1928 All 261 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 62
Summons how served.

(1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

1. Scope of s. 62: Mode of service of summons.—

This section combines *old* ss. 68(2) and 69, without any substantial change : Sub-sec. (1) reproduces sub-sec. (2) of *old* s. 68 and sub-secs. (2)-(3) reproduce sub-secs. (1)-(2) of *old* s. 69.

2. Object of s. 62.—

This section ensures a twofold safeguard for proper service, [30] *firstly,* by providing that the service should be effected by a Police officer or an officer of the Court or some other public servant, who should see that the summons is served in the manner provided in the Code and who should be able to report to the Court as to the manner in which the summons was act ually served; and, *secondly,* by authorising the serving officer to obtain a signed acknowledgment of the service which should

ordinarily be treated as cogent evidence of service [s. 66(2)].

3. Sub-sec. (1) : Summons by whom to be served. —

While s s. 72-74 deal with the person by whom a warrant may be directed to be executed, the present section deals with the persons by whom a summons may be served, namely—

(a) Any Police officer (see *ante),* or

(b) An officer of the Court issuing it, subject to Rules made by the State Government, or

(c) Any public servant, subject to Rules made by the State Government, or

(d) Where the person summoned is a Government servant, it is to be sent to the head of the office in which the person is employed, and the latter will cause the summons to be served according to s. 62 [s. 66].

4. 'A police officer'.—

The summons must be directed by the Court to be served by a police officer; in the case of a summons, there is no provision for endorsement by one police officer to another, as in the case of a warrant under s. 74,*post.*

5. 'Public servant'. —

See s. 21, I.P.C.. In West Bengal, *Dafadars* and *Chowkidars* are such public servants; [31] also process-servers appointed under the *Court-fees Act, 1870* , according to Rules made by the High Court s. 20 of the Act.

6. Sub-sec. (2) : Summons how served.—

Though this sub-section provides the primary mode of service of summons under this Code, there are other provisions relating to special contingencies, which should be referred to for a comprehensive picture :

I. The primary mode is personal service, which is provided for in the present sub-section, which means delivering or tendering one of the duplicates of the summons to the person to be served.

II. If the person to be served cannot be found, by the exercise of due diligence, the summons may be served, as above, by leaving one of the duplicates with some adult male member of his family [s. 64], not being a servant.

III. If the summons cannot be served, by the exercise of due diligence, in any of the foregoing modes, it shall be served by the serving officer by affixing a duplicate to some conspicuous apart of the house in which the person summoned ordinarily resides [s. 65].

IV. Where the person to be served to a Government employee, the summons is to be forwarded to the head of the office in which he is employed, and the latter will cause it to be served, according to s. 62 [s. 66].

V. When the summons is to be served on a corporation, it is to be personally served on the secretary, local manager or other principal officer of the corporation, or by registered post addressed to the chief officer of the corporation.

VI. Service by registered post is not valid in the case of any person other than a corporation; but *new* s. 69 provides for service of a copy of the summons by registered post on a *witness* (only) *in addition to and simultaneously* with the issue of the summons, according to the preceding provisions [s. 69].

VII. Where the summons is to be served at any place outside the local jurisdiction of the Court issuing it, the Court shall send the summons for service to a Magistrate within whose local jurisdiction the service is to be made [s. 67].

7. Other modes not valid.—

Any service outside the foregoing provisions is invalid under this Code, irrespective of its validity under the *Code of Civil Procedure* , *e.g.* ,—

(a) Service by registered post on an accused, other than a corporation. [32]

(b) Service on pleader. [33]

(c) In the absence of service, knowledge of the summons through other sources would not suffice. [34]

(d) Publication in the Official Gazette. [35]

'Delivering or tendering'.

1. Personal service may be effected either by delivering or tendering the duplicate of the summons. This means that if a person refuses to take delivery of the summons, mere tendering of it would be sufficient service. [36] Tender would also be valid service where the person to be summoned waives act ual delivery and indicates that tender would suffice. [37]

2. Tender means an offer of delivering the duplicate, which must be so understood by the person. [38] The mere showing of it to the person is not service by tender. [39]

8. Service by registered post.—

Except in the case of summons to be served on the corporate bodies or registered societies the service of summons under s. 62 of the Code cannot be sent by registered post. Such service is illegal. [40]

So, whence the summons served by the registered post is returned back with the endorsement 'refused', it is no service of summons under s. 62 of the Code. [41]

9. Service through Counsel.—

Service on the accused cannot be effected by serving the summons on his Counsel. When the accused fails to appear after such service, the Court cannot issue warrant of arrest, as such service of summons is illegal. [42]

10. Service of summons to person living abroad.—

When a person to be served is living abroad, the Court can send the summons through embassy officials for service abroad. [43]

11. Fees for service.—

1. The fees for service of a sommons are prescribed by Rules of the High Court, under *Section 22 of the Court-fees Act, 1870* .
2. The process fees so prescribed are inclusive of all charges for serving the summons, including the cost of sending by registered post, where permissible, as stated earlier.
3. Where the accused is convicted of a non-cognizable offence, upon complaint, the Court may, in addition to the penalty for the offence, order the accused to pay the costs of the complainant including process-fees [s. 359(1),— *old* s. 546A], which shall be recoverable as if it were a fine [s. 431,— *old* s. 547].

12. Punishment for prevention of service.—

1. Intentional *prevention* of service of summons by any public servant legally competent to serve it is punishable under s. 173, I.P.C., *e.g.* ,—

   Where the person gets away from the serving officer and shuts himself in his house, so that neither delivery nor tender is possible. [44]

   But it would be no offence under this section where the person *merely*— refuses to receive a summons, [45] or to sign a duplicate, by way of acknowledging service, [46] or throws down the summons after service. [47]

   The reason is that mere tender being sufficient, there is no 'prevention' of service unless the person makes even a tender impossible by some act of opposition. [48] Whether there has been such prevention is a question of fact to be determined in each case. [49]

2. Refusal to sign a receipt for the summons, as required by sub-sec. (3) of this section, is not punishable under s. 180, I.P.C., because it is not a 'statement' made by him. [50]

13. Punishment for non-attendance.—

It has already been explained that intentional disobedience to summons is punishable under s. 174, I.P.C.. But there cannot be any conviction under this section unless it is provided that the summons had been issued and duly served upon such person, as prescribed in this Chapter. [51] The mere making of an order for the issue of summons does not constitute its 'issue'. [52]

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30 *Sudhir* *v.* *R.,* AIR 1949 FC 6 (para 14).

31 Vide Govt of Bengal Notification No.2187 PJ, Cl 21-5-20.

32 *Gurnam* *v.* *Datto,* AIR 1950 EP 20 21 .

33 *Saraswati* *v.* *Durga* *Charan,* (1902) 6 CWN 927 .

34 *Parambot* *v.* *Govind,* AIR 1959 Mad 165 [*LNIND 1958 MAD 105*].

35 *Pahilajrai* *v.* *Jethi,* AIR 1959 Pat 433 434 .

36 *Sahadeo,* (1918) 40 All 577 .

37 *Budhua* *v.* *Emp.,* AIR 1928 All 118 119 .

38 *Budhua* *v.* *Emp.,* AIR 1928 All 118 119 .

39 *R. v. Karsan Lal,* (1868) 5 Bom HCR 20(CrC) .

40 *Bhimappa v. Indirabai,* 1981 NOC 8Kant ; *G.B. Hari Prasada Rao v. G. Lakshmi Rajyama,* 1992 Crlj 1594 AP .

41 *V.P. Shivanna v. Bhadramma,* 1993 Crlj 418 Kant ; *Laxmandar v. Laxmibai,* (1968) 9 Guj LR 116.

42 *Satya Securities v. Uma Erry,* 2002 Crlj 3714 : (2003) 1 BC 341 [*LNIND 2002 HP 58*].

43 *E. Chalhi v. P. Gopalan,* 1981 Crlj 691 Ker .

44 *Budhua v. Emp.,* AIR 1928 All 118 119 .

45 *Debigir,* AIR 1925 All 322 .

46 *Krishna Gobinda,* (1892) 20 Cal 358 .

47 *Arumuga,* (1881) 5 Mad 200n.

48 *Bahadura,* AIR 1926 All 304 .

49 *Budhua v. Emp.,* AIR 1928 All 118 119 .

50 *Krishna Gobinda,* (1892) 20 Cal 358 .

51 *Kuppan,* (1887) 11 Mad 137.

52 *Driver v. Valli,* (1961) 2 Guj LR 222.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 63
Service of summons on corporate bodies and societies.

Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation, or by letter sent by registered post, addressed to the chief officer of the corporation in India, in which case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Explanation. **—In this section, "corporation" means an incorporated company or other body corporate and includes a society registered under the *Societies Registration Act, 1860* (21 of 1860).**

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1. Scope of s. 63 : Service on corporate bodies and registered societies.—

1. This section corresponds to *old* s. 69(3) with the addition of the *Explanation,* and verbal changes. The Explanation has been added, as recommended by the Commission, [53] to bring registered societies within the ambit of the provision, since "although not formally incorporated, (they) possess some of the attributes of a corporation and it is desirable that such societies should be treated on a par with corporations in criminal proceedings".

2. This section provides the *mode* of service where a summons is against a corporation [54] or a registered society, *e.g.* , a trade union; [55] a Bank. [56]

Though societies registered under the

Societies Registration Act, 1860 may not be formally incorporated, yet the *Explanation* by its inclusive definition brings them under the present section when a Corporate body is an accused before the Court, the summons for appearance of such corporate body has to be sent in the name of the corporate body itself. [57]

2. Requirements of service under s. 63.—

(a) When a summons is issued against a company, or other body corporate or a registered society, the Secretary, local manager or other principal officer thereof must be described both by name and by designation, evidencing their representative character, [58] , [59] if the summons is sought to be served personally.

(b) The other alternative would be to serve it by registered letter addressed to the chief officer of such corporation or society in India.

3. Service when proper.—

In case of a service of summons on the bank through bank manager is a valid service. [60]

In case of a firm, it has to be sent by the registered post to the firm through its proprietor and not directly to the proprietor. [61]

4. Effects of non-compliance.—

A single Judge of the Calcutta High Court has held that in the absence of a description of the person on the summons or any evidence on record to show that he represents the company in the manner laid down in this section, the defect would be more than an irregularity, and the conviction must be set aside. [62] This may be relevant when the service is effected upon a 'principal officer' of the corporation because who is a principal officer of a particular corporation is a question of fact, but since 'secretary' and 'local manager' are mentioned in the section itself, once it is established that the person served was the secretary or the local manager, no question, further, as to their representative character should arise.

5. Special Law. —

See s *s. 7* , *17* of the *Prevention of Food Adulteration Act, 1954* .[63]

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53 41st Rep, Vol. I, p. 40, para 6-3.

54 *Sudhi Ranjan v. Mazumdar,* AIR 1944 Pat 210 .

55 Cf. *Bhalchandra v. Emp.,* AIR 1929 Bom 433 (*434*).

56 *Central Bank v. D.D.A.,* (1981) Crlj 1476 (para 8) Del.

57 *Anie B. Ambani v. State of Bihar,* (2002) 4 Pat LJR 571 (Pat) (Summons issued to the Managing Deputy Director not being proper ordered to be set aside).

58 *Sudhi Ranjan v. Mazumdar,* AIR 1944 Pat 210 .

59 *Central Bank v. D.D.A.,* (1981) Crlj 1476 (para 8) Del.

60 *Central Bank of India v. DDA,* 1981 Crlj 1476 .

61 *Amarnath v. State of Bihar,* 1976 Crlj 1778 Pat .

62 *South Dum Dum Municipality v. Om Khosla,* AIR 1956 Cal 237 [*LNIND 1956 CAL 36*].

63 *State v. Nangia,* AIR 1979 SC 1977 [*LNIND 1979 SC 417*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 64
Service when persons summoned cannot be found.

Where the person summoned cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Explanation. **—A servant is not a member of the family within the meaning of this section.**

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1. Scope of s. 64: Service on adult male member of family.—

This section corresponds to *old* s. 70, with the addition of the Explanation, and omission from the body of the section of the words "or, in a presidency-town....him", to provide that service on a servant of the person summoned will not be good service under the *new* Code, the servant not being a member of his family,—as recommended by the Commission. [64]

2. Service on adult male member, when due service.—

1. As provided in s. 62(2), personal service is the general rule, wherever ‘practicable’. But there are contingencies where this may not be practicable, *e.g.* , where the person summoned is not available at his residence. The present section provides that in such a case, it will amount to service on the person summoned if a duplicate of the summons is left with some adult male member of his family, residing with such person. The conditions for this mode of service are—

(a) That the serving officer exercised due diligence to find out the person to be summoned. [65]

(b) Substituted services under the present section shall not be accepted by the Court unless it appears from the Peon's return, supported by affidavit, that he took proper efforts to find out the person to be summoned, [66] and that such person evaded service or could not be found, in spite of such efforts. [67] Mere temporary absence of such person from his residence is not enough, unless it is further shown that genuine efforts were made to find him out, [68] after making inquiries as to when he was likely to be at home. [69]

(c) There must be material to show that the person summoned against was not found by exercise of due diligence and summons was served by leaving one of the duplicates for him with some adult member of his family. His temporary absence from home is not sufficient to justify the service under s. 64. [70]

(d) The person on whom the service is made under the present section is an adult male member of the family of the person against whom the summons has been issued. Service on a servant, durwan or other agent will *not* be good service under the *new* Code. The member must be male, so that service upon his mother [71] or wife will not do.

3. S s. 64, 65 and 134(2).—

1. Where service upon the person summoned personally [s. 62(2)], or on an adult male member of his family [s. 64] is not possible notwithstanding the exercise of due diligence by the serving officer, he is to resort to substituted service by affixation, under s. 65 [*old* s. 71]. But before service under s. 65 is acceptable as due service, it must be shown that proper steps, in the exercise of due diligence, have been taken, for service under s. 62 (or s. 63 in the case of a corporation or s. 64). [72]

2. Since an order under s. 133 is to be served "in the manner provided for the service of a summons" [s. 134(1)], it would follow that service by proclamation under s. 134(2),*post,* cannot be resorted to unless proper efforts to serve under s s. 62-64 have been taken. [73]

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64 41st Rep, Vol. I, p. 40, para 6.3.

65 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 ; *Jadho v. Manik,* AIR 1923 Nag 55 .

66 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 ; *Jadho v. Manik,* AIR 1923 Nag 55 .

67 *Sundar,* (1882) AWN 170.

68 *Subramania v. Subramania,* (1897) 21 Mad 419.

69 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 ; *Jadho v. Manik,* AIR 1923 Nag 55 .

70 *Ram Chandra Mishra v. State of Orissa,* (1995) 4 Crimes 54 [*LNIND 1994 ORI 140*] (56)(Ori) .

71 *Sawan,* AIR 1925 Lah 1393 .

72 *Kalipada v. State,* AIR 1951 Cal 207 ; *Bhimrao,* AIR 1963 Mys. 239 .

73 *Abdul Jabbar,* (1934) 39 CWN 141 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 65
Procedure when service cannot be effected as before provided.

If service cannot by the exercise of due diligence be effected as provided in Section 62, Section 63 or Section 64, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

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1. Scope of s. 65 : Substituted service.—

This section corresponds to *old* s. 71, with verbal changes, and the addition of the words 'the Court .....as it considers proper', at the end of the section, 'in order to bring it into line with the corresponding provision in the *Code of Civil Procedure* ', [74] that is, to make it clear that even after service by affixation, the Court has a discretion to order fresh service.

When personal service cannot be effected under s. 62 and the service under s. 64 cannot be secured, law permits substituted service as provided in s. 65. [75]

2. Conditions for validity of substituted service under s. 65.—

In order to be a valid service under the Code, the conditions for resorting to the mode of service referred to in

the present section, by affixing a copy of the summons to the residence of the person to be served, are—

(a) The general rule of service being personal service, this mode of last resort can be availed of only after the methods of service provided in s s. 62-64 have failed, [76] after the exercise of due diligence. Thus, if the process server had made no attempt to serve under the provisions of both s s. 62 and 64,[77] successively, service by affixing a copy of the summons under the present section shall be invalid, and an *ex parte* order founded on such service must be set aside [78] in revision. It is *not* a case of mere irregularity. [79]

When the validity of service under this section is challenged on the foregoing ground, it is for the State to adduce evidence that personal service or service on an adult male member of the person's family could not be effected, [80] by the exercise of due diligence. [81]

(b) On receipt of the Peon's return of service under the present section, the Court which issued the summons is to apply its mind to the conditions of service under this section and come to the decision whether there has been valid service or not; if it is not so satisfied, it must order fresh service in such manner as it considers proper. [82] , [83] If the Court does not perform this duty, then also there would be no valid service under the present section, though, it should be noted, the present section uses the words 'may...declare' instead of the words 'shall.... declare' [84] in the corresponding provision in O. 5, r. 19, CP Code . [85]

(c) The copy must be affixed at a conspicuous part of the house or homestead where the person summoned ordinarily resides; service by affixation to his office would not do. [86]

(1) There has been some speculation as to the meaning of the word 'ordinarily resides', in the absence of definition. It appears to have been used in the same sense as in *Art. 5(c) of the Constitution* and should be similarly interpreted. The word 'resides' refers to the place where the person eats, drinks or sleeps or his family so does. [87] The word 'ordinarily' denotes that he need not be present at such place every day. [88] A person's home would be the place of his ordinary residence even though he may be occasionally absent therefrom. [89] On the other hand, a place which a person visits for some particular purpose would not be the place of his ordinary residence, which expression indicates residence 'in the ordinary course of one's life. [90] The expression 'ordinarily resides', thus, denotes a quality of permanence and continuity more than what is involved in 'residence' and less than what is required for 'domicile'. [91]

3. 'In such manner as it considers proper'.—

1. These words confer on the Court wide direction to decide the proper mode of service having regard to the circumstances in each case, without being fettered by the limitations in s. 62(1) which apply only in the case of service in the first instance. [92]

2. Thus, in the case of a person employed abroad, summons can not be served upon him by affixture to any house in India, because he does not 'ordinarily reside' there. In such a case, sending the

summons to the Embassy of the country where he is employed, for service upon him, would be a proper mode of service under s. 65. [93]

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74 41st Rep. of Commission, Vol. I, para 6.5.

75 *Mac Charles (1) Ltd. v. Chandrasekhar,* 2005 Crlj 3700 : (2006) 2 Kar LJ 570 [*LNIND 2005 KANT 327*].

76 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 ; *Jadho v. Manik,* AIR 1923 Nag 55 .

77 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 ; *Jadho v. Manik,* AIR 1923 Nag 55 .

78 *Hemendra v. Archana,* AIR 1971 Cal 244 [*LNIND 1970 CAL 250*]; *State v. Bhimarao,* AIR 1963 Mys 238 .

79 *Tukaram v. Punjabrao,* (1917) 20 Crlj 816 (Punj) .

80 *Pahilajrai v. Jethi,* AIR 1959 Pat 433 .

81 *Man Mohan v. Corpn of Calcutta,* AIR 1932 Cal 62 ; *Beni v. Jadu,* AIR 1926 Cal 1208 .

82 *Hemendra v. Archana,* AIR 1971 Cal 244 [*LNIND 1970 CAL 250*]; *State v. Bhimarao,* AIR 1963 Mys. 238 .

83 Cf. *Parasurama v. Appadurai,* AIR 1970 Mad 271 [*LNIND 1969 MAD 95*](FB) .

84 Cf. *Parasurama* *v.* *Appadurai,* [AIR 1970 Mad 271 *LNIND 1969 MAD 95*](FB) .

85 41st Rep of Commission, Vol. I, para. 6.5.

86 *Hemendra* *v.* *Archana,* [AIR 1971 Cal 244 *LNIND 1970 CAL 250*]; *State v. Bhimarao,* AIR 1963 Mys 238 .

87 *Kumud,* (1911) 38 Cal 394 .

88 Cf. *Shanno* *Devi* *v.* *Mangal,* [AIR 1961 SC 58 *LNIND 1960 SC 197*](61-62) : [(1961) 1 SCR 576 *LNIND 1960 SC 197*].

89 Cf. *Turnbull v. R.C.,* 42 SC LR 15.

90 I.R.C. v. *Lysaught,* *(1928) AC 234* .

91 Cf. *Macrae* *v.* *Macrae,* (1949) 2 All ER 34 36CA.

92 *Chathu* *v.* *Gopalan,* (1981) Crlj 691 (paras 6, 8, 19) Ker.

93 *Chathu* *v.* *Gopalan,* (1981) Crlj 691 (paras 6, 8, 19) Ker.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 66
Service on Government servant.

(1) Where the person summoned is in the active service of the Government, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in the manner provided by Section 62, and shall return it to the Court under his signature with the endorsement required by that section.

(2) Such signature shall be evidence of due service.

1. Scope of s. 66 : Service on Government servant.—

This section corresponds to *old* s. 72 with the omission of the words 'a Railway Company', for, such companies hardly exist after the nationalisation of the Railways. [1]

2. This section applies to all Government servants, including the Police. Thus, summons to a Sub-Inspector of the Railway Police is to be served through the Superintendent of Railway Police. [2] But, as the High Court Circulars provide, in the case of Police or Medical Officers or the like, sufficient time should be allowed for their appearance to enable the Department concerned to arrange for substitutes during their absence from office.

3. But this section applies only where the summons is issued by a 'Court' It would not apply where a summons or order to attend is issued by a Police officer in exercise of his powers of investigation, *e.g.* , under s. 160,*post.* Such order may be served upon the Government servant direct, and it is no excuse for non-attendance that it was not sent through the departmental head. [3]

2. 'Cause the summons to be served in the manner.... s. 62'.—

It is clear from these words, even in the case of Government servants, there is no service until it is served on such Government servant personally. Though the summons in such cases is sent for service through the head of the office, the latter merely becomes an agent for service, and his endorsement of due service is given evidentiary value under sub-sec. (2). But even then, receipt of the summons by the head of the office or even knowledge of that fact by the Government servant concerned would not constitute due service upon him, under the Code, [4] until it is act ually served upon him by the head of the office. The analogy of the law of civil procedure cannot be applied to the *Criminal Procedure Code* .[5]

3. Duty of the head of office and breach of such duty.—

When a summons is received by a superior office under the present section, it is his duty to serve that summons. If, for any reason, his subordinate cannot appear on the date fixed for his appearance in Court, an application may be made after service of summons either by the superior officer or by the subordinate himself requesting the court to adjourn the case and if the application is *bona fide,* courts will accommodate Government servants in the matter. But it would be contempt of court for a superior officer to whom summons is sent to refuse to serve it on any ground other than that the subordinate officer was not available to the superior officer for service of summons, as for example when he is on leave. [6]

4. Sub-sec. (2) : Evidentiary value of endorsement by head of office.—

1. This sub-section makes the signature of the head of the office evidence of 'due service' upon the Government servant concerned. But it does not take away the power of the Court to determine, from the endorsement of the head of the office itself, whether there was 'due service' under the Code. Where the head of the office made no attempt to serve the summons personally upon the employee until he left, on transfer, to another office, it was evident that there was no due service under this section, read with s. 62. [7]

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1 Rep of the Joint Committee, p (ix).

2 *Gauri Shankar v. Collector,* AIR 1925 Pat 553 555 .

3 *Gumparthi,* AIR 1918 Mad 815 816 .

4 *Parambot* *v.* *Govind,*
AIR 1959 Mad 165 [
LNIND 1958 MAD 105](para 3).

5 *Parambot* *v.* *Govind,*
AIR 1959 Mad 165 [
LNIND 1958 MAD 105](para 3).

6 *Brijvallabh* *v.* *A.R.* *Khan,*
AIR 1958 Raj 293 [
LNIND 1958 RAJ 191].

7 *Parambot* *v.* *Govind,*
AIR 1959 Mad 165 [
LNIND 1958 MAD 105](para 3).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 67
Service of summons outside local limits.

When a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction the person summoned resides, or is, to be there served.

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1. Scope of s. 67 : Service of summons outside local jurisdiction of Court.—

1. This section reproduces *old* s. 73, with a minor verbal change.
2. It provides for service of summons on a person residing outside the jurisdiction of the Court issuing it, namely, that in such a case, It is to be sent to a Magistrate within whose local jurisdiction the summons is to be served. Subsidiary rules have been made by the various High Court Rules and Orders.
3. This section presumably deals with the service on a person within India, and not with service on a person in a foreign country, [8] for which resort has to be made to diplomatic channels.
4. By no norms of interpretation can it be suggested that a Court has no way to reach a person living outside its jurisdiction limits other than the one prescribed in the Code. [9]
5. As to proof of service under the present section, see s. 68,*below.*

8 *Nga Ba v. Emp,* AIR 1927 Rang 248 .

9 *Ghulam Mohammed v. Rasoolan,* 1991 Crlj 2837 (J&K) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 68
Proof of service in such cases and when serving officer not present.

(1) When a summons issued by a Court is served outside its local jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in the manner provided by Section 62 or Section 64) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

1. Scope of s. 68 : Proof of service when serving officer not present in Court.—

1. This Section reproduces *old* s. 73, with a verbal change.
2. It deals with the mode of proof of due service in two cases—

(a) Where the summons is served outside the local jurisdiction of the Court issuing it, under s. 67,*above.*

(b) Where even though the service has been made within such jurisdiction, the serving officer is not present in the Court at the time of hearing of the case, so that his personal testimony is not available.

3. In either of the foregoing cases, due service is to be proved by producing—

(i) An affidavit of the serving officer made before a Magistrate, which should show how the service was made, what efforts were made to find out the persons, in case of substituted service. [10]

(ii) A duplicate of the summons purporting to be endorsed by the person to whom it was delivered or tendered, in the manner required by s. 62(3) or s. 64 (as the case may be).

The statements made in these two documents shall be presumptive evidence of due service unless and until the contrary is proved.

4. This section would not apply to the case of service upon a Government servant, for, in that case, the endorsement of the head of the office shall take the place of endorsement of the person served, within the meaning of s. 62(3), by reason of the specific provision in sub-sec. (1) of s. 66, and sub-sec. (2) of that section provides that the signature of the head of the office under such endorsement " *shall be* evidence of due service".

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10 Cf. *Cohen v. Nursing,* (1892) 19 Cal 201 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

A.—SUMMONS

S. 69
Service of summons on witness by post.

(1) Notwithstanding anything contained in the preceding sections of this Chapter, a Court issuing a summons to a witness may, in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.

(2) When an acknowledgment purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received, the Court issuing the summons may declare that the summons has been duly served.

STATE AMENDMENTS

Andaman and Nicobar and Lakshadweep Islands. — *The following amendments were made by Regn. 6 of 1977, S. 2 (w.e.f. 17-11-1977).*

S. 69. —In its application to the Union Territories of Andaman and Nicobar and Lakshadweep Islands.—

(i) in sub-section (1) after the words "to be served by registered post," insert the words "or of the substance thereof to be served by wireless message".

(ii) in sub-section (2) for the word "that the witness refused to take delivery of the summons," substitute the words "or a wireless messenger that the witness refused to take delivery of the summons or the message, as the case may be". [11]

1. Scope of s. 69.—

1. This section is *new,* and has been inserted in the Bill of 1970, [12] as an *additional* mode of service.

2. Under the *old* Code, there was no provision for service by post, so that such service was held to be no service, even in the case of a witness. [13]

3. *Change made by the new Code* . The *new* Code does not prescribe service by registered post as a substitute of personal service, but empowers the Court to issue the summons by registered post, as an *additional* mode, while issuing the summons in the regular manner, under s. 62(1), in the case of a *witness,* only, with the object of avoiding delay. [14]

   But sub-sec. (2) of the present section gives a legal force to the postman's endorsement that the witness refused to take delivery of the summons by registered post, and enables the Court to declare due service of the summons, irrespective of what happens to any other mode of service.

   The words 'in addition to and simultaneously' in sub-sec. (1), however, suggest that sub-sec. (2) would not be attracted where the Court *merely* issued the summons by registered post, without issuing it also in the regular manner, under s. 62(1).

4. It is to be noted that s. 69 is confined only to the case of summons to a *witness.* It is intended to override the effect of the decision of the Federal Court in *Sudhir Kumar's case* [15] that no inference could legitimately be drawn against the accused from the fact that none of his witnesses responded, though summons had been duly sent to them by registered post.

5. Section 69 is restricted to the service of summons on the witness. Under sub-section (2) of s. 69, on the basis of endorsement purported to be made by the postal peon that the witness refused to take delivery of summons, the Court issuing the summons may declare that the summons has been duly served. [16]

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11 Reg. 6 of 1977, s. 2 (w.e.f. 17-11-1977).

12 *Vide* Notes on Clauses on Bill of 1970 p. 241.

13 *Sudhir v. R.,* AIR 1949 FC 6 (paras 14, 18).

14 *Vide* Notes on Clauses on Bill of 1970, p. 241.

15 *Sudhir* *v.* *R.,* AIR 1949 FC 6 (paras 14, 18).

16 *K. Ramesh Babu v. State of Karnataka,* 1994 Crlj 358 (360) : (1993) 2 Kar LJ 569 [*LNIND 1993 KANT 38*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

B.—WARRANT OF ARREST

S. 70
Form of warrant of arrest and duration.

(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

1. Scope of s. 70 : Form of warrant of arrest.—

1. This section reproduces *old* s. 75, with the omission of a reference to a 'Bench of Magistrates', as Benches of Magistrates have been abolished under this *new* Code.

2. What is a warrant of arrest.—

1. The distinction between a summons and a warrant of arrest has already been pointed out.

2. Though the expression 'warrant of arrest' has not been defined in the Code, it is clear from No.2 of the 2 nd Sch., *post,* that a warrant is an order addressed to a certain person to arrest the accused to take him into custody and bring him before the Court issuing the warrant. [17]

3. Except in cases mentioned at p. 187, *et seq.,* nobody can be arrested without a warrant.

4. An order of preventive detention under the law of preventive detention is *not* a warrant of arrest [18] to attract the provisions of the Code relating to a warrant to arrest, though the person against whom the order is made has to be arrested, and, hence, the mode of arrest under s. 46 of the Code must be complied with. [19] But s. 75 [*old* s. 80] will not be attracted. [20]

Comment. It is debatable whether the foregoing view expressed by the High Courts is correct. Section 4 of the Maintenance of Internal Security Act, 1971, provides—

"A detention order may be *executed.....* in the manner provided for the execution of warrants of arrest under the *Code of Criminal Procedure* ."

It is obvious that though a detention order is not a 'warrant of arrest' the provisions of the Code relating to the manner of execution of a warrant of arrest have been made applicable to the execution of a detention order. It is difficult to hold that s. 75 [*old* s. 80] does not relate to the *manner* of execution of warrant of arrest, in view of its text:

"The police officer or other person *executing* a warrant of arrest notify the substance thereof ....him the warrant."

It is settled that a non-compliance with the above provision renders the execution of a warrant of arrest illegal. [21] Can it still be held that the provision of *new* s. 75 does not appertain to the manner of execution of a warrant of arrest?

Of course, Cl. (1) of *Art 22 of the Constitution* , requiring communication of the 'grounds for arrest', is not applicable to cases of preventive detention, by reason of Art. 22(3)(b); but 'substance of the warrant' is not the same thing as 'grounds for arrest' which has a wider implication. [22]

3. Warrant of arrest to be according to law.—

The warrant of arrest must be issued according to law as it affects the deprivation of liberty. [23]

4. Requisites of a valid warrant.—

I. In order to be valid, a warrant of arrest must comply with the following conditions:

(i) It must be issued by a Court under this Code, *i.e.* , a Court mentioned in s. 6,*ante,* which includes both Judicial and Executive Magistrates as well as the Sessions Court and High Court (see next caption). Such Court must have jurisdiction to issue the warrant. [24]

(ii) It must be in *writing,* and in the Form prescribed in the 2 nd Sch. (Form no. 2, *post),* which should be used even when the warrant is issued under a special law, which does not provide for a form for such warrant. [25]

(iii) It must be issued in *duplicate.*

(iv) It must be *signed* by the presiding officer of the Court issuing it. Signature means a full signature, but initialling would be a mere 'irregularity' within the meaning of s. 465 [*old* s. 537]. [26]

'Presiding Officer' means the Magistrate who presides in the Court at the time of issuing the warrant and not the Magistrate who presided at the time of taking cognizance of the offence, [27] if he left the station after taking cognizance. If it is signed by any other person, it shall be invalid. [28] It is, however, not necessary that the duplicate also must be signed by the Presiding Officer personally. [29]

(v) It must bear the name of the Court with the seal of that Court. But failure to put the seal is a curable irregularity. [30] Absence of seal below subsequent endorsements to other police officer is also a curable irregularity. [31]

(vi) It must give the full name and description of the person to be arrested, [32] sufficient for his identification. [33] But omission of the father's name would not invalidate the warrant if the other particulars are sufficient to identify the person, [34] *e.g.* , where there is no other person of the same name in the village mentioned. [35] It would be invalid if the father's name given is wrong. [36] Where the legality of a warrant is challenged on the ground that it was issued against some other person, it is for the prosecution to show that he was the person against whom the warrant had been issued. Omission to give the place of residence of the person would invalidate the warrant. [37] So also where the warrant is issued for the arrest of the 'proprietor' of a firm without giving his name. [38]

A *general* Warrant for the arrest of all person committing a specified offence or offences would be illegal. [39]

(vii) It must specify the offence charged. [40] A conditional warrant authorising the officer executing the warrant to arrest the person if he fails to do a certain thing, *e.g.* , to remove himself from the specified area, is illegal, because the determination as to whether he is liable to be arrested has not been made by the Court but has been left to the officer entrusted to execute the warrant. [41] The offence should be mentioned specifically. [42]

(viii) It must give the name and designation of the person who is to execute it. If it is blank or is not sufficiently definite in this respect, the warrant would be invalid. [43]

5. Which Courts are competent to issue a warrant of arrest.—

1. A warrant of arrest may be issued under various provisions of the Code, by the Courts mentioned therein :

   (a) Any Court authorised by the Code to issue a summons [s s. 87, 89].

   (b) The Chief Judicial Magistrate [s. 73(1)].

   (c) A Magistrate of the first class [s s. 73(1); 187(1)].

   (d) A Judicial Magistrate or a Metropolitan Magistrate [s. 204(1)(b)].

   (e) The High Court [s. 390].

6. Local jurisdiction to issue warrant.—

1. A warrant, as s. 77*(post)* says, may be executed at any place within India. Hence, if an offence has been committed within the local jurisdiction of a Court, it can issue a warrant for the arrest of the accused who may then happen to be outside its jurisdiction, in which case, the procedure under s s. 78-80*(post)* should be complied with.

2. Nor is it necessary that the Magistrate who presides over the Court having jurisdiction must be present within his jurisdiction at the time of issuing the warrant. [44]

3. But a Court has no jurisdiction to issue a warrant where the offence has been committed outside his jurisdiction. [45] This proposition is to be read subject to s. 187 [*old* s. 186], which empowers a Magistrate of the first class to issue a warrant for arresting a person within his jurisdiction for an offence committed by him outside such jurisdiction, in the following circumstances—

   (a) The Court within whose jurisdiction the offence has been committed has not taken cognizance of the case.

   (b) In such a case, even though the Court within whose jurisdiction the person is residing for the time being is not competent to try the offence, "It may inquire into the offence *as if* it had been committed" within his jurisdiction and also issue summons or warrant of arrest to compel the accused to appear before him.

   (c) After the accused appears, the Court issuing the warrant should send him to the Magistrate having jurisdiction to try the offence.

   (d) S. 187, however, does not override the mode of execution of such warrant, as laid down in s s. 70-81 [*old* ss. 75-86]. [46]

4. As to execution of warrant outside India, see under s. 77,*post* .

7. Circumstances in which a warrant of arrest may be issued.—

1. A warrant of arrest being a more drastic step than a summons, a warrant should not, as a rule, be issued where summons would be sufficient for the ends of justice, [47] particularly because it is a deprivation of personal liberty. [48]

2. Hence, the Magistrate should be cautious in issuing, in the first instance, a warrant against *purdanashin* ladies and respectable persons. [49]

3. Even in a warrant-case, it is open to the Magistrate to issue a summons. [50]

4. In the case of a *witness,* a warrant of arrest can be issued only in the two contingencies specified in s. 87,*post.* [51]

5. When the accused fails to appear before the Court on the date fixed, the Court should not issue non-bailable warrant mechanically without ascertaining the cause of non-appearance like traffic problems in metropolitan cities. The advocate accused being an educated knows the consequence of non-appearance in the Court on the date fixed. Mere non-bailable warrant in such circumstances without considering all the aspects of the case would not be a judicious exercise of such powers. [52]

When the accused was old and suffering from ailments, his application for personal exemption was rejected but on such rejection issuance of non-bailable warrant against him was held not proper. [53]

8. Proof of issue of warrant.—

Where any question arises as to whether a warrant was issued or not, *e.g.* , under s. 82(1) [*old* s. 87], the Court should demand a strict proof because it involves the deprivation of a person's liberty. [54] Hence, no secondary evidence other than a certified copy is admissible, to show that the statutory form had been complied with. [55] Nor is the fact that a proclamation has been issued under s. 82(1) itself evidence of a warrant having been issued. [56]

9. 'Issued by a Court'. —

Section 70 and the connected sections have no application to orders of arrest which are not issued by a Court, *e.g.* , an order of preventive detention. [57]

10. Sub-sec. (2): Validity of warrant until cancelled.—

1. This sub-section lays down that even where a returnable date or date for appearance is fixed by the Court on the warrant, it remains in force and can be executed even after the expiry of that date, [58] provided it has not yet been cancelled. When the law has not fixed any period limiting the duration of a warrant, it remains valid until it is executed [59] or cancelled, and rescuing or escape of the accused from custody on arrest in execution of such warrant is punishable, [60] even though the direction for bail may have lapsed. [61]

2. The law under the *Code of Civil Procedure* that a process ceases to be valid after expiry of the returnable date does not apply under the *CrPC* .[62]

3. After a warrant is cancelled under the present sub-section, it comes to an end and cannot be re-issued. [63] But it may be re-issued so long as it is not cancelled. [64]

11. Cancellation of warrant.—

1. A warrant can be cancelled only by the Court which issued it. [65] When it is cancelled by that Court, it cannot be re-issued at the direction of a superior Court.

2. No formal order is necessary for cancellation. When the Court writes to the person to whom it was addressed to return it *unexecuted,* the warrant must be deemed to have been cancelled. [66]

3. It is competent for the Court to issue a summons after cancelling a warrant, [67] if sufficient reasons are shown, [68] though it cannot re-issue the warrant after it has been cancelled. [69]

12. Resistance or obstruction to arrest under warrant.—

1. Resistance or obstruction to arrest in execution of a warrant is punishable under ss. 186, 224, or s. 225 B of the I.P.C., provided the following conditions are satisfied :

(a) The warrant must be legal. [70] Hence, there will be no conviction where the warrant does not bear the signature [71] or seal of the Court; [72] or does not contain the name of the person to be arrested; [73] or contains a wrong description, with which the person is not identified; [74] or the warrant is without jurisdiction, [75] having been issued by a Magistrate who was not the presiding officer of the Court competent to issue it; [76] or because it was issued to compel appearance before a Police Officer. [77]

But the legality of the warrant cannot be challenged on the ground that the Court had wrongly exercised its discretion in issuing the warrant, [78] or on the ground of a mere irregularity. [79]

(b) Where it is endorsed to another police officer for execution, such endorsement must be valid (under s. 74,*post)* . Thus, resistance would be no offence where it is not endorsed to a *named* officer. [80]

2. Where the warrant or its execution is illegal, the person sought to be arrested is entitled to use criminal force in making resistance in the exercise of his right of private defence, under s. 99, I.P.C. [81]

3. When a warrant is returned unexecuted owing to obstruction or otherwise, it is competent for the Court to inquire as to why the warrant was not executed. [82]

13. Avoidance of warrant of arrest.—

A warrant is not a summons, notice or order within the purview of s. 172, I.P.C.. Hence, it is not an offence under that section to abscond to avoid arrest under a warrant. [83]

14. Escape from lawful custody. A person who escapes from lawful custody after arrest under warrant would be punishable under s. 224 or 225B, I.P.C., provided—

(a) The warrant was lawful. [84]

(b) The arrest in execution of the warrant was lawfully made. Thus, there would be no conviction—

Where the arresting officer did not notify the substance of the warrant to the person or show him the warrant, as required by s. 80*(post)* . [85]

(c) On the other hand, escape or rescuing would still be punishable—

Where the arrest is made after expiry of the returnable date or the date fixed for granting of bail, in the warrant which has not been cancelled. [86]

15. Illegal arrest not to vitiate the trial.—

The legality of an arrest has nothing to do with the question whether the person was guilty of the offence with which he was charged; [87] and under s. 465(1) [*old* s. 537], the trial cannot be vitiated on the ground of any irregularity in the warrant.

2. Of course, notwithstanding his conviction, the convict may pursue his remedies for wrongful arrest. [88]

16. Remedies for arrest under illegal warrant .—

Broadly speaking, an arrest made under an illegal warrant amounts to an arrest without legal authority, so that the same remedies, as have been discussed, *ante,* shall be available in this case also.

17. Suit for false imprisonment.—

1. Where the warrant of arrest executed by a Police officer is on its face, illegal, he would not be protected by the warrant *e.g.* , where it was not signed or sealed by the Court issuing it [89] or did not mention the name of the person to be arrested or mentioned the name of person other than the person arrested. [90]

2. Not only a police officer, but also the Magistrate who issues a warrant or causes an arrest [91] or himself makes an arrest [92] may be liable for false imprisonment. [93]

3. But the State cannot be made liable on this score. [94]

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17 *Jagdish v. Emp.*, AIR 1940 All 178 .

18 *Tangri v. State of U.P.*, AIR 1961 All 542 [LNIND 1960 ALL 189]; *Kesar Singh v. State of J&K.*, AIR 1963 J&K 23 (para.3).

19 *Jagdish v. Emp.*, AIR 1940 All 178 .

20 *Tangri v. State of U.P.*, AIR 1961 All 542 [LNIND 1960 ALL 189]; *Kesar Singh v. State of J&K.*, AIR 1963 J&K 23 (para.3).

21 *Darbesh,* AIR 1929 Cal 174 175 .

22 *Vide* Author's *Shorter Constitution of India*, Latest Edition.

23 *Jugal Kishore v. C.P.M.*, AIR 1968 Cal 220 [LNIND 1967 CAL 55]: 1968 Crlj 604 .

24 *Bishundayal v. Emp.* AIR 1943 Pat 366 .

25 *Caufman v. Govt. of Bombay,* (1894) 18 Bom 636.

26 *Bankey v. Emp.*, AIR 1918 Pat 493; *Daotaro v. State,* AIR 1956 Ori 97 [LNIND 1955 ORI 17].

27 *Kartick v. Emp,* AIR 1932 Pat 175 176; Cf. *Ayub, v. State of U.P.*, AIR 1962 All 132 [LNIND 1961 ALL 29](para 23).

28 *Yedama v. Emp.,* [AIR 1934 Mad 206 *LNIND 1934 MAD 4*].

29 *Maqbool v. State of J. & K.,* [AIR 1972 SC 963 *LNIND 1972 SC 603*](para 33).

30 *P.B. Gospain v. State,* (1962) 1 Crlj 91.

31 *Kandan v. State,* AIR 1952 TC 459.

32 *Debi Singh v. Emp.,* (1901) 28 Cal 399.

33 *Sagarmal,* in re., AIR 1940 Bom 397.

34 *Bishundayal v. Emp.* AIR 1943 Pat 366.

35 *Bishundayal v. Emp.* AIR 1943 Pat 366.

36 *Kandan v. State,* AIR 1952 TC 459.

37 *Caufman v. Govt. of Bombay,* (1894) 18 Bom 636.

38 *Velappan v. State of Kerala,* [AIR 1965 Ker 72 *LNIND 1964 KER 42*].

39 *Sagarmal, in re* ., AIR 1940 Bom 397.

40 *Velappan v. State of Kerala,* [AIR 1965 Ker 72 *LNIND 1964 KER 42*]; *Bidhumukhi,* in re., (1870) 6 BLR App 129.

41 *Caufman v. Govt. of Bombay,* (1894) 18 Bom 636.

42 *Caufman v. Govt. of Bombay,* (1894) 18 Bom 636.

43 *Debi Singh v. Emp.,* (1901) 28 Cal 399 .

44 *Locha Kala,* (1876) 1 Bom 340.

45 *Kali Charan v. State,* AIR 1955 All 462 .

46 *Sagarmal,* in re., AIR 1940 Bom 397 398 .

47 *Prem v. Mai Sharan,* (1908) 8 Crlj 454 .

48 *Velappan v. State of Kerala,* AIR 1965 Ker 72 [*LNIND 1964 KER 42*].

49 *Prem v. Mai Sharan,* (1908) 8 Crlj 454 ; *R* . v. *Mahomed,* 11 Crlj 197 (198) Sind; *Badruddin v. Balocho,* 14 Crlj 310.

50 *Prem v. Mai Sharan,* (1908) 8 Crlj 454 .

51 *Govt. of Assam v. Sahebulla,* (1923) 27 CWN 857 873FB.

52 *Raghuvansh Singh v. State of Maharashtra,* 2008 Crlj 2127 (Bom-DB).

53 *H.C. Jain v. R.K. Synthetics and Fibres Pvt. Ltd.,* 1999 Crlj 2922 Bom .

54 *Easwaramurthi v. Emp.,* AIR 1944 PC 54 56 .

55 *Easwaramurthi v. Emp.,* AIR 1944 PC 54 56 .

56 *Easwaramurthi v. Emp.,* AIR 1944 PC 54 56 .

57 *Maqbool v. State of J. & K.,* AIR 1972 SC 963 [*LNIND 1972 SC 603*](para 33).

58 *Emp* . v. *Binda,* AIR 1928 Pat 466 ; *Shaik Yousuf v. State of A.P.,* 2001 ALT (Cri) 270(AP) .

59 *Allomiya,* (1903) 28 Bom 129.

60 *Raushan* *v.* *Emp.,* (1909) 13 CWN 1091 .

61 *Raushan* *v.* *Emp.,* (1909) 13 CWN 1091

62 *Naser* *v.* *Emp.,* (1910) 37 Cal 122 .

63 *Guru* *Charan* , in re., (1897) 1 CWN 650 .

64 *Janat* , (1907) 8 Crlj 187 .

65 *Linton* *v.* *Emp.,* (1927) 28 Crlj 326 (327).

66 *Jagdish* *v.* *Emp.,* AIR 1940 All 178 179 .

67 *Prem* *v.* *Mai* *Sharan,* (1908) 8 Crlj 484 .

68 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 .

69 *Janat,* (1907) 8 Crlj 187 .

70 *Fattu,* (1932) 55 All 109 (111-12); *Gopal,* AIR 1941 Pat 161 .

71 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 .

72 *Badri,* (1925) ILR 5 Pat 216.

73 *Jogendra* *v.* *Hiralal,* (1924) 51 Cal 902 .

74 *Debi* *Singh,* (1901) 28 Cal 399 ; *Jogendra* , (1897) 24 Cal 320 .

75 *Dharanidhar* *v.* *Kedar,* AIR 1945 Cal 48 .

76 *Jagpat,* (1918) 18 Crlj 526 (Pat) .

77 *Jogendra,* (1897) 24 Cal 320 .

78 *Puna,* (1932) 11 Pat 740.

79 *Jogendra* *v.* *Hiralal,* (1924) 51 Cal 902 .

80 *Durga* , (1900) 4. CWN 85.

81 *Bisu* *v.* *Emp.,* (1907) 11 CWN 836 .

82 *State of Bombay* *v.* *Nanavati,* AIR 1960 Bom 503 (FB) .

83 *Annawdin,* (1923) 1 Rang 218.

84 *Fattu,* (1932) 55 All 109 (111-12); *Gopal,* AIR 1941 Pat 161 .

85 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 .

86 *Raushan* *v.* *Emp.,* (1909) 13 CWN 1091 .

87 *Emp.* *v.* *Madho,* (1903) 31 Cal 557 .

88 *Emp.* *v.* *Madho,* (1903) 31 Cal 557 .

89 *Subromanaya v. Emp.* (1883) 6 Mad 396; *Mahajan v. Emp.*, (1915) 42 Cal 708 .

90 *Emp. v. Gaman,* (1913) 14 Crlj 142 (Lah) .

91 *Gouri Prasad v. Chartered Bank,* (1925) 52 Cal 615 .

92 Cf. *Ram Narain v. Sen,* AIR 1958 All 757 ; *Manmatha v. Cossipore Municipality,* (1909) 9 CWN 736 .

93 Cf. *Ram Narain v. Sen,* AIR 1958 All 757 .

94 *Kasturilal v. State of U.P.,* AIR 1965 SC 1039 [*LNIND 1964 SC 245*] : (1965) 2 Crlj 144 : (1965) 1 SCR 375 [*LNIND 1964 SC 245*].

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CHAPTER VI
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B.—WARRANT OF ARREST

S. 71
Power to direct security to be taken.

(1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound;

(c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed shall forward the bond to the Court.

1. Scope of s. 71: 'Bailable warrant'.—

1. This section reproduces *old* s. 76, with verbal changes.

2. This section confers a discretion upon the Magistrate, while issuing a warrant of arrest, to make it 'bailable' (which term, of course, is not used in the Code), which means that if the arrested person executed a bond with sufficient sureties for his attendance before the Court at a specified time, the officer to whom the warrant is directed shall take such security and release the person from custody.

3. This discretion of the Magistrate extends to all cases, including even cases where the person is accused of a 'non-bailable offence' (*e.g.* , where the offence is technical) [1] or cases under s. 87. [2]

4. Just as the Magistrate has the discretion whether or not to give this direction in any particular case even though it may be bailable, [3] so it is in the option of the person arrested whether to accept the offer of obtaining his release on executing a bond with sureties or not; he is not bound to do it. [4]

5. The section applies to both accused persons and witnesses. [5]

6. It is not applicable to orders of preventive detention. [6]

2. Sub-sec. (1), (2) : Form and contents of direction.—

1. The direction must be given by an endorsement on the warrant, in the form which is contained in the second half of Form No. 2 of the 2nd Sch., *post.*
2. The endorsement shall state—

(a) the number of sureties;

(b) the amount in which the sureties and the person against whom the warrant is issued are to be respectively bound;

(c) the time at which such person is to attend before the Court; the person executing the bond shall be bound to appear on the specified date and from day to day thereafter until otherwise directed by the Court.

(d) the bond shall be for attendance before the issuing Court or some other Court as directed in the endorsement. It cannot be for attendance before a Police Officer; [7]

(e) the bond is to be executed by the person against whom the warrant has been issued, and not by any other person; the officer executing the warrant has no discretion in this respect. [8]

3. The endorsement shall direct the executing officer (a) to take the authority, when furnished in terms of the endorsement, and (b) to *release* the arrested person from custody.

A. direction in the endorsement that the person arrested should be delivered to a specified person or any person nominated by the complainant would be illegal. [9]

4. Section 71 speaks of discretionary power of the Court to specify about the security to be taken in case the person is to be released on his arrest pursuant to the execution of warrant against him under s. 70. Sub-section (2) of s. 71 enumerates the endorsements which can be made on the warrant. [10]

3. Right to obtain release to be communicated. —

1. Under s. 75,*post,* the person executing the warrant is bound to notify to the person to be arrested the substance of the warrant which, of course, includes his right to obtain release on executing the bond referred to in the endorsement on the warrant, under the present section. [11] In case of omission to give this information, the arrest would become illegal. [12]

2. It is to be noted, however, that on the expiry of the date fixed for appearance in the endorsement of the warrant, the direction to release the person on taking security would lapse, but the warrant for arrest would nonetheless continue to be valid until it is executed or cancelled. [13]

4. Liability of sureties when ceases.—

After the person has been taken into custody, the liability of the sureties comes to an end. If subsequently the accused absconds from the Court, the sureties cannot be held liable. [14]

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1 *Sivamalu* , (1911) 12 Crlj 430 ; *Marula* , (1911) 1 MWN 452 .

2 *Chotey Lal v. Emp.* AIR 1948 All 72 .

3 *Lachmi Narain v. Emp.,* AIR 1939 All 156 .

4 *Chotey Lal v. Emp.,* AIR 1948 All 72 .

5 *Marula,* (1911) 1 MWN 452 .

6 *Maqbool v. State of J&K,* AIR 1912 SC 963 (para 34).

7 *Emp. v. Jogendra,* (1897) 24 Cal 320 .

8		*Kalu,*				
	(1906) 6 Crlj 275		(Lah) .			
9		*Maqbool*	*v.*	*State*	*of*	*J&K,*
	AIR 1972 SC 963 *LNIND 1972 SC 603*		](para 34).			[
10		*Raghuvansh*	*v.*	*State*	*of*	*Maharashtra,*
	2008 Crlj 2127		Bom DB .			
11		*Shyamacharan*		*v.*		*Emp.,*
	(1911) 16 CWN 549		.			
12		*Shyamacharan*		*v.*		*Emp.,*
	(1911) 16 CWN 549		.			
13		*Raushan*		*v.*		*Emp.,*
	(1908) 13 CWN 1091		.			
14		*Karim*	*Shah*	*v.*	*State*	*of* *U.P.,*
	2008 Crlj 2974		All .			

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CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

B.—WARRANT OF ARREST

S. 72
Warrants to whom directed.

(1) A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

1. Scope of s. 72 : Warrant to whom directed. —

This section corresponds to *old* s. 77, with the omission of the words 'when issued by a Presidency Magistrate', in sub-sec. (1), with the result that even a Metropolitan Magistrate shall now have the power to direct a warrant to be executed by some other person when a Police officer is not immediately available. [15]

2. Sub-sec. (1) : Warrant to be ordinarily directed to Police officer.—

1. The general rule laid down in this section is that a warrant for arrest should be directed to a Police officer or officers, for execution. An exception to the rule is to be found in s. 78 [*old* s. 83], *post.* [16]

2. Though Form No. 2 of the 2nd Sch., post, says that both the 'name and designation' of the person who is to execute the warrant should be mentioned in the warrant, it has been held that a warrant would not be illegal if the Police officer to whom it is directed is described by his designation and not by name, [17] because—

> "It would be extremely difficult to carry on the Police administration of the country if every warrant had to be directed by name to a Police officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place". [18]
>
> Of course, the case would be otherwise where both name and designation are absent, [19] and the space is kept blank. [20]

3. But when a warrant directed to a Police officer is endorsed by him for execution to another police officer, under s. 74,*post,* the *name* of the latter police officer must be specified in the endorsement; otherwise the endorsement and execution of the warrant shall be illegal. [21] , [22]

4. When an accused who is sentenced to imprisonment is not in Court or is under bail, the Court must [s. 418(2),*post*], issue a warrant for his arrest under the present section. [23]

3. When a warrant may be directed to a person other than a Police officer.—

1. The latter part of sub-sec. (1) authorises a warrant of arrest to be directed to a person other than a police officer, for execution, in the following circumstances:

   (i) This power belong only to the Court issuing a warrant, and not to a police officer to whom a warrant has been directed by the Court; the latter can endorse it for execution only to another Police officer by name, under s. 74,*post.*

   (ii) The arrest is immediately necessary. [24]

   (iii) No police officer is immediately available for execution of the warrant. [25]

2. If the foregoing conditions are fulfilled, the warrant may be directed to some officer other than a police officer [26] or to a private person.

4. Sub-sec. (2) : Execution where directed to several persons.—

This sub-section makes it clear that where a Court directs a warrant for execution to more than one person, such persons may execute it either individually or collectively.

15 41st Rep. of the Commission, Vol. I, para 6.7.

16 Cf. *Sagarmal,* AIR 1940 Bom 397 .

17 *Bankey* *v.* *Emp.,* (1918) 19 Crlj 747 (748). [The contrary view taken in *Emp. v. Shankar Dayal,* AIR 1922 Oudh 224 , does not appear to be sound,—where there is designation, the omission of name might at best be an irregularity.]

18 *Bankey* *v.* *Emp.,* (1918) 19 Crlj 747 (748). [The contrary view taken in *Emp. v. Shankar Dayal,* AIR 1922 Oudh 224 , does not appear to be sound,—where there is designation, the omission of name might at best be an irregularity.]

19 *Emp.* *v.* *Gaman,* (1913) 14 Crlj 142 (Punj) .

20 *Emp.* *v.* *Gaman,* (1913) 14 Crlj 142 (Punj) .

21 *Bankey* *v.* *Emp.,* (1918) 19 Crlj 747 (748). [The contrary view taken in *Emp. v. Shankar Dayal,* AIR 1922 Oudh 224 , does not appear to be sound,—where there is designation, the omission of name might at best be an irregularity].

22 *Durgacharan,* (1890) 27 Cal 457 .

23 *Mumtaz* *v.* *Chhutwa,* (1914) 41 Crlj 741 (742).

24 Cf. *Nobin* *v.* *Surendra,,* (1870) 13 WR 27 .

25 *Pasuvathia* *v.* *Emp.,* AIR 1928 Mad 624 625 .

26 *Pasuvathia* *v.* *Emp.,* AIR 1928 Mad 624 625 .

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B.—WARRANT OF ARREST

S. 73
Warrant may be directed to any person.

(1) The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under Section 71.

1. Scope of s. 73: When warrant may be directed to any person.—

1. This section corresponds to *old* s. 78 with the following important changes, besides drafting changes :

(a) While under the *old* action, the power belonged to a District Magistrate or a Sub-Divisional Magistrate, under the *new* section, the power would belong only to Judicial Magistrates of the

superior categories—the Chief Judicial Magistrate and a Magistrate of the First Class. Executive Magistrates shall have no such power [sub-sec.(1)].

(b) In sub-sec. (1), the words 'land-holder, farmer or manager' have been replaced by the generic word 'person', as recommended by the Joint Committee, [27] which means that under this section the warrant may be directed, for execution, to *any* person even though he may not be a land-holder, farmer or manager of land.

2. Conditions for the applicability of s. 73.—

1. It has been seen, that in case of urgency if no Police officer is immediately available, *any* Court may direct a warrant of arrest to any person other than a Police officer, for execution.
2. The present section confers a special power only on the specified classes of Judicial Magistrates, to direct any person other than a Police officer, irrespective of any urgency, but subject to the conditions specified, as follows:

(i) Only a Chief Judicial Magistrate or a Magistrate of the First Class may exercise this power.

(ii) The person to be directed by the warrant must be within the local jurisdiction of such Magistrate.

(iii) Such direction may be made only where the person to be arrested is (a) a proclaimed offender, or (b) any person who is accused of a non-bailable offence and is evading arrest.

(iv) Such person may be arrested in execution of such warrant only if the person is in, or enters on, any land or other property under the charge of the person directed by the warrant.

(v) Warrant of arrest under s. 73 of the Code cannot be issued solely for production of the accused before police in aid of investigation. [28]

(vi) When the accused is already in judicial custody in pursuance of an order of a competent Court. [29]

(vii) When there was nothing on record to show arrest issuance of non-bailable warrant against them without assigning any reason was found to be not sustainable. [30]

(viii) The warrants bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind. The Court must carefully examine whether the complaint or F.I.R. was not filed with an oblique motive. [31]

(ix) It cannot be issued against a witness whose presence is required as a witness. [32]

(x) When the allegation against the accused, contain serious allegations, such as, custodial death, the Magistrate is justified in issuing non-bailable warrant against the accused. [33]

3. Procedure for execution of such warrant .—

1. On receipt of warrant with such direction, the person so directed shall acknowledge receipt of the warrant [sub-sec. (2)].

2. He must execute it if or when the person to be arrested comes upon any land or other property under the charge of the person so directed [sub-sec. (2)].

3. When the person is arrested, he is to be made over, with the warrant, to the nearest police officer to be taken before a Magistrate having jurisdiction, unless the warrant contains a direction [s. 71(1),*ante*] for release on furnishing security and such security is taken by the person executing the warrant [sub-sec. (3)].

4. Non-compliance with direction.—

Wilful non-compliance with the duty to execute the warrant under the present section would be punishable under s. 187, I.P.C. (see *ante*), provided, of course, the warrant is legally valid.

5. Analogous Provisions.—

1. under s. 40(1)(b)- (c), any resident of a village has the obligation to give *information* as to the presence of a proclaimed offender or the commission of a non-bailable offence, in or near such village.

2. When a warrant is directed to a person other than a police officer, any other person may lawfully aid in the execution of such warrant [s. 38,*ante*].

3. The general provisions in ss. 46, 47 and 49, *ante,* would be applicable to the execution of such warrant.

4. Apart from execution of a warrant directed to him, a private person may make an arrest, without any warrant at all, of a proclaimed offender or a person committing a ‘non-bailable’ and ‘cognizable’ offence in his presence, under s. 43.

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27 Rep. of the Joint Committee, p. (x).

28 *State v. Dawood Ibrahim,* AIR 1997 SC 2494 [LNIND 1997 SC 815]: (2000) 10 SCC 438 [LNIND 1997 SC 815] : (1997) 2 Crimes 92 .

29 *Bineesh v. State of Kerala,* (2006) 2 Crimes 123 (Ker) .

30 *Dipti Ranjan Parida v. State of Orissa,* 2008 Crlj 4651 Ori .

31 *Inder Mohan Goswami v. State of Uttaranchal,* [AIR 2008 SC 251 : *LNIND 2007 SC 1179*] : [(2007) 12 SCC 1 : *LNIND 2007 SC 1179*] : (2008) 1 SCC 254 (Cri) .

32 *W.N. Chadha v. State,* 1993 Crlj 3214 Del .

33 *Jayaprakash v. State,* 1998 Crlj 4368 Del .

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B.—WARRANT OF ARREST

S. 74
Warrant directed to police officer.

A warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

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1. Scope of s. 74. —

1. This section reproduces *old* s. 79, without any change.
2. This section enables a Police to whom a warrant has been directed [s. 72(1),*ante*] to endorse it for execution to another police officer, without any direction from the Court in this behalf.
3. But the conditions for such delegation by the Police officer are—

(a) The person to whom it is endorsed must be a *Police officer.* Endorsement in favour of any person other than a Police officer, such as a Process-server or Watcher would be illegal. [34] But a member of the Police service shall continue to remain a Police officer irrespective of his *current post.* [35]

(b) The endorsement must be by *name* of the person to whom it is endorsed; otherwise execution of the warrant shall be illegal. [36] But if the name is given, absence of designation would not invalidate endorsement. [37]

(c) The endorsement must be made only by the Police officer to whom the warrant has been directed by the Court, [38] or by the officer to whom it has been validly endorsed. [39] In other words, subsequent endorsements are possible. [40]

(d) The endorsement must be made on the warrant itself, and not on any copy thereof. [41] The Sind High Court held that the endorsement may be written on a separate piece of paper, [42] but this view is hard to maintain in the face of the words "endorsed *upon* the warrant" in the section.

4. A warrant addressed to a private person cannot be endorsed to any other person; [43] and a warrant directed to a Police officer cannot be executed by another Police officer without an endorsement in conformity with the present section. [44]

2. Endorsement of warrant for execution by another Police officer.—

1. This section provides that when a warrant is directed to a Police officer, he can not only execute it himself, but is competent to endorse it to another Police officer, in which case, execution by the latter will be valid. [45] But it cannot be endorsed in favour of any person other than a Police officer. [46] , [47]

2. But this general provision is limited by the special provisions of s. 79 [*old* s. 84], so that when a warrant is directed to a police officer for execution outside the jurisdiction of the Court issuing the same, he cannot himself endorse it to another Police officer; if he does not execute it himself under sub-sec. (3), he must proceed under sub-sec. (1) of s. 79. [48]

3. Illegality, effects of.—

If the requirements of this section are not complied with, the endorsement hall be invalid, so that the execution of the warrant by the person to whom it has been endorsed shall be illegal and obstruction of or escape from such arrest shall be no offence under ss. 224-225, I.P.C., [49] *e.g.* —

(i) Where the *name* of the person to whom it is endorsed does not appear in the endorsement, [50] even though he is described as the officer of a certain police station. [51]

(ii) Where the person to whom it is endorsed is not a ‘Police officer’. [52]

4. Applicability to arrests under special Act s.—

It has been held that the present section is not applicable to warrants of arrest under the following special Acts, which must be executed only by the Police officer named therein:

(i) Bombay Gambling Act, 1887. [53]

(ii) Bengal Chowkidari Act, 1870. [54]

(iii) *Public Gambling Act, 1867* [s. 5].[55]

(iv) Rajasthan Public Gambling Ordinance, 1949. [56]

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34 *Durga Charan,* (1900) 27 Cal 457 (460).

35 *Kashyap v. State of J. & K.,* AIR 1959 Crlj 56 58 .

36 *Kochu Kunja v. State of Kerala,* (1962) 2 Crlj 437 (Ker) .

37 *Kartick,* 1932 Pat 171.

38 *Durga Charan,* (1900) 27 Cal 457 (460).

39 *Durga Charan,* (1900) 27 Cal 457 (460).

40 Cf. *Indar v. State of Bihar,* AIR 1967 Pat 14 (para 6).

41 *Dalip,* (1896) 18 All 246 .

42 *Mangharam v. Emp.* AIR 1931 Sind 89 94 .

43 *Pasuvathia v. Emp.* AIR 1920 Mad 624 .

44 *Ghasita,* AIR 1921 Lah 236 .

45 Cf. *Indar v. State of Bihar,* AIR 1967 Pat 14 (para 6).

46 *Durga Charan,* (1900) 27 Cal 457 (460).

47 *Pasuvathia* *v.* *Emp.* AIR 1920 Mad 624 .

48 *Devisingh* *v.* *State of Rajasthan,* AIR 1964 Raj 36 [*LNIND 1963 RAJ 31*](para 10).

49 *Kochu Kunja* *v.* *State of Kerala,* (1962) 2 Crlj 437 (Ker) .

50 *Kochu Kunja* *v.* *State of Kerala,* (1962) 2 Crlj 437 (Ker) .

51 *Durga* *Charan,* (1900) 27 Cal 457 (460).

52 *Durga* *Charan,* (1900) 27 Cal 457 (460).

53 *Asgarali* *v.* *Emp.,* AIR 1940 Bom 127 .

54 *Naser,* (1909) 37 Cal 122 .

55 *Kimat* *Mal,* AIR 1956 All 449 [*LNIND 1956 ALL 8*](DB) ; *Kundan v. Emp,* AIR 1948 Cal 81 .

56 *State* *v.* *Laxminarayan,* AIR 1965 Raj 5 [*LNIND 1964 RAJ 92*].

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B.—WARRANT OF ARREST

S. 75
Notification of substance of warrant.

The police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

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1. Scope. of s. 75 : Notification of substance of warrant .—

1. This section reproduces *old* s. 80, without any change.
2. It has two obligations imposed upon the person executing a warrant of arrest, whether he is a police officer or other person:

I. To notify the *substance* of the warrant.

(i) The object of notifying the substance is to inform the person arrested of the charge on which he was being arrested, so that may arrange for his release or defence. Where the officer executing the arrest shows the warrant to the person in the first instance, allows him to read it, and also informs him of his right to bail, the arrest would not be illegal merely because the substance of the warrant was not separately notified. [57]

(ii) On the other hand, where the warrant provided for bail, and the officer arrested the person without informing him of that provision, the arrest itself was held to be illegal. [58]

II. To *show* the warrant, if so required.

(i) The obligation to show the warrant arises only if the person to be arrested demands it; it need not be shown when the substance thereof is notified. [59]

(ii) But mere showing is not enough because the person to be arrested is entitled to know the charge against him, [60] and also to see that the person arresting has authority. [61] Hence, the warrant should be shown in such manner that the person gets an opportunity to read it. [62]

2. Effects of non-compliance.—

I. If a person executing a warrant fails to comply with the requirements of this section, the arrest would not be lawful, so that resistance or obstruction thereto would not be an offence, *e.g.* , under s. 186,[63] 224, 225, [64] 225B, or 333, [65] I.P.C., *e.g.* —

(a) Where the person executing the warrant fails to notify the substance of the warrant, [66] unless such notification is rendered impossible by the person sought to be attested, by offering immediate resistance, [67] in which case, the arrest would be valid under s. 46(2). [68]

(b) Where the person executing the warrant fails to show the warrant, if so required by the person to be arrested, or refuses him the opportunity of reading it. [69] , [70]

II. But it is not necessary to mention in the report of execution that the substance of the warrant was notified [71] or that it was shown.

III. The onus is on the person who alleges that the requirements of this section were not complied with, to show that, and in the absence of proper evidence the presumption will be that official act s have been properly performed. [72]

3. Protection of Police officer.—

1. A Police officer who acts under a warrant issued by a Magistrate, has immunity from civil act ion or criminal prosecution for anything done in execution of such warrant, notwithstanding any defect in the jurisdiction of the Magistrate,— under *Section 43 of the Police Act, 1861* . [73]

2. Section 79 of the I.P.C. protects a person executing warrant of arrest for anything done, in good faith, under a mistake of fact, *e.g.* , relating to the identity of the person to be arrested. [74]

3. But a Police officer who, without a warrant, or without a proper endorsement thereon, arrests a person chargeable with non-cognizable offence. *i.e.* , a case not covered by s. 41,*ante* would be punishable under s. 342 of the I.P.C., unless the case can be covered by s. 79, I.P.C. [75]

4. Analogous provision.

See s. 55(1),*ante,* which imposes a similar obligation on a subordinate Police officer to notify the substance of the order deputing him under the section and also to show him the order, if so required.

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57 *Bankey* *v.* *Emp.,* AIR 1918 Pat 613 615 .

58 *Shyama* *Charan,* (1911) 13 Crlj 590 (Cal) .

59 *Baroda,* (1921) 25 CWN 815 ; *Ranjit v. Emp.,* AIR 1938 All 20 .

60 *Bankey* *v.* *Emp.,* AIR 1918 Pat 613 615 .

61 *Abdul* *Gafur* , (1896) 23 Cal 896 (898).

62 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 (750).

63 *Abdul* *Gafur* , (1896) 23 Cal 896 (898).

64 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 (750).

65 *Amarnath,* (1883) 5 All 318 .

66 *Satish* *v.* *Jadu,* (1899) 26 Cal 748 (750).

67 *Ranjit* *v.* *Emp.,* AIR 1938 All 20 .

68 *Legal Remembrancer v. Darbesh,* AIR 1929 Cal 174 175 .

69 *Satish v. Jadu,* (1899) 26 Cal 748 (750).

70 *Abdul Rahaman v. Emp.,* (1914) MWN 498 .

71 *Kartick v. Emp.,* AIR 1932 Pat 171 173 .

72 *Zarkhan v. Emp.,* AIR 1940 Pesh. 10 .

73 Cf. *Kaverappa v. Sankannayya,* AIR 1965 Mys. 214 221 .

74 *Kanai,* (1897) 24 Cal 885 ; *Gopala,* (1923) 26 Bom LR 138 .

75 *Gopal,* (1922) 46 Mad 605(FB) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

B.—WARRANT OF ARREST

S. 76
Person arrested to be brought before Court without delay.

The police officer or other person executing a warrant of arrest shall (subject to the provisions of Section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person :

Provided **that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.**

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1. Scope of s. 76: Person arrested to be brought before Court .—

1. This section reproduces *old* s. 81, with a drafting change and the addition of the Proviso, to conform to the requirements of *Art. 22(1) of the Constitution* .

2. While s. 43(1) lays down the corresponding obligation of private person making an arrest without warrant, and s. 56 lays down the corresponding obligation of a Police officer making an arrest without warrant, the present section lays down the obligation of a person (whether police officer or private person) who arrests a person in execution of a warrant. In this case, production of the arrested person before another Police officer will not do; he must be produced before the Court to which he was required by the warrant to be brought.

3. The warrant is exhausted the moment the person arrested is brought before the Court. The legality of further detention of the person will depend upon an order of remand issued by the Court, under s. 309(2) [*old* s. 344(1A)].

4. The present section relates to arrest in execution of a warrant of arrest issued under s. 70. It has nothing to do with a warrant for the execution of a sentence of imprisonment which is dealt with in s. 419 [*old* s. 384], *post.*

2. 'Without unnecessary delay'.—

1. While s. 57 specifies a period of 24 hours for production of the person arrested in case of an arrest *without* warrant, *old* s. 81 did not specify any such period, but used the expression 'without unnecessary delay' as is used in s. 56. This anomaly has been removed by adding the *new* Proviso.

2. If the person arrested is detained for an unnecessary period or beyond 24 hours without production before the Court as required by this section, the person making the arrest shall be liable for wrongful confinement, under Section 342, I.P.C.; and a Police officer, also under *s. 29 of the Police Act, 1861* .

3. The words 'subject to .. s. 71' mean that if the warrant contains an endorsement for releasing the person on his furnishing security, as provided is s. 71(1), the person arresting shall have no further obligation to produce such person before the Court as required by the present section.

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B.—WARRANT OF ARREST

S. 77
Where warrant may be executed.

A warrant of arrest may be executed at any place in India.

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1. Scope of s. 77: Where warrant may be executed.—

1. This section reproduces *old* s. 82.
2. Though the section mentions a warrant of arrest, it is extended to a search-warrant, by s. 99,*post* so that a search-warrant may also be executed at any place in India. [76]
3. Section 78,*post,* provides the procedure to be followed where the warrant is to be executed outside the jurisdiction of the Court issuing it, but within India. [77]
4. The Code does not provide for the execution of a warrant outside India, for that is governed by the provisions of the *Extradition Act* . [78] (see *below*).

2. Where warrant may be executed.—

1. By providing that a warrant may be executed at any place in India, the present section does not impose any restriction upon the powers of a Police officer under the Code or under any other law. The object of the present section is only to make it clear that a warrant issued by any Magistrate in India may be executed at any place in India and is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or the Court to which he is subordinate. [79]

2. Where the place of execution is a State or territory to which this Code does not extend, the procedure under s. 105 [*old* s. 105A] is to be followed.

3. Procedure for arresting a person from outside India: Extradition.—

I. By reason of s. 1(2), the jurisdiction of an India Court or the Indian Police cannot extend beyond the territorial limits of India. Hence, a warrant issued by an Indian Court cannot be executed outside India by virtue of anything in this Code.

II. This does not prevent an Indian Court from issuing a warrant for the arrest of a person who is alleged to have committed an offence in India and then fled away to another country. [80] The mode of securing his arrest in pursuance of that warrant, however, must be sought from other laws.

III. The procedure, according to which the arrest of an offender who, after having committed an offence in India, has fled to another country, is known in International law as ‘extradition’. India has enacted the *Extradition Act, 1962* , to govern this procedure when a foreign State requisitions extradition of a fugitive offender from India, as well as the procedure when India has to requisition such extradition from a foreign country,—the latter procedure being provided in Chap. IV of the Act (ss. 19-21).

IV. But though the *Extradition Act, 1962* , applies only with respect to countries with which there is arrangement for extradition or agreement, it does not follow that where that Act does not apply, it would be without jurisdiction for the Government of India, at the instance of a Magistrate in India, to requisition another country to deliver up a person for trial in this country if the Government of India is able to *persuade* that country in this behalf. [81] When a man is brought for trial before a Magistrate in this country, he cannot plead that he was brought here illegally, from foreign country. [82]

V. When the Police asks for a warrant for the arrest of a person from another country, the Magistrate has only to be satisfied that there is *prima facie* evidence before him that such person has committed an offence in India which he is competent to try. On being satisfied on this point, he issues the warrant of arrest to the Police (in India) under the present Chapter of the Code, in the usual manner. It is the Police authorities who would then approach the Government of India for requisitioning the extradition of the person from the foreign country. [83]

VI. The surrender of the offender by the foreign country is governed by the municipal law of that country. If that country arrests that person and surrenders him, the Indian Court before whom he is produced shall have no competence to question the legality of the arrest of such person on the ground that he had been arrested and surrendered by the foreign country, contrary to law. [84]

4. Execution of warrant issued by a foreign Court.—

1. It is clear that the present section speaks of the execution of warrant issued by a Court in India, under s. 70.

2. The Code does not provide for the execution in India of a warrant issued by a foreign Court. For such purpose resort is to be had to the provisions of the *Extradition Act* . *Old* s. 93A has been omitted by the *new* Code.

5. Execution of search-warrant. —

By virtue of s. 99,*post,* s. 77 is also applicable to a search warrant. Hence, it can be executed at any place in India. [85]

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76 *Gyaso* *v.* *State,* AIR 1957 MP 7 8 [*LNIND 1956 MP 50*].

77 Cf. *Yusufuddin* *v.* *R.,* (1897) 25 Cal 20 PC ; *Haramohan v. Emp.,* 18 Pat 121.

78 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

79 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

80 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

81 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

82 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 ; *Emp. v. Savarkar,* (1911) 35 Bom 225.

83 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

84 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

85 *State* *of* *W.B.* *v.* *Jugal,* AIR 1969 SC 171 .

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CHAPTER VI
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B.—WARRANT OF ARREST

S. 78
Warrant forwarded for execution outside jurisdiction.

(1) When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to any Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction it is to be executed; and the Executive Magistrate or District Superintendent or Commissioner shall endorse his name thereon, and if practicable, cause it to be executed in the manner hereinbefore provided.

(2) The Court issuing a warrant under sub-section (1) shall forward, along with the warrant, the substance of the information against the person to be arrested together with such documents, if any, as may be sufficient to enable the Court acting under Section 81 to decide whether bail should or should not be granted to the person.

1. Scope of s. 78: Execution outside jurisdiction of Court issuing warrant.—

1. This act ion corresponds to *old* s. 83, with the following changes:

(i) In sub-sec. (1), besides verbal changes, the word ‘Executive’ has been inserted to quality ‘Magistrate’, and the words ‘within its jurisdiction’ have been inserted after the words ‘police officer’,

to make it clear that the warrant may be forwarded outside the jurisdiction of the issuing Court, where it is to be executed outside the jurisdiction of that Court, but within India. [86]

(ii) *Old* sub-sec. (2) has been added at the end of sub-sec. (1).

(iii) Sub-sec. (2) has been substituted, on the recommendation of the Joint Committee [p. (x)], in order to enable the Magistrate having jurisdiction over the place of arrest to release the arrested person on bail, which power he did not have under the *old* Code (see *post*).

(2) This is only an enabling provision, which enables a Court issuing a warrant to forward a warrant to an Executive Magistrate or District Superintendent or Commissioner of Police outside the jurisdiction of the issuing Court, for execution within the jurisdiction of such Magistrate or Police officer. [87] It does not prevent the issuing Court to direct it to a Police officer within its jurisdiction, to be executed in the manner laid down in s. 79 [*old* s. 84]. [88]

When the offence was committed in India, but the accused flees to a foreign State, there is nothing wrong for the Metropolitan Magistrate in sending the warrant of arrest for execution by the authorities in that foreign State, through the Indian External Affairs Ministry. [89]

3. The Court should exercise this power with the utmost circumspection, having applied its mind as to the need for authorising arrest beyond jurisdiction. [90]

4. The procedure for execution to be followed by the receiving Executive Magistrate or Superintendent or Commissioner of Police is laid down in the concluding portion of sub-sec. (1) which was contained in *old* sub-sec. (2). It says that the receiving Magistrate or Police officer must endorse his name on such warrant and then have it executed in accordance with the preceding provisions of the Code which includes the procedure under s. 74 [*old* s. 72]. [91]

2. Sub-sec. (1) : Endorsement.—

1. Though sub-sec. (1) requires the receiving Magistrate or Police officer to endorse his name on the warrant where he affixes his initial instead of signature, the execution of the warrant would not be illegal; it would amount to an irregularity, curable under s. 465 [*old* s. 537]. [92]

2. It is for the receiving Court to direct the warrant to an officer for execution; if, however, the issuing Court mentions the officer who is to execute it, that would constitute only an irregularity. [93]

3. Sub-sec. (2) : Particulars to be forwarded with warrant to be executed outside jurisdiction.—

This *new* sub-section, which was engrafted at the instance of the joint Committee, [94] is consequential upon the insertion of the second Proviso to s. 81(1), which was also recommended by the Committee, in these words :

"Under the present provisions [*old* s. 86] where a warrant of arrest is sent to a place outside the local jurisdiction of a Magistrate, for execution, the arrested person has necessarily to be transported in custody to the Magistrate issuing the warrant before he can claim to be released on bail .... this results in considerable hardship and inconvenience to persons arrested far away from

Court issuing the warrant of arrest.

To remove such hardships and inconvenience, the Committee has amended these clauses conferring power on the Magistrate having jurisdiction over the place of arrest to release the person on bail [*new* 2 nd Proviso to s. 81(1)], subject to the other provisions of the Code relating to bail [s. 437]. To enable such Magistrate to consider whether bail should be granted, it has further been provided [s. 78(2)] that the Magistrate issuing a warrant should also forward along with the warrant the *substance of the information, together with relevant documents* ."

4. Jurisdiction of the executing Court to question the legality of a search warrant.—

1. Under the *old* Code, it was held that a warrant which was not sufficiently definite either in the name of the person to whom the warrant is addressed or in the description of the person to be arrested was invalid, so that the Court receiving it for execution under the present section [*old* s. 83] would be justified in returning it unexecuted. [1] , [2] Under sub-sec. (2) of s. 78, as inserted by the *new* Code, it is clear that if the warrant is lacking in the necessary particulars regarding the person to be arrested, the same conclusion would follow.

2. Similarly, as regards a search warrant, the receiving Court would be justified in refusing to execute it if the particulars regarding the things to be seized are absent or insufficient for identification, but not where of the items are definite while others are not. [3]

3. But the receiving Court has no jurisdiction to question the legality of the search warrant on the ground that it should not have been issued on the allegations, or materials before the issuing Court. [4] , [5]

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86 Cf . *Yusufddin v. R.,* (1897) 25 Cal 20 PC ; *Haramohan v. Emp* ., 18 Pat 121.

87 *Kunhunny v. State of Kerala,* (1962) 1 Crlj 645 (Ker) .

88 *Devisingh v. State of Rajasthan,* AIR 1964 Raj 36 37 .

89 *State of W.B. v. Jugal,* AIR 1969 SC 171 .

90 *Dhrupatia* , AIR 1956 Bom 591 [*LNIND 1956 BOM 60*].

91 *Devisingh* *v.* *State* *of* *Rajasthan,* AIR 1964 Raj 36 37 .

92 *Daitari* *v.* *State,* AIR 1956 Orissa 97 .

93 *Debendra* *v.* *State,* (1969) 73 CWN 97 .

94 Rep. of the Joint Committee on the Bill of 1970 (p. x, on Cl. 78).

1 *Dhrupatia* , AIR 1956 Bom 591 [*LNIND 1956 BOM 60*].

2 *Sagarmal,* in re., AIR 1940 Bom 397 ; *Velappan v. State of Kerala,* AIR 1965 Ker 72 [*LNIND 1964 KER 42*].

3 *Debendra* *v.* *State,* (1969) 73 CWN 97 .

4 *Debendra* *v.* *State,* (1969) 73 CWN 97 .

5 *Emp* *v.* *Benjamin,* AIR 1945 All 1 5 .

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B.—WARRANT OF ARREST

S. 79
Warrant directed to police officer for execution outside jurisdiction.

(1) When a warrant directed to a police officer is to be executed beyond the local jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to an Executive Magistrate or to a police officer not below the rank of an officer-in-charge of a police station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police officer to whom the warrant is directed to execute the same, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police officer within whose local jurisdiction the warrant is to be executed will prevent such execution, the police officer to whom it is directed may execute the same without such endorsement in any place beyond the local jurisdiction of the Court which issued it.

1. Scope of s. 79 : Warrant directed to Police officer within jurisdiction, to be executed outside jurisdiction.—

1. This section reproduces *old* s. 84, without any substantial change, excepting the restriction of the power to endorse to an Executive Magistrate.

2. As has already been pointed out (*ante*) s. 78 is only an enabling provision which enables a Court of the jurisdiction to send its warrant of arrest direct to an Executive Magistrate or Superintendent or Commissioner of Police of another jurisdiction. Instead of following that course, the Court issuing the warrant may, in such case, direct the warrant to a Police officer within its own jurisdiction, in the usual manner in which case, the procedure to be followed by such Police officer is laid down in the present section. [6]

3. A Police officer to whom a warrant is directed under the present section, has no power to endorse the warrant to any other Police Officer in the manner provided in s. 74 (*ante*). He must himself execute such warrant after obtaining the endorsement [subject to his emergency power under sub-sec. (3)] of the local Magistrate or officer-in-charge of the police station of the jurisdiction where the warrant is to be executed; the arrest made by any other Police officer would be illegal. [7]

2. Sub-sec. (3) : Execution by police officer without endorsement as required by sub-sec. (1).—

Sub-sec. (3) forms an exception to the requirement of obtaining endorsement from Executive Magistrate or superior Police officer [sub-sec. (1)]. This exception comes into play where the Police officer to whom the warrant is directed has reason to believe that the case is such that the delay involved in obtaining the endorsement would prevent execution. In such a case, the Police officer may execute the warrant on his own authority, without such endorsement. [8]

Only if such officer has reason to believe that obtaining such endorsement would prevent execution of the warrant by virtue of the delay which is likely to be occasioned on obtaining such endorsement he may not want for such endorsement. The arresting officer must bring material on the record to demonstrate that obtaining such endorsement on the warrant would have prevented execution of the warrant. [9]

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6 *Devisingh v. State of Rajasthan,* AIR 1964 Raj 36 37.

7 *Devisingh v. State of Rajasthan,* AIR 1964 Raj 36 37.

8 *Devisingh v. State of Rajasthan,* AIR 1964 Raj 36 37.

9 *Kuma Rajaiah alias K. Rajanna v. State of A.P.,* 2007 Crlj 2031 : (2007) 1 ALD 845 (Cri) (AP).

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B.—WARRANT OF ARREST

S. 80
Procedure on arrest of person against whom warrant issued.

When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometres of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under Section 71, be taken before such Magistrate or District Superintendent or Commissioner.

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1. Scope of s 80 : Procedure after arrest beyond jurisdiction of issuing Court.—

1. This section reproduces *old.* S. 85 with the substitution of ‘thirty kilometers’ for ‘twenty miles’ and of ‘Executive Magistrate’ for ‘Magistrate’.
2. While s. 76 provides for the production of the arrested person before the Court issuing the warrant, where it is executed within the jurisdiction of the Court (see *ante*), the present section provides for the production of the arrested person in cases where the execution of the warrant takes place outside the jurisdiction of the issuing Court (under s. 78 or 79). In such a case, the person arrested is to be produced by the arresting officer—

(a) before the issuing Court, where that Court is within 30 kilometers of the place of arrest or is nearer than the Executive Magistrate or Superintendent of Police or Commissioner of Police within whose jurisdiction the arrest was made;

(b) in other cases, before the Executive Magistrate, Superintendent or Commissioner of Police within whose jurisdiction the arrest was made. [10]

3. Of course, no such production would be necessary if the arrested person is released on security, as directed in the warrant under s. 71 (see *ante*).

4. The procedure to be followed by the Executive Magistrate or Superintendent or Commissioner of Police before who the arrested person is produced is laid down in s. 81, namely, that he shall direct the removal of the arrested person to the issuing Court.

5. It is to be noted that s. 80 is not controlled by s. 187 [*old* s. 186], which deals with the case where the Court which has jurisdiction to inquire into an offence committed within its jurisdiction has not taken cognizance of the case and the offence is brought to the notice of a Magistrate of another jurisdiction who is not competent to try it. [11] Section 80 deals with the case where the Court within whose jurisdiction the offence has been committed, has issued a warrant for the arrest of the person who may have removed himself outside the jurisdiction of that Court.

In such case, the executing Court is *not* entitled to institute an inquiry under s. 187 to determine the legality of the warrant. If the *identity* of the person sought to be arrested is established, he is to execute it and proceed according to s. 81. [12]

2. 'Unless security is taken under s. 71'.—

1. A Magistrate, not having jurisdiction over the place where the offence was committed, is authorised to take security under the present section where the warrant issued by the Court having jurisdiction provides for such security being taken.

2. In the absence of such direction in the warrant, Magistrate of one jurisdiction could not obtain security from a person for appearance before a Court of another jurisdiction. [13]

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10 Cf. *Khan Chand v. State,* (1971) Crlj 149 (Cal) .

11 *Sagarmal,* in re., AIR 1940 Bom 397 ; *Velappan v. State of Kerala,* AIR 1965 Ker 72 [*LNIND 1964 KER 42*].

12 Cf. *Khan Chand v. State,* (1971) Crlj 149 (Cal) .

13 Cf. *Lal Bahadur, v. Emp.,* AIR 1929 All 914 .

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B.—WARRANT OF ARREST

S. 81
Procedure by Magistrate before whom such person arrested is brought.

(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court :

Provided **that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under Section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant :**

Provided further **that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of Section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of Section 78 to release such person on bail.**

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under Section 71.

STATE AMENDMENT

Uttar Pradesh. — *The following amendments were made by U.P. Act 1 of 1984, S. 9 (w.e.f. 1-5-1984).*

S. 81. —In Section 81, sub-section (1) insert the following third proviso:—

" *Provided also* that where such person is not released on bail or where he fails to give such security as aforesaid, the Chief Judicial Magistrate in the case of a non-bailable offence, or any Judicial Magistrate in the case of a bailable offence may pass such orders as he thinks fit for his custody till such time as may be necessary for his removal to the Court which issued the warrant."

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1. Scope of s. 81. —

This section corresponds to *old* s. 86, with the following changes:

(i) The words 'such Magistrate' have been replaced by the words 'The Executive Magistrate'.

(ii) The numbers of the other sections referred to have been changed, according to the arrangement of the *new* Code.

(iii) The second Proviso has been inserted in sub-section (1), as recommended by the Joint Committee on the Bill of 1970. [14]

2. Sub-sec. (1) : Power of the Executing Magistrate or Police officer. —

1. Words 'appears to be' indicate that the Executive Magistrate or Superintendent or Commissioner of Police before whom the arrested person is brought under s. 80, is not bound to remove the arrested person to the issuing Court, unless he is satisfied as to the identity of the person arrested with the person described in the warrant forwarded for execution, under s. 78. [15]

2. This does not mean that he has to make any elaborate inquiry as to the identity of the person, [16] , [17] but that he should be *prima facie* satisfied as to his identity. [18]

3. The scope for making any inquiry has since been reduced by the insertion of s. 78(2), which requires issuing Court to forward with the warrant "the substance of the information against the person to be arrested together with such documents ... as may be sufficient" for the purpose of granting bail. But if, notwithstanding all these materials accompanying the warrant, the Magistrate or Police officer, under the present section, is not *prima facie* satisfied that the identity has not been established, it would be not only within his power but his duty to refuse to remove the arrested person to the issuing Court, *e.g.* , where the warrant only mentions the surname of the accused without any description, occupation or address; [19] or where the warrant only mentions 'the proprietor of a named company' to be arrested, without giving the name of such person. [20]

3. 2nd Proviso : If the offence be a non-bailable one. —

1. This Proviso, as stated earlier, has been inserted in pursuance of the recommendation of the Joint Committee on the Bill of 1970. In the absence of such a provision under the *old* Code, in the case of execution of a warrant outside the jurisdiction of the issuing Court, the executing Court had no power to grant bail, so that the arrested person had to be transported in custody to the issuing Magistrate before he could claim to be released on bail, resulting in considerable hardship to the person arrested. This Proviso confers the power to grant bail, in such cases, upon the executing Court, and, in order to enable him to exercise that power, it has been provided in the *new* sub-sec. (2) to s. 78, that the issuing Court should, along with the warrant to be executed outside its jurisdiction, forward all information, and documents necessary for the purpose of granting bail under the present section.

2. The reference to s. 78 makes it clear that the Chief Judicial Magistrate or Court of a Session other than those having jurisdiction over the offence can have the power to grant bail under this Proviso only where a warrant has been forwarded under s. 78. [21]

4. 'Subject to the provisions of s. 437. —

The 2nd Proviso to s. 81(1) empowers the Chief Judicial Magistrate to release a person arrested of a non-bailable offence. To this the latter part of s. 437(1),*post,* constitutes a limitation, [22] namely, that if the person appears to be guilty of offence punishable with death or imprisonment for life (*e.g.* , under ss. 302-304; 121), he ' *shall not* be released on bail'.

The limitation under s. 437(1), it should be noted, does not apply to a Court of Session or the High Court. [23]

5. S s. 81 and 438. —

This section and its Proviso apply to cases of post-arrest bail and do not refer to anticipatory bail. [24]

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14 Rep. of the Joint Committee on the Bill of 1970 (on Cl. 78).

15 *Sagarmal, in re.* , AIR 1940 Bom 397 ; *Velappan v. State of Kerala,* AIR 1965 Ker 72 [LNIND 1964 KER 42].

16 *Sagarmal, in re.* , AIR 1940 Bom 397 ; *Velappan v. State of Kerala,* AIR 1965 Ker 72 [LNIND 1964 KER 42].

17 *Kunhunny v. State of Kerala,* (1962) 1 Crlj 645 (Ker) .

18 *Kunhunny* *v.* *State* *of* *Kerala,*
(1962) 1 Crlj 645 (Ker) .

19 *Sagarmal,* *in* *re.* ,
AIR 1940 Bom 397 ; *Velappan v. State of Kerala,*
AIR 1965 Ker 72 [
LNIND 1964 KER 42].

20 *Sagarmal,* *in* *re.* ,
AIR 1940 Bom 397 ; *Velappan v. State of Kerala,*
AIR 1965 Ker 72 [
LNIND 1964 KER 42].

21 *Zafrul* *v.* *State,*
(1986) Crlj 605 (para 13) Pat (FB).

22 *Govind* *v.* *State* *of* *W.B.,*
AIR 1975 SC 1249 .

23 *Govind* *v.* *State* *of* *W.B.,*
AIR 1975 SC 1249 .

24 *Zafrul* *v.* *State,*
(1986) Crlj 605 (para 13) Pat (FB); *State of Manipur v. Vikash Yadav,*
2000 Crlj 4229 (Gau) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

C.—PROCLAMATION AND ATTACHMENT

S. 82
Proclamation for person absconding.

(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded, or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(i)

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

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[(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the *Indian Penal Code (45 of 1860)* , and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1) .]

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1. Legislative change.—

Sub-sections (4) and (5) have been incorporated in s. 82 of the Code by *s. 12 of the Code of Criminal Procedure* (Amendment) Act, 2005 which the two sub-sections have come into force with effect from 23.06.2006.

Notes on Clause 12 of the Bill reads as follows:

> 'Clause 12 seeks to insert new sub-sections (4) and (5) in s. 82 empowering the Court to make the declaration that the person is a proclaimed offender where he fails to appear at the place and time mentioned in the proclamation issued under sub-section (1) of s. 82 in relation to offences under ss. 302, 304, 364, etc. of the *Indian Penal Code* .'

2. Scope of s. 82: Proclamation against absconder.—

1. This section corresponds to *old* s. 87, with the following changes, other than drafting changes:

> Sub-section (2) has been divided into two clauses (i) and (ii), the latter being *new.* It has been inserted to provide for proclamation in a newspaper, as an *additional* mode of publication, at the discretion of the Court, as recommended by the Commission [26] and the Joint Committee. [27]

2. The powers under this section and the subsequent sections under this sub-head belong to any of the Courts specified in s. 6,*ante,* including an Executive Magistrate.

3. The power is available also in summons cases [28] and against witnesses [29] as against accused persons, provided the conditions specified have been fulfilled.

4. Sub-sections (4) and (5) inserted by the *Code of Criminal Procedure* (Amendment) Act, 2005 (Act 25 of 2005) empowers the court to make a formal declaration of a person accused of any of the offences specified in sub-section (4) that such accused is proclaimed offender when he fails to appear at the specified place and time required by the proclamation. However, before making declaration, the Court may hold necessary enquiry as it thinks fit.

3. S s. 82-85: Procedure where a person absconds after issue of warrant against him.

1. If any Court has reason to believe that a person against whom warrant has been issued by it has absconded, or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation [s. 82(1)].

2. The Court issuing such proclamation may, at any time thereafter, order the attachment of any property, movable or immovable, or both belonging to the proclaimed person [s. 83(1)]. If the proclaimed person appears within the time specified in the proclamation the Court shall make an order releasing the property from the attachment [s. 85(1)].

3. If the proclaimed person does not appear as directed, property under attachment shall be at the disposal of the State Government but it shall not be sold until expiration of six months from the date of attachment and until the disposal of any claim [s. 85(2)] which may have been preferred or objection made by any person other than the proclaimed person on the ground that he has interest in such property and that such interest is not liable to attachment [s. 84].

4. The successive steps in s s. 82-86, as stated above, have been embodied in the Code to safeguard the rights of the person against whom a compulsory process has been issued, and anything done in defiance of any of the safeguards shall be illegal. [30] Conversely, these provisions form a complete Code on the subject and a person aggrieved by any of these steps must find his remedies from these provisions, [31] apart from revision [32] and remedies [33] under the *Constitution* , if any.

The accused convicted in a criminal case and said conviction has been confirmed in revision by the Revisional Court also. Non-bailable warrant was issued twice by the Magistrate against the accused so that the accused who was on bail could be apprehended to serve out the sentence. The concerned police officer expressed his inability to execute the non-bailable warrant. The statement of concerned village administrative officer and police officer show that the accused is wilfully avoiding the process of the Court. Even in such a case, the procedure for declaring the accused as proclaimed offender can be adopted. [34]

4. Sub-sec. (1) : Conditions for the validity of Proclamation under s. 82.—

1. The conditions specified in this section, for the issue of a Proclamation against an absconder, which are drastic, are mandatory, [35] and a contravention of any of these conditions renders the Proclamation and proceedings subsequent thereto a nullity. [36]

(i) That a warrant has been issued against a person. [37]

(ii) The Court must have reason to believe that the person against whom warrant has been issued has absconded [38] or is concealing himself so that the warrant cannot be executed. [39]

Hence, a simultaneous issue of a warrant of arrest and a Proclamation founded on an erroneous assumption that a report of non-execution of a warrant of arrest had been received, would be illegal. [40] The Court must await return of the warrant. [41]

As the words 'after taking evidence or not' indicate, the Magistrate is not bound, in every case, to take evidence before issuing a Proclamation under sub-sec. (1). He cannot issue the Proclamation as a matter of course because the Police is asking for it; he must be *prima facie* satisfied [42] that the person has absconded so that the warrant of arrest, previously issued, [43] *cannot* be executed, notwithstanding reasonable diligence. [44]

(iii) A definite place and date must be specified in the proclamation, requiring such person to appear at the place and on such date.

(iv) Such date must not be less than 30 clear days [45] from the date of *publication* [46] of the Proclamation in the manner laid down in sub-sec. (2).

(v) Where the entire proceedings are liable to be quashed, *e.g.* , for non-examination of the complainant under s. 200, the Proclamation and the order under s. 83 shall be invalid. [47]

2. The requirements of s. 82 being mandatory, any non-compliance therewith cannot be cured as an 'irregularity'. [48]

3. Before declaring an accused as absconder, Court is to be satisfied that the accused has left his permanent place of abode or he is avoiding service or there is no chance of arrest in near future. [49]

4. The *sine qua non* for an act ion under s. 82 of the Code is the prior issuance of warrant of arrest by the Court. There must be a report before the Magistrate that the person against whom warrant was issued by him had absconded or had been concealing himself so that the warrant of arrest could not be issued against him. [50]

5. The Court must record its reason to believe for taking such action and it must also satisfy about the abscondance of the accused as well as about the dealing of this property under s. 83. Without such complaint, issuance of such order of proclamation and attachment cannot be valid exercise of power. [51]

5. 'Absconded'.—

1. In the absence of a definition of this word in the Code, it must be understood in its etymological sense of 'hiding oneself': if such person was in *concealment* from before the issue of the process, it constitutes absconding if he continues to do so, after the issue of the process. [52]

2. Change of place is not necessary [53] to constitute absconding; conversely, mere change of place may not amount to absconding where it was not for the purpose of concealment or avoiding execution, *e.g.* , where the person was changing hospitals for treatment. [54]

3. A person cannot be said to have absconded to avoid a warrant which was not act ually issued; [55] or had settled abroad prior to the issue of process. [56]

   But if a person, before the issue of legal process somehow comes to know of the issue of the process or anticipates it and quits the country, he can be said to have 'absconded'. [57]

4. A person cannot be said to have absconded if, after making of an order for the issue of a warrant, he was taking steps to secure orders from a superior Court against the order issuing the warrant or for bail. [58]

5. Section 82 is, however, an enabling provision and does not place any obligation on the Police to take this step against an absconder. Consequently, where any question arises as to whether a person had absconded during a particular period, it cannot be contended that he did not abscond merely because no proceeding under s. 82 was taken against him. [59]

6. If the issue of the warrant [60] and its return is proved by the prosecution, the onus of proving that he did not abscond is on the accused. [61]

7. Every person who is not immediately available cannot be characterised as an absconder. So, in every case the warrant is not executed, the proclamation cannot be issued. [62]

6. 'Has reason to believe'.—

1. What is necessary to justify the issue of a proclamation under sub-sec. (1) is the magistrate's reasonable belief that the person has absconded. The magistrate must form an opinion, [63] on the materials before him, that the person has absconded or is concealing himself (*e.g.* , to avoid service of process). [64] The magistrate need not necessarily come to a finding that the person has *factually* absconded. [65]

2. Where, however, there were no materials upon which the magistrate could reasonably [66] form such opinion, orders under s s. 82-83 shall be invalid. [67]

3. An army personnel who is in active service and in operational area cannot be said that he is avoiding the service and as such he cannot be declared a proclaimed offender. [68]

7. Effects of non-compliance with the requirements of s. 82.—

It has been held that the requirements of this section are mandatory, [69] so that non-compliance with any of the following requirements would render the Proclamation, with subsequent proceedings founded thereon, [70] invalid, and not merely irregular. [71]

(a) Failure to specify time or place for appearance [sub-sec. (1)]. [72]

(b) The time specified being less than 30 days from the date of *publication* of the proclamation, as distinguished from the date of issue thereof [sub-sec. (1)] [73] , [74]

(c) Want of proof of due publication, according to sub-sec. (2), [75] except where there is a statement of the Court issuing the proclamation, in terms of sub-sec. (3), specifying that (i) it was duly published; (ii) the date of publication; if the statement omits to mention either of these terms, it would itself be invalid. [76] But this section being subject to s. 405 [*old* s. 537], the attachment and sale following the proclamation shall not be invalid, unless the defect is mere irregularity and has not occasioned a failure of justice, *e.g.* , where the proclamation was read and published in the places where the absconder was most likely to hear it, the omission to affix a copy thereof in the Court house would not invalidate the proclamation. [77]

(d) The prosecution must also prove that the conditions precedent for the issue of proclamation were fulfilled, *viz.* (a) that a warrant of arrest had actually been issued against the person; (b) that such person has absconded or is concealing himself, so that the warrant cannot be executed. The mere fact that a proclamation was made cannot make the proclamation legal evidence of the issue of the warrant. [78] If no such warrant had been issued or there was no authority to issue the warrant, the proclamation would be invalid. [79]

(e) The records must show that there were materials from which the Court had 'reason to believe' that a warrant of arrest 'cannot be executed' for the reasons stated in sub-sec. (I). [80] Where the Magistrate simultaneously issued a warrant of arrest, proclamation and order of attachment, without being satisfied that a warrant of arrest could be executed, the subsequent proceedings would be invalid. [81]

What is required is that there must be *some* materials from which the Magistrate can form an opinion that the person has absconded; evidence to prove that he has factually absconded is not necessary. [82]

(f) The notification calling upon the person to appear in less than the period of thirty days is invalid and liable to be quashed. But when the proclamation for the person absconding is declared illegal, the Court can still direct the accused to appear before the Court and the plea that fresh proclamation is necessary to be issued is not tenable. [83]

(As to the simultaneous issue of an order of attachment, see under s. 83(1),*post*).

8. Illegality of the Proclamation.—

Apart from non-compliance with the requirements of this section, a Proclamation would be illegal—

(a) Where the Magistrate had no jurisdiction to issue the warrant of arrest, [84] *e.g.* , where the accused was not living within the limits of the jurisdiction of the Count at the time the warrant had been issued.

(b) Where the order for issue of the warrant was otherwise illegal [1] (see *ante*).

(c) Where the proceedings are liable to be quashed, for some defect going to the root of the proceeding. [2]

9. Sub-sec. (2); Modes of publication.—

1. The three sub-clauses (a)-(c) are conjunctive and not disjunctive, which means that there would be no valid publication of the proclamation unless all the three modes of publication are proved. [3] The requirements being mandatory, non-compliance cannot be explained away as an 'irregularity' [4], [5]

2. But proof of Publication would be dispensed with, if there is a statement under sub-sec. (3). [6]

3. In the absence of a statement under sub-sec. (3), the burden of proving due publication is on the prosecution. [7], [8]

10. Effect of publication of proclamation.—

1. The immediate effect of publication of the proclamation under s. 82 is that the Court is empowered to make an order of attachment, under s. 83, whereupon the subsequent sections 84- 85 will come into play.

2. But the object of the proclamation being to compel the appearance of the person before the court which issued it, it cannot be used for other purposes. Thus, the publication of the proclamation cannot be taken as a substituted service of the notice of appeal under s. 385(1) [*old* s. 422]; hence, if the appellate Court proceeds with an appeal in the absence of the absconder on the ground that a proclamation under s. 82 has been served upon him, the *ex parte* judgment or order of the appellate Court would be set aside. If service of the notice of appeal cannot be otherwise made, the Court has no other alternative than to adjourn the hearing of the appeal. [9]

11. Sub-Sec. (3) : Statement as to due publication of proclamation, evidentiary value of.

1. This sub-section raises a conclusive presumption as to the compliance of this section regarding publication of the proclamation from a statement in writing of the Court issuing the proclamation that it has been duly published. In order to raise this conclusive presumption,—

   (a) The statement must be in *writing.* In the absence of such statement in writing on the record, any person against whom the proclamation has been issued to show that it has not been published in the manner required by sub-sec. (2). [10]

   (b) The statement must say that the proclamation was *'duly published'* . Where it merely says that the proclamation was 'issued', it would not raise the presumption of law regarding publication. [11]

   (c) It must mention the date of publication, [12] in the absence of which sub-sec. (3) would not be attracted. [13]

2. The present sub-section deals with the proof of publication of the proclamation; it has nothing to say about the proof of issue of the warrant of arrest. Proof of publication of the proclamation does not constitute evidence as to the issue of the warrant or its legality, [14] *e.g.* , owing to omission to specify the date of publication. [15]

3. It does not override the provisions of the *Evidence Act* to lay down expressly or by implication that the proclamation would be equivalent to notice of its contents, to the public or even the inhabitants of the town or village where it was published. [16]

4. Notwithstanding such presumption, the court should preserve the proclamation and the records relating to its proclamation, [17] for the presumption would be of no avail where the requirements of s. 82 have not been complied with. [18]

5. A purchaser to the property attached at the sale held under s. 85(2),*post,* must take the precaution of ascertaining whether a statement to the effect that the proclamation was duly served [s. 82(3)] appears on the record, for, in the absence of such statement, the question whether the Proclamation was duly published would be open to evidence. [19]

12. Pronouncement of certain accused as proclaimed offender by the Court in certain offences.—

By the *Code of Criminal Procedure* (Amendment) Act, 2005 (Act 25 of 2005) with effect from 23.06.2006, the specific provision has been made empowering the Court to make a pronouncement of any person accused of an offence under ss. 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 I.P.C.*i.e.* in respect of serious offences, a proclaimed offender when he fails to appear at the specified place and time required by the proclaimed. However, before issuing such proclamation, the Court may hold an enquiry, if it considers fit and make a declaration to that effect. Prior to this amendment, s. 82 required publication a written proclamation requiring the accused absconding to appear at a specified place and time not less than thirty days of issuing of proclamation. When a proclamation was thus duly published, sub-section (3) provided that if the proclamation had been published duly, then it would be a conclusive evidence that the requirement of s. 82 had been complied with and that the proclamation was on such day. However, in respect of serious offences mentioned in sub-section (4) a formal proclamation of the person accused of any such offences pronouncing him a proclaimed offender and make a declaration to that effect has to be made.

13. Sub-section (5).—

It is made clear in sub-section (5) of s. 82 that before making such pronouncement of the person accused of any of offences specified in sub-section (4), there shall be due publication of the proclamation and a statement in writing has to be made by the Court that the proclamation has been duly published and such statement in writing shall be conclusive evidence that the requirement of sub-section (1) have been duly complied with and that the proclamation was published on such date.

Before the Court proceeds to pronounce a person accused of an offence specified in sub-section (4) a proclaimed offender and made a declaration to that effect. So, pronouncing a person accused of any such offence a proclaimed offender and making a declaration to that effect, it is incumbent sub-sections (2) and (3) have been duly complied with otherwise no such pronouncement and declaration as contemplated in sub-section (4) of s. 82 cannot be made.

14. Punishment for non-appearance.—

1. It has already been pointed out (see *ante*) that a warrant not being a summons, notice or order addressed to the person to be arrested, absconding to avoid execution of warrant of arrest is not punishable under s. 172, I.P.C. [20]

2. But if he fails to appear in obedience to a Proclamation under this section, he would be punishable under s. 174, I.P.C. [21] If he has any grounds to challenge the validity of the Proclamation, he should appear before the Court and raise his pleas for a judicial determination, [22] or apply for revision, if so advised.

3. But the fact of the issue and publication of the proclamation must be strictly proved to secure conviction. [23] , [24]

15. Revision.—

1. The Proclamation should be quashed and the property of the petitioner, if attached, should be restored to him. [25]

(a) Where the Magistrate issuing the proclamation does not maintain and cannot produce the records to show that the mandatory requirements [26] of the Code relating to proclamation and attachment were complied with. [27]

(b) Where the records disclose that he issued the Proclamation without being satisfied as to the condition precedent mentioned in sub-sec. (1). [28]

(c) Where the Court did not record statement that the Proclamation was published on a specified date. [29]

(d) Where there was no publication in the manner required by sub-sec. (2). [30]

(e) Where it omits to mention the time and place for appearance of the absconder, as required by sub-sec. (1). [31]

(f) Where the date specified in the proclamation for appearance of the persons is (i) less than 30 days from the date of its publication; or (ii) the time of 30 days was computed from the date of *issue* of the proclamation, and not from that of its publication, as required by sub-sec. (1). [32]

(g) If the proclamation is not publicly read in some conspicuous place of the town or village where the person ordinarily resides, as required by sub-sec. (2)(a); [33] or proof of publication in all the three modes mentioned in sub-clauses (a)-(c) is wanting. [34]

16. Applicability to contempt of Court.—

Since the provisions of the Code do not apply to proceedings for contempt of Court, a Proclamation under this Chapter cannot be used to secure the presence of a person who is alleged to have committed contempt of Court. [35]

17. Applicability to preventive detention.—

1. An authority empowered to make an order of preventive detention under the Maintenance of Internal Security Act, 1971, is not a 'court' within the purview of the *CrPC* . Hence, where the person against whom an order of detention is proposed to be issued be an absconder at that time, the authority cannot resort to the procedure under s. 82.[36]

2. In any case, an order of detention under such law cannot be challenged as *mala fide* on the mere ground that the procedure under s. 82 was not resorted to before making such order. [37]

18. Analogous Provisions .—

1. In connection with s. 82, should be noted the provision in s. 299 [*old* s. 512] which deals with another consequence of an *accused* person having 'absconded'. It enables the Court to record the evidence of prosecution witnesses in the absence of the accused,—as an exception to the general rule that witnesses against the accused must be examined in his presence.

2. The mere fact that proceedings under s. 82 were not taken against the accused would not show that he was not absconding. [38]

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25 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 12 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

26 41st Rep. of the Commission, Vol. I, para. 6. 9; 37th Rep., para. 225.

27 Rep. of the Joint Committee, p. 241.

28 *Yasin* *v.* *Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip.* v. *State of Bihar,* (1981) Crlj 1672 (Pat) DB ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

29 *Yasin* *v.* *Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip. v. State of Bihar,* (1981) Crlj 1672 (Pat) DB ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

30 *Yasin* *v.* *Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip. v. State of Bihar,* (1981) Crlj 1672 (Pat.) D.B. ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

31 *Deva Singh v. Fazal,* AIR 1928 Lah 562 566 .

32 Cf. *Abdul Cader v. Union of India,* (1977) Crlj 1707 (para 25) Mad.

33 *Birad* *v.* *State,* AIR 1958 Raj 167 [

LNIND 1957 RAJ 64](para 7); *Pal Singh v. State,* AIR 1955 Punj 18 .

34 *Nachi Exports v. M/s. T.K. Thiruven Gadam and Sons,* 2008 Crlj (NOC) 278(Mad) .

35 *Yasin v. Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip.* v. *State of Bihar,* (1981) Crlj 1672 (Pat) DB ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

36 *Birad v. State,* AIR 1958 Raj 167 [LNIND 1957 RAJ 64](para 7) ; *Pal Singh v. State,* AIR 1955 Punj 18 .

37 *Bishan Dayal v. Emp.,* AIR 1943 Pat 366 369 .

38 *Bishan Dayal v. Emp.,* AIR 1943 Pat 366 369 .

39 *Pawan v. State of W.B.,* (1973) 79 Crlj 1368 (para 4).

40 *Pawan v. State of W.B.,* (1973) 79 Crlj 1368 (para 4).

41 *Sushil v. State,* AIR 1960 Pat 160 161 .

42 *Yasin v. Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip.* v. *State of Bihar,* (1981) Crlj 1672 (Pat) DB ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

43 *Bishan Dayal v. Emp.,* AIR 1943 Pat 366 369 .

44 *Jadho v. Maniklal,* AIR 1923 Nag 55 .

45 *Gurappa v. State of Mysore,* (1969) Crlj 826 .

46 *Jadho v. Maniklal,* AIR 1923 Nag 55 ; *Mian Jan v. Abdul,* (1905) 27 All 572 .

47 *Dulichand v. State,* AIR 1971 Assam 14 .

48 *Asstt. Registrar of Companies v. Standard Paint Works,* (1971) 2 SCC 85 : AIR 1971 SC 1115 [*LNIND 1971 SC 147*]: 1971 Crlj 827 .

49 *Abdul Rehman v. State,* 2007 Crlj 3113 Raj .

50 *Rohit Kumar v. State of Delhi,* 2008 Crlj 2561 Del, see *Sanjiv Kumar Agarwal v. State of Jharkhand,* AIR 2010 NOC 71 (Jhar), in this case no service of summons was proved.

51 *Md. Nazrul Islam v. State of Assam,* 2008 Crlj 3374 : (2008) 1 GLT 979 [*LNIND 2008 GAU 241*].

52 *Srinivasa v. R.,* (1881) 4 Mad 393 (397).

53 *Srinivasa v. R.,* (1881) 4 Mad 393 (397).

54 *Forbes v. Emp.,* AIR 1943 Oudh 325 328 ; *Jagdev v. Emp.,* AIR 1984 Lah 151 .

55 *Srinivasa v. R.,* (1881) 4 Mad 393 (397).

56 *Gundappa v. State of Karnataka,* (1977) Crlj 187 (NOC) (Knt) ; *Vellyappa v. Alagappa,* AIR 1942 Mad 289 [*LNIND 1941 MAD 168*].

57 Cf. *Abdul Cader v. Union of India,* (1977) Crlj 1707 (para 25) Mad.

58 *Qamardin,* AIR 1992 Lah 475 .

59 *State v. Girasia,* AIR 1994 Sau 39 42 .

60 *Pandya,* (1884) 7 Mad 436.

61 *Forbes* *v.* *Emp.,* AIR 1943 Oudh 325 328 ; *Jagdev v. Emp.,* AIR 1948 Lah 151 .

62 *Devendra Singh Negi v. State of U.P.,* 1994 Crlj 1783 All ; *Dip Narain Singh v. State of Bihar,* 1981 Crlj 1672 Pat .

63 *Easwaramurthi* *v.* *Emp.,* AIR 1944 PC 54 57 ; *Rohit Kumar v. State,* 2008 Crlj 3561 Del .

64 *Abdul v. Union of India,* AIR 1977 Mad 386 [LNIND 1977 MAD 78](para 24) (FB); *Nazrul Islam v. State,* 2008 Crlj 3374 Gau .

65 *Easwaramurthi* *v.* *Emp.,* AIR 1944 PC 54 57 .

66 *Yasin* *v.* *Emp.,* (1909) 10 Crlj 306 (Nag) ; *Dip.* v. *State of Bihar,* (1981) Crlj 1672 (Pat) DB ; *Devendra v. State of U.P.,* (1994) Crlj 1783 (paras 13-14).

67 *Ratish* *v.* *Mohesh,* (1985) Crlj 94 (para 4) Gau; *Debendra Singh Negi v. State of U.P.,* 1994 Crlj 1783 All ; *Siddangowda v. State of Mysoore,* 1972 Crlj 289 Mys .

68 *Nirmala Devi v. State of H.P.,* 2003 Crlj 3499 UP .

69 *Birad* *v.* *State,* AIR 1958 Raj 167 [LNIND 1957 RAJ 64](para 7) ; *Pal Singh v. State,* AIR 1955 Punj 18 .

70 *Gurappa v. State of Mysore,* (1977) Crlj 826 .

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74 *Karnubha,*
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75 *Mian* *Jan* v *Abdul,*
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77 *Malli* *v.* *Emp.,*
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78 *Easwaramurthi* *v.* *Emp.,*
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79 *Bishandayal* *v.* *Emp.,*
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80 *Pawan* *v.* *State* *of* *W.B.,*
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82 *Abdul* *v.* *Union* *of* *India,*
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LNIND 1977 MAD 78](para 24) (FB).

83 *Savitaben* *v.* *State* *of* *Gujarat,*
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8 *Pandya,* (1884) 7 Mad 436.

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17 *Emp. v. Jina,* (1911) 13 Crlj 293 (294).

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22 *R. v. Womesh,* (1866) 5 WR 71 .

23 *Pal Singh v. State,* AIR 1955 Punj 18 .

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34 *Pawan v. State of W.B.,* (1973) 79 Crlj 1368 (para 4) Cal.

35 *Sukhdev* *v.* *Chief* *Justice,*
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LNIND 1953 SC 108] :
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36 *Indradeo* *v.* *State* *of* *W.B.,*
AIR 1973 SC 1062 (para 3) :
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37 *Indradeo* *v.* *State* *of* *W.B.,*
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

C.—PROCLAMATION AND ATTACHMENT

S. 83
Attachment of property of person absconding.

(1) The Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person :

Provided **that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued—**

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

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

it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to

such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases—

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the *Code of Civil Procedure, 1908* (5 of 1908).

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1. Scope of s. 83 : Attachment of property of absconder.—

1. This section corresponds to *old* s. 88, with the following changes, other than verbal—

(i) In sub-sec. (1), corresponding to *old* sub-sec. (1), the words 'at any time' have been substituted by the words 'for reasons to be recorded in writing ... after the issue of the proclamation', and the Proviso has been added, as recommended by the Joint Committee [Rep., p. (x)].

(ii) In sub-sec. (2), corresponding to *old* sub-sec. (2) the words or 'Chief Presidency Magistrate' have been omitted.

(iii) In sub-sec. (4), corresponding to *old* sub sec. (4), Cls. (e)-(h) have been numbered as Cls. (a)-(d).

2. It was recommended by the Commission [39] that the words 'District Magistrate' in sub-sec. (2) should be replaced by the words 'Chief Judicial Magistrate', but that has *not* been adopted in the Bill as introduced after the Report of the Joint Committee. [40]

3. Since a Proclamation under s. 82 can be made against 'any person', an order of attachment can also be made in respect of the property of 'any person',—an accused or a witness—against whom a Proclamation has been made.

4. An order of attachment can be made by 'any Count' which is competent to make a Proclamation. If, however, the Court is not competent to issue an order of attachment, the attachment and consequent sale shall be void [s. 461(a), — *old* s. 530(a)].

2. Object of attachment.—

The object of the attachment of the property of the absconder under s. 83 is not to punish the accused but to procure his appearance. [41]

3. Not to be issued in haste.—

The order of attachment under s. 83 of the Code should not be passed in haste or without proper application of mind. [42]

4. Analysis of s. 83.—

This section authorises the Court issuing a proclamation against an absconder under s. 82, to order attachment of any property belonging to such person [sub-sec. (1) to compel his appearance. [43] It is a penalty for his non-appearance, notwithstanding the Proclamation, [44] besides prosecution under s. 174, I.P.C. for disobedience of the Proclamation. Sub-sec. (2) authorise the attachment even outside the district of the issuing Court, provided the endorsement of the District Magistrate of the district where the property is situate is obtained.

The mode in which the attachment is made is laid down in sub-secs. (3)-(4), according to the nature of the property,—debt, movable or immovable property. Subsection (5) empowers the Court to sell the property ordered to be attached where it is of a perishable nature.

One of the modes of attachment of immovable property, under sub-sec. (4) is by the appointment of a Receiver. Sub-section (6) makes applicable the provisions of Order XL of the *Code of Civil Procedure, 1908* , to the powers, duties and liabilities of a Receiver appointed under sub-sec. (4)(b) of the present section.

[Cls. (6A)-(7) of *old* s. 88 have been incorporated in s s. 84-85 (1)-(2) of the *new* Code, *post*]

5. Sub-sec. (1) : Which Court may order attachment.—

1. It is only the Court which issued the Proclamation under s. 82(1) [see *ante*], which is competent to make an order of attachment under the present section, provided that Proclamation was a legal one. [45]

2. Since the power to issue a Proclamation, under s. 82(1), belongs to 'any Court', the power to attach also belongs to any such Court.

3. But where the property to be attached is situated in a district outside the district of the attaching Court, it would, in order to be effective, require the endorsement of the District Magistrate of that district where the property is situate [s. 83(2)].

6. When an order of attachment may be made .—

I. Under *old* sub-sec. (1), the order of attachment could be issued against the property of a 'proclaimed person at any time', so that it could be made simultaneously with the issuing of the Proclamation. [46]

II. But this has been controlled by amending sub-sec. (1) and inserting the Proviso thereunder.

Changes made by the new Code. —The effects of the changes made in sub-sec. (1) are as follows:

(a) Whenever any order of attachment is to be made, the reasons therefor must be recorded in writing. There was not such obligation under the *old* sub-section. But there is no requirement to issue a notice to show cause before making the order.

(b) An order of attachment can be made only *after* the Proclamation under s. 82(1) has already been 'issued' except in the cases mentioned in the Proviso. In other words, an order of attachment would be illegal if made simultaneously with the issue of the Proclamation, unless it is made in the following exceptional circumstances,—

(i) Where the proclaimed person is about to dispose of the whole or part of his property, or

(ii) Where the proclaimed person is about to remove the whole or any part of his property from the local jurisdiction of the Court.

(c) Before making a simultaneous order of attachment, the Court must be satisfied as to the existence of either of the circumstances specified in the Proviso, "by affidavit or otherwise".

The reasons which prompted the Joint Committee [p. (x)] to recommend the foregoing changes are—

"The existing provision permits the issue of an order of attachment of property simultaneously with the issue of proclamation. This may result in hardship in some cases where the person concerned, even before he comes to know of the issue of the proclamation, finds his property being attached suddenly. At the same time the Committee cannot

shut their eyes to the fact that if prior notice is insisted on in all cases, the purpose would be defeated in some cases as the property would be secreted. The appropriate course, in the opinion of the Committee, would be to provide that an order of attachment should be capable of being issued simultaneously with the proclamation in certain special circumstances, *e.g.* , when the absconding person is about to dispose of his property. Sub-clause (1) has, therefore, been amended with a view to providing for the simultaneous issue of proclamation and attachment in certain special circumstances".

3. It is doubtful whether under the *new* section, the issue of a Proclamation under s. 82(1) could be presumed [47] from the mere fact that an order of attachment under the present section has been made. It must be proved [48] in order to make the order of attachment valid.

4. Therefore without having issued a proclamation under s. 82, except in emergency, no attachment of the property of the absconder can be made. [49]

5. The provisions of *Cr.P.C.* do not warrant sale of the attached property after the accused has surrendered as the purpose of s. 82 of the Code has been achieved and attachment does not subsist and sale of the said property is not warranted.[50]

7. What property may be attached.—

1. Sub-section (1) makes it clear that *any* property, movable or immovable belonging to the proclaimed person, may be attached. It follows that items of property which are exempted from attachment by *s. 60 of CPC* ode, 1908 are not immune from attachment under the instant section.
2. The word ‘belonging’ does not mean that the absconder must be the full owner of the property or it must be in his possession. Any interest in the property which is alienable [51] by the absconder may be attached, *e.g.* ,—

   (i) The beneficial interest of the absconder. [52]

   (ii) His undivided interest in the family property. [53]

   (iii) His undivided interest as a partner in business. [54]

   (iv) The equity of redemption of the absconder in mortgaged property. [55]

3. But no property in which the absconder has no present interest can be attached *e.g.* —

   (i) Property in the hands of a Receiver appointed by Court. [56]

   (ii) Property subject to a charge for maintenance; [57] but so long as there is no charge under decree of Court, it is a mere personal obligation which would not bar attachment, [58] unless the property is burdened with the obligation to maintain under the personal law of the absconder. [59]

4. Where the property attached is an undivided interest of the absconder, the only procedure that could be adopted by the Court is to appoint a Receiver to collect the share of the absconder in the income, which shall be at the disposal of the Government under s. 85(2),*post* .

5. Only the property of the absconder and not the property of the father of the absconder can be attached under s. 83 of the Code. [60]

8. Form of order of attachment.—

See Form no. 6 of the 2 nd Sch., *post* . But any defect in *form* will not invalidate the attachment [s. 466,— *old* s. 538].

9. Conditions for the validity of an order of attachment .—

An order of attachment under this section will be valid only if the following conditions are fulfilled:

(i) The Proclamation issued under s. 82 must be valid in law [61] (see *ante*), as distinguished from 'irregularity', within the meaning of s. 465(1) [*old* s. 537].

Thus, the attachment would be invalid where no valid warrant has been issued. [62] This does not mean that an officer executing the warrant would have any concern to question the propriety in issuing the warrant. [63]

An order under s. 83 would also be invalid where there is no material that the accused was absconding, [64] so that the Proclamation, under s. 82 was a nullity.

(ii) The Proclamation must have been duly published subject to s. 82(3) [see *ante*], and the presumption of official acts under *s. 114, Evidence Act* , [65] , [66] and s. 466 [*old* s. *538*], *post,* which says that the attachment shall *not* be invalid, owing to any defect or want of *form* in the 'writ of attachment or *other proceedings* relating thereto'.

(iii) Where the property to be attached is outside the jurisdiction of the issuing Court the order must be endorsed by the District Magistrate within whose district it is situate, as required by sub-sec. (2). [67]

(iv) The property to be attached must belong to the proclaimed person and not any third party. [68]

(v) It is only when the proviso to sub-section (1) of s. 83 is attracted, there can be simultaneous order of proclamation and attachment, otherwise the Court shall have to wait for thirty days from the date of the proclamation to exercise the power of attachment under s. 83. If either of the two conditions referred to Clause (a) or Clause (b) of the proviso is attracted, such a course can be adopted. Even in such a case, the Magistrate has to record his reasons for arriving at the judicial satisfaction that such conditions as mentioned in the proviso have come into existence. [69]

10. Sub-sec. (2): Property outside jurisdiction.—

Where the property to be attached is outside the jurisdiction of the Court making the order of attachment, it will be invalid unless it is endorsed by the District Magistrate within whose jurisdiction the property is situate. [70]

11. Sub-sec. (3)(a).

The possession of a movable may be taken by seizure and removal, *e.g.* , the doors or shutters of a building, but not the fixtures embedded in the floor or the walls, which, being immovable property, cannot be dug up and removed. [71]

12. Resistance to attachment. —

1. Resistance to attachment under this section is punishable under s. 186 of the I.P.C.. In case of hurt or assault, s. 332,[72] or s. 353, I.P.C. may be applicable. [73]
2. But there will be no punishment where the attachment is illegal or void *ab initio,* [74] *e.g.* —

   (i) Where the proclamation issued under s. 82 is not valid, because the condition of attachment under s. 83(1) is that there must have been a proclamation lawfully issued by the attaching Court.

   (ii) Where the Magistrate is not empowered to exercise the powers under s. 83 [see s. 461(a),*post*].

   (iii) Where the date fixed for execution of the warrant of attachment had expired before the attachment. [75]

   (iv) Where the mode of attachment is not in conformity with sub-secs. (3)-(4), as may be applicable, *e.g.* , where he seeks to remove fixtures by digging them up, as if they were movables. [76]

3. There is no right of private defence where the attachment is merely 'irregular' [vide s. 466,*post*], and the Police officer acts in good faith under colour of his office, [77] except where the proceedings are altogether without jurisdiction. [78]
4. Where the accused is acquitted in the prosecution for resistance to an illegal attachment, the Court may direct restoration of the property attached to him. [79]

13. Effects of attachment.—

1. As a 85(2) clearly provides, the property attached shall be 'at the disposal of the Government' from the date of attachment, if the proclaimed person does not appear by the date specified in the Proclamation.
2. The interest acquired by the Government by an attachment under this section is, thus, not that of a mere attaching decree-holder under the *CPC* ode. [80] It creates an interest in the property to be in possession of the property, to lease it out and otherwise to dispose of it. [81]

3. Hence, any interference with the possession of the State, taken in the manner provided in sub-secs. (3)-(4) of the present section, under the order of attachment, would be a trespass. Removal of the standing crops thereafter would constitute theft, under s. 379, I.P.C. [82]

4. In order to confer the aforesaid rights on the Government, there must be a valid attachment in conformity with s. 83(1)- (4); a mere seizure of the property of the absconder by the Police would not have such effects. [83]

5. In a suit for redemption or sale of the attached property, which was mortgaged, the Government is a necessary party, but after it is sold by the Government under s. 85(2), only the purchaser at that sale shall be a necessary party. [84]

6. The attachment ceases if the proclaimed person appears in Court within the date specified in the Proclamation [s. 85(1)].

14. Priority between attachment in civil and criminal proceedings.—

1. The doctrine of *lis pendens* applies to an attachment of immovable property whether made by a Civil Court or by a Criminal Court under the present section. Hence a person obtaining a decree for specific performance is entitled to recover from the Government, if the property had been attached under the present section during pendency of the suit for specific performance.

2. In the result, if during the subsistence of an attachment made under the present section, the attached property is attached again by the Civil Court in execution of a decree and sold, the purchaser at the Civil Court sale must take it subject to the rights of the Government under the attachment made under the present section as well as that of the purchaser if the property has already been sold under s. 85(2). [85] In other words, even where the sale held by the Civil Court be earlier than the sale held by the Criminal Court [under s. 85(2),*post*], the purchaser at the sale held by the Civil Court shall take subject to the interest of the purchaser at the Criminal Court sale, if the *attachment* made by the Criminal Court was earlier than the civil attachment. [86]

3. Conversely, if the attachment made by the Civil Court is prior in time, it will have effect against any attachment made by a Criminal Court under this section, subsequent thereto.

15. Revision.—

1. Where the attachment is illegal, on account of violation of the conditions for its legality (see *ante*), revision lies to quash it. [87] , [88]
2. It would also lie—

(a) If the Court fails to decide the claim or objection preferred under s. 84,[89] or simply orders it to be filed. [90] Pre-1923 decisions to the contrary are no longer good law. [91]

(b) If the Proclamation contravenes the requirements of s. 82(1). [92]

(c) Where the attachment order was made without issuing a proclamation under s. 82. [93]

(d) Where the proceeding was initiated without examining the complainant under s. 200. [94]

(e) Where the complaint relates to a dispute of a civil nature. [95]

16. Special law.—

The provision cannot be used in proceedings for contempt of Court to secure the presence of the contemner. [96]

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39 41st Rep. of the Commission. Vol. I, para 610.

40 Notes on Clauses, p. 241.

41 *Devendra Singh Negi v. State of U.P.*, 1994 Crlj 1783 All .

42 *Devendra Singh Negi v. State of U.P.*, 1994 Crlj 1783 All .

43 *Peterson v. Forbes*, AIR 1963 SC 692 697 : 1963 Supp (1) SCR : (1963) 1 Crimes 633 .

44 *Siddangouda v. State of Mysore*, (1972) Crlj 289 (para 7).

45 *Bhai Lal*, (1092) 29 Cal 417 ; *Bishundayal v. Emp.*, AIR 1943 Pat 366 368 .

46 *Bhai Lal*, (1092) 29 Cal 417 ; *Bishundayal v. Emp.*, AIR 1943 Pat 366 368 .

47 As was held in *Shib Charan v. Emp.*, AIR 1938 All 220 .

48 This view of the Author, expressed in Latest Edition, is affirmed by the Allahabad High Court in *Devendra v. State of U.P.*, (1994) Crlj 1783 (para 22) All that the orders under s s. 82, 83 must be *preserved* on the record.

49 *Ratish Rai v. Mukesh Singh*, 1985 Crlj 94 Gau .

50 *Vimlaben* *v.* *Vabralaben,* AIR 2008 SC 2675 [*LNIND 2008 SC 694*] : (2008) 4 SCC 649 [*LNIND 2008 SC 694*] : 2008 AIRSCW 4475.

51 *Radharanee* *v.* *Binoda,* AIR 1942 Cal 92 99 .

52 *Radharanee* *v.* *Binoda,* AIR 1942 Cal 92 99 .

53 *Secy. of State v. Ahalyabai,* AIR 1938 Bom 321 ; *Tilga v. State of Hyderabad,* AIR 1951 Hyd 24 .

54 *Abbott v. Abbott,* 5 BLR 382.

55 *Tilga v. State of Hyderabad,* AIR 1951 Hyd 24 .

56 *Abbott v. Abbott,* 5 BLR 382.

57 Secy. *of State v. Ahalyabai,* AIR 1938 Bom 321 .

58 *Durgi,* AIR 1929 Lah 528 .

59 Secy. *of State v. Ahalyabai,* AIR 1938 Bom 321 .

60 *Puneshwar Prosad Singh v. State of Jharkhand,* 2004 Crlj 4493 Jhar .

61 *Pal Singh v. State.* AIR 1955 Punj 18 20 .

62 *Vellyappa* *v.* *Alagappa,* AIR 1942 Mad 289 290 .

63 As was held in *Shib Charan v. Emp.,* AIR 1938 All 220 .

64 *Ratish* *v.* *Mohesh,* (1985) Crlj 94 (para 4) Gau.

65 *Siddangouda v. State of Mysore,* (1972) Crlj 289 (para 7).

66 As was held in *Shib Charars v. Emp.,* AIR 1938 AIRALL 220 .

67 *Ganu* v *Emp.* AIR 1930 Pat 347 .

68 *Subramania,* (1912) 13 Crlj 568 (569).

69 *Rohit Kumar v. State,* 2008 Crlj 3561 Del ; *Md.Nazrul Islam v. State of Assam,* 2008 Crlj 3374 Gau ; *Dinesh v. State,* 2001 Crlj 318 All ; *Devendra Singh v. State of U.P.,* 1994 Crlj 1783 All ; *Molly v. State of Kerala,* (1994) 3 Crimes 1084 (Ker) .

70 *Ganu* v *Emp.* AIR 1930 Pat 347 .

71 *Ramji v. Emp.,* AIR 1930 Pat 387 .

72 *Ramji v. Emp.,* AIR 1930 Pat 387 .

73 As was held in *Shib Charan v. Emp.,* AIR 1938 All 220 .

74 *Ramsaran,* AIR 1960 Pat 232 .

75 *Mahadeo,* (1926) 2 Luck 40 .

76 *Ramji v. Emp.,* AIR 1930 Pat 387 .

77 *Bhai Lal v. Emp.,* (1902) 6 CWN 680 .

78 *Ramsaran,* AIR 1960 Pat 232 .

79 *Ramsaran,* AIR 1960 Pat 232

80 *Alagammal* *v.* *Sadasiva,*
AIR 1930 Mad 1017 1020 .

81 *Alagammal* *v.* *Sadasiva,*
AIR 1930 Mad 1017 1020 .

82 *Emp.* *v.* *Bande* *Ali,*
AIR 1940 Cal 163 .

83 *Subramania,*
(1912) 13 Crlj 568 (569).

84 *Bindeswari* *v.* *Lal,*
AIR 1937 Pat 642 .

85 *Gulam* *v.* *Toolseram,*
(1883) 9 Cal 861 .

86 *Gulam* *v.* *Toolseram,*
(1883) 9 Cal 861 .

87 *Siddangouda* *v.* *State* *of* *Mysore,*
(1972) Crlj 289 (para 7).

88 *Saraswati* *v.* *State,*
AIR 1955 All 127 [
LNIND 1954 ALL 115]; *Hameed v. State,*
AIR 1957 All 121 [
LNIND 1956 ALL 148].

89 *Hameed* *v.* *State,*
AIR 1957 All 121 [
LNIND 1956 ALL 148].

90 *Saraswati* *v.* *State,*
AIR 1955 All 127 [
LNIND 1954 ALL 115].

91 *Hameed* *v.* *State,*
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92 *Siddangouda* *v.* *State* *of* *Mysore,*
(1972) Crlj 289 (para 7).

93 *Ratish* *v.* *Mohesh,*
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94	*Ratish*	*v.*	*Mohesh,*	
(1985) Crlj 94		(para 4) Gau.		
95	*Ratish*	*v.*	*Mohesh,*	
(1985) Crlj 94		(para 4) Gau.		
96	*Peterson*	*v.*	*Forbes,*	[
AIR 1963 SC 692				
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CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

C.—PROCLAMATION AND ATTACHMENT

S. 84
Claims and objections to attachment.

(1) If any claim is preferred to, or objection made to the attachment of, any property attached under Section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under Section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part :

Provided **that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.**

(2) Claims or objections under sub-section (1) may be preferred or made in the Court by which the order of attachment is issued, or, if the claim or objection is in respect of property attached under an order endorsed under sub-section (2) of Section 83, in the Court of the Chief Judicial Magistrate of the district in which the attachment is made.

(3) Every such claim or objection shall be inquired into by the Court in which it is preferred or made :

Provided **that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to him.**

(4) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (1) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

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1. Scope of s. 84.—

1 This section combines *old* ss. 88(6A), (6B), (6C), (6D), with the following changes, other than verbal:

Under *old* s. 88(6B), where the property to be attached was within a district outside that of the attaching Court, the order of attachment was to be endorsed by the District Magistrate or Chief Presidency Magistrate of the District, and any claim or objection regarding the attachment was to be preferred in the Court of such Magistrate. Under the *new* Code, though the endorsement is to be made by the District Magistrate of that district [s. 83(2),*ante*], the claim or objection is to be preferred to and decided by the Chief *Judicial* Magistrate of that district [s. 84(2)]. This change was made in the Bill, [1] evidently because hearing of the claim or objection is a judicial function. Corresponding change has been made in s. 84(3).

2. The section deals with a claim or objection raised by a third party, i.e., a person other than the proclaimed person [s. 84(1)]. (see, further, at the end of s. 85,*post.)*

3. The rights of the proclaimed person are dealt with in s. 85,*post.*

2. Sub-sec. (1) : Duty of Court to decide claim or objection.—

1. Under this section, the claim or objection must be determined [2] by the Court before which it is duly preferred—

(i) if it has been preferred within a period of 6 months from the date of attachment under s. 83(1);

(ii) if it has been preferred by a person (other than the proclaimed person) claiming an ‘interest’ in the property, which is not attachable under s. 83. The interest is not confined to possessory interest only. [3]

On the other hand, a person merely entitled to maintenance from the absconder has no such interest as to be entitled to apply under this section. [4]

If the claim or objection has been duly made as above, it may be continued by the legal representative of the

claimant or objector, in the event of the latter's death *(Proviso).*

2. If the foregoing conditions are fulfilled, the Court must make an order either allowing or disallowing the claim in whole or in part. He cannot dispose of it as 'filed'. [5]

3. The determination is to be made judicially, on taking evidence. [6] It cannot be disposed of in the absence of the party concerned, and without giving him an opportunity of establishing his claim. [7]

4. There is nothing in this section, however, to hold that the owner of the property cannot bring a suit under the general law, to establish title or interest, without preferring a claim under s. 84(1). [8]

3. Scope of inquiry.

1. Though a Criminal Court is ordinarily concerned only with questions relating to possession, this sub-section makes a departure by deliberately using the word 'interest' which is wider than 'possession. [9] Hence, under the present sub-section, the Magistrate cannot refuse to determine the question whether the absconder had lost interest in the property by reason or purchase by the claimant anterior to the attachment. [10] The only limitation upon the powers of the Magistrate under this section is that his order will remain in force only until the aggrieved party obtains relief in a civil suit. The provisions of the present section are thus made analogous to those of O. 21, r. 58 of the *C.P.C* ode, 1908.

2. The Court has to determine whether the proclaimed person had any attachable interest in the property at the time of attachment.

4. Onus.—

1. The inquiry into the claim or objection is to be made by the Court in which it is preferred, on evidence. [11]

2. The onus is no doubt on the party who prefers the claim, to prove his interest in the property. But if he adduces evidence in support of his claim, it is for the State to show that the property belonged to the proclaimed person. In the absence of such evidence, the claim cannot be rejected. [12]

5. Sub-sec. (2) : Forum.—

1. The claim or objection is to be preferred before the Court which issued the order of attachment [s. 83(1)].

2. But where the property attached is situate in another district, it is to be preferred before the Chief Judicial Magistrate of that district.

6. Sub-sec. (3): Transfer of case.—

1. Where the claim is preferred in the Court which issued the order of attachment, it must be inquired into by that Court and no transfer of the case by that Court to some other Magistrate would be permissible.

2. Where, however, it is preferred before a Chief Judicial Magistrate [s. 84(2)], he may either determine it himself or transfer it for disposal to any Magistrate subordinate to him.

7. Sub-sec. (4): Finality of order.—

1. This sub-section [*old* s. 88(6D)] provides that the remedy of a person who is aggrieved by an order under sub-sec. (1) of this section [*old* s. 88(6A)] is by way of suit.

2. The language in the latter part of this sub-section being similar to that in O. 21, r. 63, *CPC* ode. [13] It should receive a similar interpretation. Hence, no appeal shall lie from an order under s. 84(1). [14] Such order cannot be challenged in any proceeding other than a suit as envisaged by s. 84(4), on the ground that the property was not liable to attachment as a property of the proclaimed person.

3. The finality under this sub-section attaches only to an order under s. 84(1), by which the claim or objection has been disallowed in whole or in part. [15] It would not apply to an order of the Magistrate that the Petition of claim be 'filed' for absence of the Petitioner. [16] , [17]

8. Revision.—

But revision may lie if the order cannot be held to be a legally valid order under the section, [18] *e.g.* ,—

(a) Where the Magistrate disposes of the claim without making an inquiry, as required by sub-sec. (3). [19]

(b) Where his finding is perverse. [20]

(c) Where the Proclamation under s. 82 had been issued without complying with the requirement of sub-sec. (1) or (2) thereof. [21]

(d) Where there is no statement under s. 82(3), and it is proved that the Proclamation was not legally published. [22]

9. Suit for establishment of right to the property.—

A.

1. Under the general law, the owner of the attached property (not being the proclaimed person) is entitled to bring a suit for declaration of his title, with consequential relief, without resorting to the summary procedure under the present section of the Code. Such suit cannot be thrown out on the ground that he should have first preferred an objection under the present section. [23]

2. In such suit, he may claim not a declaration of his title to the property and restoration of his possession, but also damages for illegal seizure of the property, [24] with *mesne profits* , against the Government and the person at whose instance the criminal proceedings were instituted. [25]

3. Such suit, under the general law, would lie so long as the property remains in the hands of the Government and is not governed by the special limitation of one year under sub-sec. (4) of s. 84. [26]

4. Where the Proclamation and the subsequent proceedings were illegal, the owner can claim recovery of his property even from a purchaser from the Government, as envisaged by s. 85(2),[27] *e.g.* , where the sale was not made subject to a subsisting lease. [28]

5. The one year's limitation in s. 84(4) is not applicable to such suit, and the owner can get his relief without setting aside even the order of confiscation under s. 85(2),*post.* [29]

B.

1. The real owner may also bring to suit, after being unsuccessful in his claim in whole or in part, [30] preferred before the Magistrate, as contemplated by sub-sec. (4) of this section. [31]

2. Such suit is for a declaratory decree, for the establishment of his title, without any consequential relief. [32]

3. Such suit is, however, subject to the following limitations, where it is brought after his claim has been disallowed under s. 84(1)—

   (i) Such suit must be brought within the period of special limitation prescribed by sub-sec. (4), namely, one year from the date of the order sub-sec. (1), disallowing the claim. [33] , [34] The limitation cannot be computed from any earlier date when the Petitioner's claim was dismissed for default (but subsequently revived). [35]

   (ii) If the property has, in the meantime, been sold by the Criminal Court under s. 83(5) or s. 85(2), the plaintiff cannot ask for a restoration of his property, and his relief must be confined to recovery to the sale-proceeds and damages for the loss caused to him by such sale [36] , [37] [see, further, under s. 85,*post*].

10. Court-fees for suit under sub-sec. (4).—

A suit brought for declaration of title to property under sub-sec. (4) is analogous to a suit under O. 21, r. 63 of the *CPC* ode. If no consequential relief is asked for, court-fee payable for such suit would be under Sch. II, Art. 17A of the Court Fees Act .[38]

11. Suit for recovery of sale-proceeds.—

1. As has been just stated, where the property attached has been sold by the Criminal Court, the claimant to the property must be confined to his relief against the sale proceeds, [39] which represents the property.
2. Some controversy arose under the *old* Code as to whether such suit for recovery of the sale-proceeds would be governed by the special limitation under s. 84(4). The Bombay High Court [40] took the view that s. 84(4) would not permit a suit against the sale-proceeds inasmuch as it is not a suit to establish a right in respect of the 'property'.

   But the better view is that the expression 'in respect of the property' would cover the sale-proceeds which represent the property after sale, so that a suit to recover the sale-proceeds would also be governed by the special limitation under s. 84(4), where the suit is brought by a *claimant.* [41]

3. If, however, the suit is brought by the *absconder* himself, it would be governed by the special provision in s. 85(3), which prescribes a period of 2 years from the date of attachment.
4. In a suit against the sale-proceeds, the claimant to the property may also claim damages for illegal attachment and sale, which would also be governed by the special limitation in s. 84(4). [42]

12. Suit for recovery of property apart from sub-sec. (4).—

1. As has been stated already (see *ante*) a third party who has interest in the property attached, is not bound to prefer a claim under s. 84. He is entitled, under the general law, to bring a suit for declaration of his title to attached property, independent of the limitation imposed by s. 84(4). [43]
2. If he succeeds in obtaining a decree from the Civil Court at any time before the property is disposed of by the Government, such decree would be binding against the Government and the property can thereafter be disposed of by the Government only subject to the rights established under such decree. [44]

13. Suit for damages.—

1. Where the attachment and seizure of property is illegal, *e.g.* , where the property belongs not to the absconder but to third party, the latter may bring a suit for damages against the party at whose instance for attachment took place, on the footing of actionable trespass. [45]
2. Where the property has been sold, he may claim damages not only for the value of the property lost, but also for incidental loss, *e.g.* , closure of business (where the property seized was a shop). [46]
3. The cause of act ion for such suit being outside the purview of s. 84(4),[47] limitation for such suit would be governed not by the special limitation provided by s. 84(4), but by Art 80 of the Limitation Act, 1963 (

Art. 29 of the Limitation Act . 1908), so far as illegal seizure is concerned, and by Art. 113 of the Act of 1963 (Art. 36 of the Act of 1908), so far as other cause of action, such as damages for closure of business is concerned. [48] , [49]

14. Right of proclaimed person to use. —

See under s. 85(3),*post.*

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1 Notes on Clauses on the Bill of 1970, p. 241.

2 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

3 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

4 *Gaddireddi* *v.* *State,* (1979) Crlj 1107 (para 15) Del.

5 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

6 *Hameed* *v.* *State,* AIR 1957 All 121 [*LNIND 1956 ALL 148*].

7 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

8 *Secy. of State* *v.* *Ahalyapai,* AIR 1938 Bom 321 323 .

9 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

10 *Panchu* *v.* *State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

11 *Hameed* *v.* *State,* [AIR 1957 All 121 *LNIND 1956 ALL 148*].

12 *Hameed* *v.* *State,* [AIR 1957 All 121 *LNIND 1956 ALL 148*].

13 *Mangru* *v.* *Taraknathji,* [AIR 1967 SC 1390 *LNIND 1967 SC 65*]: [(1967) 3 SCR 125 *LNIND 1967 SC 65*].

14 *Panchu* *v.* *State,* [AIR 1955 Cal 524 *LNIND 1955 CAL 103*].

15 *Panchu* *v.* *State,* [AIR 1955 Cal 524 *LNIND 1955 CAL 103*].

16 *Panchu* *v.* *State,* [AIR 1955 Cal 524 *LNIND 1955 CAL 103*].

17 *Saraswati* *v.* *State,* [AIR 1955 All 127 *LNIND 1954 ALL 115*].

18 *Jawai v. Emp.,* AIR 1942, Lah 214.

19 *Saraswati* *v.* *State,* [AIR 1955 All 127 *LNIND 1954 ALL 115*].

20 *Hameed* *v.* *State,* [AIR 1957 All 121 *LNIND 1956 ALL 148*](para 7).

21 *Pawan* *v.* *State* *of* *W.B.,* (1973) Crlj 1368 (para 10) Cal.

22 *Emp. v. Subbarayar,* (1895) 19 Mad 3.

23 *Ezekiel* *v.* *Prov.* *of* *Bengal,* AIR 1939 Cal 746 ; *Parbati v. Govt. of U.P.,* AIR 1945 Oudh 104 105 .

24 Cf. *Munnalal v. I.T. Commr.,* AIR 1957 Nag 71 .

25 *Secy. of State v. Jagat,* (1901) 28 Cal 540 .

26 *Ezekiel v. Prov. of Bengal,* AIR 1939 Cal 746 ; *Parbati v. Govt. of U.P.,* AIR 1945 Oudh 104 105 .

27 *Secy. of State of v. Lown,* (1920) 21 Crlj 475 (pat) .

28 *Abdul v. Kazim,* (1904) AWN 159.

29 *Secy. of State v. Lown,* (1920) 21 Crlj 475 (Pat) .

30 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

31 Cf. *Munnalal v. I.T. Commr.,* AIR 1957 Nag 71 ; *Amina v. State of Maharashtra,* AIR 2001 SC 656 [*LNIND 2001 SC 135*]: (2001) 2 SCC 675 : 2001 Crlj 965 : (2001) 1 Crimes 111 [*LNIND 2001 SC 135*]; *Dy. Supt. of Police, CBI v. Nabeesa,* 1997 Crlj 843 Ker .

32 *Govt. of Madras v. Lakshmi,* AIR 1954 Mad 290 [*LNIND 1953 MAD 16*].

33 *Panchu v. State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

34 Cf. *Munnalal v. I.T. Commr.,* AIR 1957 Nag 71 .

35 *Panchu v. State,* AIR 1955 Cal 524 [*LNIND 1955 CAL 103*].

36 Cf *Munnala v. I.T. Commissioner,* AIR 1957 Nag 71 .

37 *Gangayya v. Lakshmi,* AIR 1942 Mad 93 94 . [The view, to the contrary, in *Secy. of State v. Ahalyabai,* that words 'right in respect of the property' in s. 84(4) would not include the sale-proceeds, does not appear to be correct].

38 *Govt of Madras v. Koda,* AIR 1954 Mad 290 291 .

39 *Dattaji v. Narayanrao,* AIR 1928 Bom 198 .

40 *Secy. of State* v *Ahalyabai,* AIR 1938 Bom 321 .

41 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

42 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

43 *Secy. of State* v *Ahalyabai,* AIR 1938 Bom 321 .

44 *Secy. of State* v *Ahalyabai,* AIR 1938 Bom 321 .

45 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

46 *Chiranji Lal* v *Shib Lal,* AIR 1926 Lah 242 .

47 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

48 *Jamshed v. State of M.P,* AIR 1957 Nag 71 73 .

49 *Chiranji Lal v. Shib Lal,* AIR 1926 Lah 242 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

C.—PROCLAMATION AND ATTACHMENT

S. 85
Release, sale and restoration of attached property.

(1) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under Section 84 has been disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.

(3) If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under sub-section (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him.

1. Scope of s. 85.—

1. This section combines *old* s. 88(6E)- (7) and s. 89, with verbal changes.

2. This section prescribes the rights and remedies of proclaimed person under the Code, on the assumption that there has been a valid proclamation [50] and attachment in the manner required by s s. 82-83.

2. Sub-sec. (1) : When the attachment comes to an end.—

1. This sub-section provides that the attachment made under s. 83(1) shall cease if the proclaimed person appears in Court within the time specified in the Proclamation issued under s. 83(1). In this case, a formal order releasing the property from attachment is to be made by the Court.
2. It has been held [51] that the attachment under s. 83(1) may come to an end in two other ways—

(i) Where, instead of the proclaimed person voluntarily appearing, he is arrested and brought before the Court, in execution of the warrant issued under s. 70.

(ii) Where the proclaimed person is sentenced to pay a fine and a fresh attachment is made, for realisation of that fine, under s. 421(1)(a) [*old* s. 389], the previous attachment under s. 83(1) would automatically come to an end.

(iii) The provisions of the Code do not warrant the sale of the property after the accused has surrendered. This is because the purpose of s. 82 and s. 83 of the Code have been achieved with such surrender of the accused before the Court. [52]

3. Sub-sec. (2): 'At the disposal of the Government'.—

1. Since this expression is also used in s. 458(1) [*old* s. 524], the interpretation of the expression under both sections should be similar.
2. It means that in case of non-appearance of the proclaimed person within the date specified in the Proclamation [s. 82(1)] for the appearance of the proclaimed person, the property vests in the State Government absolutely, from the date of attachment [53] so that it would be competent (subject to the conditions specified *below)* to dispose of or deal with the property in any manner it deems fit. [54] Hence—

(a) It would be open to the Government to take and remain in possession. [55]

(b) To lease out the property and to receive the income so long as the property remains at its disposal. [56]

(c) The interest of the Government from such date is not that of a mere attaching creditor. [57]

(d) The Doctrine of *lis pendens* is attracted to such attachment. [58]

(e) Government would be liable for damages and *mesne* profits derived from the property during the period it remains at the disposal of the Government. [59] , [60]

3. What comes under the disposal of the Government is the interest which the proclaimed person had in the property at the time of attachment. [61] Hence, Government would be entitled to possess the following interests only:

(i) Where the property was subject to a mortgage, the equity of redemption only. [62]

(ii) Where it was subject to a lease, only the interest of the lessor, subject to the right of the lessee to remain in possession till the expiry of the lease. [63]

(iii) Where the property attached is that of any undivided member of a Hindu joint family, Government will acquire only the undivided interest of such member and would be entitled to collect his share of the income, by appointing a Receiver; [64] it will also be subject to the burden of maintenance of dependants which was binding on such coparcener, if any. [65]

4. But though the property vests in the Government from the date specified for appearance in the Proclamation, it is subject to the following limitations :

(i) The property is not to be sold before the expiration of 6 months from the date of attachment, except where it is subject to speedy and natural decay or where the Court considers that an immediate sale would be for the benefit of the owner [s. 85(2)].

(ii) Even after the sale is held, the sale proceeds cannot be forfeited to Government until the expiration of 2 years from the date of attachment, during which period, the proclaimed person has the right to appear and claim the sale proceeds on adducing the evidence as required by s. 82(3). [66]

(iii) So long as the property is not sold, and remains in the hands of the Government, the real owner may bring a suit in the Civil Court for the declaration of his title to the property and recovery of possession, [67] without filing a claim under s. 84. From this, it has been held that where such a suit has been filed before it is sold under s. 85(2), the sale, if subsequently held, shall be subject to the result and Government shall not have an absolute right of disposal until the suit is decreed and the appeal, if any therefrom, is also disposed of. [68]

5. Though s. 85(2) does not speak of any declaration being necessary to bring the property under the disposal of the Government, it has been held that a declaration to this effect should be made by the Court, after the expiry of the date specified in the Proclamation for appearance of the proclaimed person. [69] Such declaration cannot be made if the person appears within that date.

6. Once the attached property is declared to be at the disposal of the Government under the present sub-section, the position of the Government shall be similar to that of a Receiver appointed for the possession and management of the property. Hence, Government would be a necessary party in any subsequent suit for redemption or sale under O. 34, r. 1 of the *CPC* ode under a mortgage relating to the property. [70]

7. But such declaration or order of confiscation is no bar to a suit by the real owner to recover his property, in which it is not even necessary to ask for setting aside such order of forfeiture, as has been held under the analogous provision in s. 458(1) [*old* s. 524(1)]. [71]

4. Title of the purchaser at the sale.—

1. A sale held under this sub-section shall transfer only such interest as the proclaimed person had in the property, at the time of attachment. [72] Thus, it will be subject to a subsisting lease on the property. [73]

2. The title of the auction-purchaser shall be superior to that of an auction-purchaser at an earlier sale held by the Civil Court if the attachment by that Court was subsequent to that by the Criminal Court. [74]

3. If the sale is illegal (see *ante*), a suit would lie to recover the property even from an auction-purchaser at such sale, [75] *e.g.* , where the Proclamation was not in conformity with s. 82(1); [76] or the sale is otherwise a nullity. [77]

5. Sub-sec. (3) : Scope and conditions for its application.—

1. This sub-section (reproducing *old* s. 89) affords a remedy, by way of restitution of his property, *to a person whose property has been attached,* under s. 83(1), on the ground that he was proclaimed an 'absconder'. While s. 84 gives relief to third parties, s. 83(3) is concerned with absconder himself, and has no application to a third party.
2. In order to obtain this relief, the following conditions must be satisfied—

   (a) The alleged absconder must voluntarily appear or be brought, on arrest, before the Court which issued the order of attachment or the Court to which the former Court is subordinate.

   (b) The alleged absconder must prove to the satisfaction before such Court that—(i) he did not abscond or conceal himself for the purpose of avoiding execution of the warrant; and (ii) he had no such notice of the proclamation as to enable him to attend within the time specified therein. He cannot get relief unless *both* [78] these facts are established. His acquittal in the trial for the substantive offence is not enough. [79]

   (c) The limitation for the purpose of relief under sub-section is two years from the date of attachment. Within that period, not only should the absconder appear before the Court and make his application for restoration, [80] but also offer the proof required by the sub-section. [81] An application under this sub-section after 2 years shall be thrown out. [82] , [83]

3. Once the property has been sold, the absconder shall have no remedy *under the instant provision,* against the purchaser, but can only recover the sale proceeds and the residue of the property, after meeting the expenses of the attachment. [84]

6. Scope of inquiry under sub-sec. (3).—

1. There has been a controversy as to the scope of the inquiry of the Court under this sub-section, which provides for restoration of the property or its sale proceeds to the proclaimed person, on being satisfied on two points, namely:

(a) that he did not abscond for the purpose of avoiding execution of the warrant, and

(b) that he had no such notice of the proclamation as to enable him to attend within the time specified in the Proclamation.

2.

A. One view is that the scope of the inquiry of the Court under this sub-section is confined to a finding on the above two conditions specified in the sub-section, so that any question as to the illegality of the proclamation itself cannot be inquired into by that Court, in a proceeding under sub-sec. (3). [1], [2]

B. The better view is that a Proclamation being the foundation of an order of attachment, the Court is entitled to go into the question of legality of the Proclamation, in a proceeding under s. 85(3), and to grant relief on the ground of illegality of the Proclamation itself. [3], [4]

7. Onus.—

1. It is for the proclaimed person to offer proof of the following facts, in order to succeed under this sub-section:

(i) That he did not abscond or conceal himself for the purpose of avoiding the Proclamation. [5] It is enough to show that within the period of two years, he appeared voluntarily or was brought before the Court. [6]

(ii) That he had no such notice of the Proclamation as to enable him to attend within the time specified in the Proclamation. [7]

(iii) Such proof must be given within 2 years from the date of attachment. [8]

2. It is not imperative that the application under the present sub-section must be made by the proclaimed person himself, [9] but proof of the foregoing facts must be offered by him personally. [10]

3. When the proclaimed person appears, he must be given an opportunity to prove the facts required by this sub-section. An omission to do so would vitiate all subsequent proceedings. [11]

8. Appeal.—

An order rejecting an application, under this section, for restoration of attached property or the sale proceeds thereof is appealable [s. 86,*below (old* s. 405)].

9. Revision.—

1. Independent of the right created by s. 85(3), the proclaimed person can move the High Court in revision for quashing the order of attachment, [12] restoration of his property, [13] or delivery of the sale proceeds (in case it has already been sold), [14] where the proceedings are illegal, *e.g.* , the Proclamation not being in conformity with s. 82. [15]

2. The *legality* [16] of the proclamation or its publication and attachment may be inquired into under the revisional jurisdiction.

3. But in case of mere irregularity, the High Court would not, after a sale, affect the title of a stranger purchaser, in the exercise of its provisional powers. [17]

4. Revision also lies against an order passed in appeal under s. 86,*post,* on the ground, for instance, that the proceedings were a nullity, being in contravention of s. 82. [18]

10. High Court's inherent powers.—

There are cases where the High Court has exercised its inherent powers under s. 482 [*old* s. 561A], outside the ambit of s. 85(3), where the proclaimed person appears beyond two years, not having knowledge of the proclamation. [19]

11. Whether a suit by the absconder or his representative-in-interest for restoration of the attached property is maintainable.—

1. There has been some controversy as to whether a suit under *s. 9 of the CPC* would lie where the absconder prefers not to resort to the special remedy offered by this provision of the *Cr.P.C.* The controversy may be resolved by a harmonisation of the two principles which are applicable when a question of exclusion of the Civil Court by a statutory remedy is raised,*viz* ,—

   (a) The jurisdiction of the Civil Court may be barred by the statutory remedy not only expressly, but also impliedly. [20]

   (b) But a statute excluding the jurisdiction of the Civil Court must be construed strictly, [21] and would not, therefore, bar its jurisdiction to determine questions which the statutory tribunal had no competence to decide, or where the order complained of was a nullity. [22]

2. Applying the foregoing principles, it would appear that:

   (a) The absconder or his representative-in-interest cannot bring a suit on grounds which are covered by the present sub-section of the Code. [23]

   (b) But s. 85(3) of the Code prescribes the special remedy on the assumption that the proclamation was validly issued. [24] The Criminal Court, under the present provision, had no concern with legality on the proclamation. [25]

   Hence, a suit may be maintainable for declaration of title and recovery of possession even against a purchaser at the sale held under the attachment, in the following cases—

Where the proclamation [26] or attachment were tainted by illegality, [27] rendering it a nullity, [28] as distinguished from mere irregularity. [29] *e.g.* ,

(i) Where the Proclamation did not specify the requirements of s. 82(1); [30]

(ii) Where there is no statement under s. 82(3), and it is proved that there was no due publication of the Proclamation. [31]

(iii) Where the absconder acquired title to the property subsequent to the confiscation under s. 85(2). [32]

Such suit would be outside the purview of s. 85(3).

(c) No such suit would, however, lie against the auction-purchaser in case of a mere 'irregularity'; or where the absconder had applied for restoration of his property or its sale proceeds under s s. 85(3) and 86 and the order rejecting that application has become final. [33]

(d) There is a distinction between the rights of the absconder and those of his heirs:—

(i) The absconder's right to recover the attached property is limited by s. 85(3). He can obtain relief only from the Criminal Court after satisfying the conditions specified therein. If he does not take such step within 2 years from the date of attachment, a suit by him for any such purpose would be impliedly barred. [34]

But s. 85(3) is not available to the heir of the absconder after his death, nor are his rights limited by its provisions. Hence, the heir is entitled to bring a suit under s. 9 of the C.P. Code for such title as the absconder might have in the property at the time of his death. [35]

The title of the absconder subsisted at his death (for the purposes of inheritance) where the property had not been confiscated [36] or disposed of [s. 85(2)], in accordance with the law. Hence the heir of the absconder is entitled to sue for declaration of his title and possession under s. 9 of the C.P. Code. [37]

50 *Abdullah* *v.* *Jitu,*
(1900) 22 All 216 (219).

51 *Suraj,*
AIR 1934 Pat 181 182 .

52 *Vimlaben* *v.* *Vatsalaben,*
AIR 2008 SC 2675 [
LNIND 2008 SC 694]:
(2008) 4 SCC 649 [
LNIND 2008 SC 694] : 2008 AIRSCW 4475.

53 *Narayan* *v.* *Govind,*
AIR 1929 Bom 200 201 .

54 *Gulam* *v.* *Toolseeram,*
(1883) 9 Cal 861 (863).

55 *Alagammal* *v.* *Sadasiva,*
AIR 1930 Mad 1017 1020 .

56 *Alagammal* *v.* *Sadasiva,*
AIR 1930 Mad 1017 1020 .

57 *Alagammal* *v.* *Sadasiva,*
AIR 1930 Mad 1017 1020 .

58 *Narayan* *v.* *Govind,*
AIR 1929 Bom 200 (201).

59 *Secy. of State v. Ahalyabai,*
AIR 1938 Bom 321 .

60 *Secy. of State v. Jagat Mohini,*
(1901) 28 Cal 540 (543).

61 *Bindeshwari,*
AIR 1937 Pat 642 .

62 *Bindeshwari,*
AIR 1937 Pat 642 .

63 *Illamdin,*
(1908) 8 Crlj 260 (Punj) .

64 *Veerayya v. State of Hyderabad,* AIR 1951 Hyd 81 .

65 *Secy. of State v. Ahalyabai,* AIR 1938 Bom 321 .

66 *Dattaji v. Narayanrao,* (1922) Bom LR 228 .

67 *Ezekiel v. Prov. of Bengal,* (1939) 2 Cal 52 .

68 *Parbati v. Govt. of U.P.,* AIR 1954 Oudh 104 105 .

69 *Bhailal,* (1902) 29 Cal 417 .

70 *Alagammal v. Sadasiva,* AIR 1930 Mad 1017 1020 .

71 Cf. *Secy. of State v. Lown Karan,* (1920) 21 Crlj 475 (Pat) .

72 *Subramania,* (1912) 13 Crlj 536 (Rang) .

73 *Illamdin* , (1908) 8 Crlj 260 .

74 *Golam v. Tulseeram,* (1883) 9 Cal 861 .

75 *Abdul v. Kazim,* (1904) AWN 159.

76 *Bhailal,* (1902) 29 Cal 417 .

77 *Mian Jan v. Abdul,* (1905) 27 All 572 .

78 *Buta v. Emp,* AIR 1926 Lah 662 663 .

79 *Pal Singh v. State,* AIR 1955 Punj 18 (para 3).

80 *Gurunath,*
AIR 1924 Bom 485 .

81 *Nikanth,* in re.,
(1912) 15 Bom LR 175 ; *Madivalappa v. State of Mysore,*
(1972) 78 Crlj 189 (Mys) .

82 *Gurunath,*
AIR 1924 Bom 485 .

83 *Mala* *Singh,*
(1916) 17 Crlj 414 (Punj) .

84 *Fazl* *Dad,*
(1922) 24 Crlj 573 (Lah) .

1 *Pal* *Singh* *v.* *State,*
AIR 1955 Punj 18 (para 3).

2 *Abdulla* *v.* *Jitu,*
(1900) 22 All 216 ; *Jawai v. Emp.,*
AIR 1942 Lah 214 .

3 *Mian* *Jan* *v.* *Abdul,*
(1905) 27 All 572 .

4 *Siddangouda* *v.* *State,*
AIR 1958 Raj 167 [
LNIND 1957 RAJ 64](para 7).

5 *Jagdev* *v.* *Emp.,*
AIR 1948 Lah 151 .

6 *Jagdev* *v.* *Emp.,*
AIR 1948 Lah 151 .

7 *Jagdev* *v.* *Emp.,*
AIR 1948 Lah 151 .

8 *Jagdev* *v.* *Emp.,*
AIR 1948 Lah 151 .

9 *Jagdev* *v.* *Emp.,*
AIR 1948 Lah 151 .

10 *Jagdev* *v.* *Emp.,* AIR 1948 Lah 151 .

11 *Shewdayal,* (1867) 6 WR 73 Cr .

12 *Gurappa* *v.* *State* *of* *Mysore,* (1969) 75 Crlj 826 .

13 *Siddangouda* *v.* *State,* AIR 1958 Raj 167 [*LNIND 1957 RAJ 64*](para 7).

14 *Fazl* *Dad,* (1922) 24 Crlj 573 (Lah) .

15 *Gurappa* *v.* *State* *of* *Mysore,* (1969) 75 Crlj 826 .

16 *Malli,* (1917) 18 Crlj 979 (980).

17 *Abdulla* *v.* *Jitu,* (1900) 22 All 216 ; *Jawai v. Emp,* AIR 1942 Lah 214 .

18 *Birad* *v.* *State* *of* *Rajasthan,* AIR 1958 Raj 167 169 [*LNIND 1957 RAJ 87*].

19 *Madivalappa* *v.* *State* *of* *Mysore,* (1972) 78 Crlj 189 (para 2).

20 *Secy.* *of* *State* *v.* *Mask,* AIR 1940 PC 105 [*LNIND 1940 PC 9*].

21 Cf. *Abdul* *v.* *Bhawani,* AIR 1966 SC 1718 [*LNIND 1966 SC 56*]: (1966) 3 SCR 617 [*LNIND 1966 SC 56*].

22 Cf. *Ram* *Swarup* *v.* *Shikar,* AIR 1966 SC 394 .

23 *State of Punjab v. Daya Nand,* AIR 1974 P&H 108.

24 *Jawai* *v.* *Emp.,* AIR 1942 Lah 214 .

25 *Hans* *Raj* , AIR 1934 Lah 987 ; *Mian Jan v. Abdul,* (1905) 27 All 572 (575).

26 *Emp. v. Subbarayar,* (1895) 19 Mad 3.

27 *Hans* *Raj* , AIR 1934 Lah 987 ; *Mian Jan v. Abdul,* (1905) 27 All 572 (575).

28 *Abdul v. Kazim,* 1904 AWN 159.

29 *Dewa* *Singh* *v.* *Fazl,* AIR 1928 Lah 562 .

30 *Hans* *Raj* , AIR 1934 Lah 987 ; *Mian Jan v. Abdul,* (1905) 27 All 572 (575); *Emp. v. Subbarayar,* (1895) 19 Mad 3.

31 *Hans* *Raj* , AIR 1934 Lah 987 ; *Mian Jan v. Abdul,* (1905) 27 All 572 (575).

32 *Jawai* *v.* *Emp.,* AIR 1942 Lah 214 .

33 *Dewa* *Singh* *v.* *Fazl,* AIR 1928 Lah 562 ; *Dayanand v. State,* AIR 1976 P&H 190 (paras 11-14).

34 *Dayanand v. State,* AIR 1976 P&H 190 (paras 11-14).

35 *Dayanand v. State,* AIR 1976 P&H 190 (paras 11-14).

36 *Dattaji* *v.* *Narayanrao,* AIR 1923 Bom 198 ; *Secy. of State v. Rangaswamy,* AIR 1917 Mad 366 (FB) .

37 *Dayanand v. State,* AIR 1976 P&H 190 (paras 11-14).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

C.—PROCLAMATION AND ATTACHMENT

S. 86
Appeal from order rejecting application for restoration of attached property.

Any person referred to in sub-section (3) of Section 85, who is aggrieved by any refusal to deliver property or the proceeds of the sale thereof may appeal to the Court to which appeals ordinarily lie from the sentences of the first-mentioned Court.

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1. Scope of s. 86.—

1. This section transposes *old* s. 405, with verbal changes.
2. It gives to the proclaimed person a right to appeal against an order under s. 85(3), which refuses him relief. The appeal shall lie to the Court to which appeal lies from the Court which has refused relief under s. 85(3), if the order had been a sentence. [38] A decision of such appeal by any other Court would be void [s. 461(o),*post*].
3. The scope of the appeal would be confined to the conditions specified in s. 85(3).

2. Revision.—

1. Apart from the remedy by way of claim or objection under s. 84(1), and a suit to establish such claim under s. 84(4),[39] and appeal [s. 86] from an order under s. 85(3), revision would lie under s. 397 against the Proclamation under s. 82(1); [40] order of attachment under s. 83; [41] a disallowance of a claim under s. 84(1); refusal of application under s. 85(3) for restoration of the property. [42]

2. While the scope of the appeal under s. 86 is confined to the statutory conditions specified in s. 85(3), revision would lie to correct *any illegality* , [43] *e.g.* rendering the Proclamation a nullity. [44]

3. While the right of appeal under s. 86 is confined to the proclaimed person, [45] the right to revision would be available to the proclaimed person as well as a claimant whose claim has been rejected, *e.g.* , without deciding it on the merits. [46]

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38 *Anant Ram,* in re., (1887) 11 Bom 438; *Maduray* , (1895) 22 Cal 487 (490).

39 Cf. *Pritam v. State of Punjab,* (1967) Crlj 1120 (Punj) .

40 *Birad v. State of Rajasthan,* [AIR 1958 Raj 167 169 *LNIND 1957 RAJ 87*].

41 *Guruppa v. State of Mysore,* (1969) 75 Crlj 826 .

42 *Emp. v. Subbarayar,* (1895) 19 Mad 3.

43 *Emp. v. Subbarayar,* (1895) 19 Mad 3.

44 *Mian Jain v. Abdul,* (1905) 27 All 372 .

45 *Mian Jain v. Abdul,* (1905) 27 All 372 .

46 Cf. *Saraswati,* [AIR 1955 All 127 *LNIND 1954 ALL 115*].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

D.—OTHER RULES REGARDING PROCESSES

S. 87
Issue of warrant in lieu of, or in addition to, summons.

A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

1. Scope of s. 87: When warrant may be issued in lieu of summons.—

1. This section reproduces *old* s. 90 with the omission of the words "other than a juror", in view of the abolition of jury trial.
2. A warrant for arrest may be issued either *in lieu* of, or, in addition to a summons for appearance [s. 61,*ante*] under the following conditions :

(i) The Court must be empowered by the Code to issue summons. [47]

Thus, the power under the present section may be used against a witness under s. 145(9); [48] but not at an inquiry under s. 202. [49] Nor has a Court the power to issue warrant to secure the appearance of a person at a police investigation. [50]

(ii) The Court must record [51] its reasons, in writing, for issuing warrant, *in lieu* of or in addition to summons.

(iii) Such warrant may be issued only in either of the two cases—

(a) Where before of after the issue of summons the Court has reason to believe that the person summoned has absconded or will not appear in obedience to the summons.

(b) Where the service of summons is duly proved [52] but the person has failed to appear [53] on the date fixed for his appearance, without reasonable cause.

Hence, the issue of warrant under the present section was held to be illegal where the requirements of s. 64 [*old* s. 70] were not complied with. (As to proof of service, *see ante*).

3. Subject to the foregoing conditions the present section is applicable to an accused [54] as well as a witness, [55] or opposite party. [56]

4. This is an enabling provision and confers a discretion upon the Court to issue a warrant *in lieu* of summons, but the discretion has to be judicially exercised, so that a revisional Court might interfere if it is exercised or refused [57] to be exercised arbitrarily.

5. Col. 4 of Sch. 2 of the *old* Code prescribed whether summons or warrant should issue, in the first instance, in cases of specific offences. Notwithstanding this it was held [58] that the present section enabled to Court to issue a warrant instead of summons in those cases where the 2nd Sch. prescribed a summons to be issued in the first instance.

Col. 4 has been *omitted* from the corresponding 1st Sch. of the *new* Code, as recommended by the Commission. [59] Hence, it is clear that whenever the conditions of this section are present, the Court can issue a warrant, without being obsessed by the question whether the offence is such that a summons should issue in the first instance. [60]

But since a warrant deprives a person of his liberty, before issuing a warrant under the present section, the Court should take care to see that either of the two conditions specified herein were present. [61]

When the Trial Court, allowing a petition under *s. 319 Cr.P.C.* issued a non-bailable warrant against the accused persons without first issuing summons and none of the conditions mentioned in s. 87 of the Code had been satisfied, the High Court has set aside the order directing the Trial Court to issue summons against the accused persons.[62]

2. Cl. (a): 'Absconded'.—

See under s. 82(1),*ante* .

Where the criminal case in respect of which an accused was entered in a register of absconders is itself terminated with an order of discharge, the person cannot be subsequently arrested merely on the strength of the fact that his name wrongly continues to be on that register. [63]

3. Disobedience to summons.—

It has already been pointed out (see *ante*) that disobedience to summons is summarily punishable under s. 350 [*old* s. 485A], provided the Court which issued it had jurisdiction to issue it.

2. The power to issue process must be drawn either from the general power under s. 311 [*old* s. 540] or any specific provision authorising the issue of process [*e.g.* s. 244(2), *post*] at an inquiry or other proceeding.

3. Though s. 202(2) authorises a Magistrate to take evidence in an inquiry under sub-section (1) of that section, it does not specifically empower him to issue any process for compelling the attendance of witnesses for this purpose. The power under s. 311, again, can be exercised only by a 'Court' having seisin of a case, whether in its original, revisional or appellate jurisdiction. [64] But a Magistrate making an inquiry under s. 202(1) has not yet taken seisin of the case, and such inquiry can also be made by a police officer or other person, who is not a 'Court'. From this, it has been held that at the inquiry under s. 202(1), the Magistrate is to examine any witness as may be produced by the complainant, but he has no power to issue a summons or a warrant of arrest *in lieu* thereof, and that, accordingly, if any such process is issued to a witness without jurisdiction, non-compliance therewith would not be punishable under s. 311,*post* . [65]

4. Conditions of a valid warrant.—

See under s. 70,*ante* .

5. Remedies for illegal arrest.—

See under s. 41,*ante* . [66]

6. Revision.—

1. An order issuing a warrant, *in lieu* of summons, under this section, shall be set aside on revision if (i) such order does not state the reasons [67] for issuing a warrant instead of summons; [68] or (ii) the reasons given do not conform to either Cl. (a) or (b) of the section; [69] or it appears that he did not apply his mind to the requirement of the section; [70] or (iii) the Magistrate exercises or refuses to exercise his discretion arbitrarily. [71]

2. But, by reason of s. 465(1) [*old* s. 537], the situation may be different after the trial or other proceeding has been completed against the person brought before the Court on the strength of a warrant which does not conform to the requirements of s. 87. In such a case, the better view seems to be that the trial would not be vitiated so as to set aside the conviction or other order, on the ground of such defects in the warrant which does not cause a failure of justice, *e.g.* , where the Court does not record the reasons for issue of the warrant *in lieu* of summons in the order-sheet, but such reasons are apparent on the face of the warrant itself. [72] , [73]

7. S s. 71 and 87.—

1. The provisions of s. 71 [*old* s. 76, see *ante*] are applicable to a warrant issued under the present section so that it is open to the Court to endorse on such warrant a direction to release the arrested person on his furnishing security for attendance. [74]

2. But the incorporation of such endorsement is discretionary and not obligatory upon the Court; [75] in other words, the present section is not controlled by s. 71.

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47 *Lennan* *v.* *State,* [AIR 1968 Cal 195 197 *LNIND 1967 CAL 11*].

48 *Anoop* *v.* *Cheloo,* [AIR 1957 Raj 382 *LNIND 1956 RAJ 116*].

49 *Mangal* , (1914) 36 All 13 .

50 *Arpin* *v.* *Arobdi,* (1897) 24 Cal 320 323FB.

51 *Karuthan* , (1914) 38 Mad 1088; *Subol* *v.* *State,* (1974) 1 Crlj 176 (para 3) Cal.

52 *Chunder* *v.* *Emp.*, AIR 1941 Pat 206 .

53 *Gopi v. State,* (1974) II Crlj 1410(All) .

54 *Emp.* *v.* *Gur* *Din,* (1919) 20 Crlj 384 (All) .

55 *Lennan* *v.* *State,* AIR 1968 Cal 195 197 [*LNIND 1967 CAL 11*].

56 *Gopi v. State,* (1974) II Crlj 1410(All) .

57 *Anoop* *v.* *Cheloo,* AIR 1957 Raj 382 [*LNIND 1956 RAJ 116*].

58 *Lachmi* *Narain* *v.* *Emp.*, AIR 1939 All 156 .

59 41st Rep. of the Commission. Vol. I, para 472.

60 Cf. *India* *Devi* *v.* *Sarnagat,* AIR 1955 Punj 81 .

61 *Govt.* *of* *Assam* *v.* *Sahebulla,* (1923) 51 Cal 1 (FB) .

62 *Brij* *Nandan* *v.* *State* *of* *U.P.*, 2007 Crlj 378 All .

63 *Ram* *Pyare* *v.* *Om* *Prakash,* (1977) Crlj 1984 (para 8).

64 *Mangal* , (1914) 36 All 13 .

65 *Lennan* *v.* *State,* AIR 1968 Cal 195 197 [*LNIND 1967 CAL 11*].

66 As to suit for false imprisonment, *see* , further, *Ram Pyare v. Om Prakash* , (1977) Crlj (1988-95) Del; *Anwar* *v.* *Ajoy,* AIR 1959 Assam 28 .

67 The view taken by the majority of the Calcutta High Court that the omission to record the reasons in the order-sheet would not matter if the reasons are stated in the warrant [*Govt. of Assam v. Sahebulla,* (1923) 51 Cal 1 (FB)], is debatable because the section says that the warrant can be issued only *after* recording the reasons, which can only mean that the Court must record the reasons in his order, before issuing the order itself. The revisional Court should interfere, if moved in time [*Indra Devi v. Sarnagate,* AIR 1955 Punj 81].

68 *Subol* *v.* *State,* (1974) Crlj 176 (Cal) .

69 *Subol* *v.* *State,* (1974) Crlj 176 (Cal) .

70 *Sukheswar* , (1911) 38 Cal 789 .

71 *Anoop* *v.* *Cheloo,* AIR 1959 Raj 382 383 .

72 *Govt.* *of* *Assam* *v.* *Sahebulla,* (1923) 51 Cal 1 (FB) .

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74 *Chhotey* *v.* *Emp.,* AIR 1948 All 72 .

75 *Lachmi* *Narain* *v.* *Emp.,* AIR 1939 All 156 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

D.—OTHER RULES REGARDING PROCESSES

S. 88
Power to take bond for appearance.

When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.

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1. Scope of s. 88.—

This section corresponds to *old* s. 91, with the addition of the words, at the end—"or any other Court to which the case may be transferred for trial", as recommended by the Commission. [76]

2. Conditions necessary for the application of s. 88.—

An order under this section will be valid on the following conditions:—

(i) The person from whom the security for appearance is demanded must be present in Court; it is not necessary that he was present in pursuance of any summons or other process.

This section does not enable Magistrate to go to the house of a person and compel him to execute

a bond for his appearance. [77]

(ii) The officer presiding over such Court must be empowered to issue summons or warrant for compelling the appearance of or arresting such person [*see ante*].

By reason of s. 113, the present section may be applied in a proceeding under Chap. VIII, but not after an order is made under s. 111 [*old* s. 112], after which the Court can proceed only under ss. 111 and 116. [78]

(iii) This section only empowers the Court to obtain a bond for appearance. he has no power, under present section, to send a witness to lock-up, even though there is an apprehension that the witness may be kept away by the accused. [79]

(iv) If the foregoing conditions are satisfied, such Court may require such person to execute a bond, with or without sureties, for his appearance in such Court or any other Court to which the case may be transferred for trial. [80]

(v) Such person may be an accused or a witness. [81]

(vi) The power under this section belongs only to the Court. It cannot be utilised by the Police for the appearance of a person before a Police officer; [82] though a Police officer may obtain a bond for appearance before a Court, *e.g.* , under s. 42(2) [see *ante*]. [83]

There are other provisions of the Code which authorise a Police officer to obtain a bond for appearance before himself or at a specified place, *e.g.* , Sections 436- 437; 441(1). [84]

(vii) This section is applicable where a person is present in Court as a free agent, so that he may be bound over to appear on another day. It cannot possibly apply where such person is under detention or in custody after arrest. [85]

3. 'Officer presiding in Court'.—

The bond is to be executed in favour of the presiding officer of the Court empowered to issue summons or warrant. Where it is executed not at the instance of the Court but a Police or other officer, [86] such bond cannot be forfeited under s. 446 [*old* s. 514].

4. 'Or any other Court to which the case may be transferred'.—

1. Under *old* s. 91, these words being absent, it was held that the obligation under the bond was only to appear before the Court mentioned in the bond; there was no breach of the bond if the person failed to appear in another Court to which the case might be transferred. [87]

2. The foregoing defect has been removed by the addition of these words at the end of the instant section, so that the bond may be enforced not only by the Court by which it had been taken but also by another Court to which the relevant case has been transferred. [88]

5. Obligations of surety.—

1. Various provisions relating to bonds and sureties thereto are to be found in Chap. XXXIII [*old* Chap. XLII].

2. The liability of a surety is to produce the accused or other executant of the bond bound to appear before the Court, on the date mentioned in the bond. [89] If such person duly appears, the surety shall be discharged [s. 444].

3. The liability of surety is, however, confined to the proceedings pending against such person at the time of execution of the bond. It would not extend to proceedings arising out of offences committed subsequently. [90]

4. The bond shall be forfeited, and the surety shall be liable to pay the penalty specified therein or any part thereof as the Court may impose, in case the person bound fails to appear [s. 446]. But the surety shall not be liable for non-appearance owing to causes beyond his control, *e.g.* ,—

   Act of State or act of God or death of such person; [91] or arrest of such person and detention in another case. [92]

5. A surety cannot get a discharge until the accused appears or is brought before the Court. [1] But under s. 442(2) [*old* s. 502(2)], the surety can apply for his discharge, whereupon the Magistrate must issue a warrant for arrest of the person for whose appearance the surety executed bond. In such a case, the bond of the surety cannot be forfeited without complying with the provisions of s. 442(2). [2] But the surety shall be discharged only after the accused is arrested under s. 440(2) and brought before the Court [3] [s. 444(3)], unless, in the meantime, the Court accepts a fresh security and thereupon cancels the earlier surety bond. [4]

6. Penalty for failure to execute bond.—

1. Section 88 itself does not lay down any penalty for non-compliance with the order of the Court requiring security for appearance from the person present in Court. The question is whether the accused may be sent to jail custody for refusal to execute a bond in such circumstances. Section 167 cannot be invoked, because that section applies only where the accused is *arrested* and determined in custody of the police. [5] Nor does s. 309 apply because that provision is applicable only after a Magistrate has taken cognizance of an offence, [6] and not where a person voluntarily surrenders himself or is present in Court, otherwise than in response to a summons or warrant. [7] In view of the Supreme Court ruling that no Court has any *inherent* power to remand an accused to custody in the absence of an express legal authority, [8] it has been held that a Magistrate has no inherent power to remand a person in custody for non-compliance with an order under s. 88. [9] , [10]

7. Penalty for non-appearance in terms of bond.—

See s. 89, *below* , and s. 446,*post* .

8. S s. 88 and 111.—

Section 88 has no application to proceedings under Chap. VIII. Section 88 may be available till an order under s. 111 [*old* s. 112] is drawn up. After that is drawn up, the Magistrate has to act under Sections 112 [*old* s. 113] and 116(1) [*old* s. 117(1)]. [11]

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76 41st Rep. of the Commission, Vol. I, para 6.11.

77 *Ajodhya* *v.* *Municipal* *Committee,* (1936) 37 Crlj 837 (Nag) .

78 *Madhu* *Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 48) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 . overruling *Vasudeo v. State of U.P.,* AIR 1958 All 578 [*LNIND 1957 ALL 216*].

79 *Kazim* , (1901) AWN 35.

80 Cf. *Kimat* *v.* *Emp.,* AIR 1945 Lah 215 216 .

81 *Emp.* *v.* *Gur* *Din,* AIR 1919 All 158 .

82 *Hamid* *v.* *Emp.,* AIR 1925 Lah 152 .

83 *Om* *Prakash* *v.* *State,* (1971) 77 Crlj 865 (All) .

84 Cf. *Kimat* *v.* *Emp.,* AIR 1945 Lah 215 216 .

85 *Madhu Limaye v. Ved Murti,* [
AIR 1971 SC 2481
LNIND 1970 SC 448](para 18) :
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 .

86 *Prabhu Dayal* ,
AIR 1960 MP 85 [
LNIND 1959 MP 82].

87 *Ballabhdas v. Emp.,*
AIR 1943 Bom 178 .

88 *State of Maharashtra v. Dadamiya,*
AIR 1971 SC 1722 (para 9) :
(1972) 3 SCC 85 :
1971 Crlj 1274 .

89 *K.N. Chaudhury* , (1953) 32 Pat 640.

90 *Mana v. Emp.,*
AIR 1924 Lah 622 623 .

91 *Namdeo v. Emp.,*
AIR 1938 Nag 275 276 .

92 *Alauddin* ,
(1925) 26 Crlj 833 .

1 *Fatehchand* ,
AIR 1940 Sind 136 .

2 *Gurmukh* ,
(1926) 27 Crlj 848 .

3 *Gurmukh* ,
(1926) 27 Crlj 848 .

4 *Bekaru v. State of U.P.,* [
AIR 1963 SC 430](438) :
LNIND 1962 SC 128 [
(1963) 1 SCR 55] :
LNIND 1962 SC 128
(1963) 1 Crimes 335 .

5 *Ram v. State of U.P.,*
(1977) Crlj 1783 (All) .

6 *Ram v. State of U.P.,* (1977) Crlj 1783 (All) .

7 *Ram v. State of U.P.,* (1977) Crlj 1783 (All) .

8 *Natabar v. State of Orissa,* AIR 1975 SC 1465 [*LNIND 1975 SC 159*]: (1975) 2 SCC 220 [*LNIND 1975 SC 159*] : 1975 Crlj 1212 .

9 *Ram v. State of U.P.,* (1977) Crlj 1783 (All) .

10 The Contrary view, expressed in *Vasu Deo v. State of U.P.,* AIR 1958 All 578 [*LNIND 1957 ALL 216*], is *no longer* good law in view of the Supreme Court decision in *Natabar v. State of Orissa,* AIR 1975 SC 1465 [*LNIND 1975 SC 159*]: (1975) 2 SCC 220 [*LNIND 1975 SC 159*] : 1975 Crlj 1212 . But, in that view, it appears to be a lacuna in the Code, though, of course, disobedience to the order of the Court may constitute on offence punishable under Section 188, I.P.C.

11 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 48) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 . overruling *Vasudeo v. State of U.P.,* AIR 1958 All 578 [*LNIND 1957 ALL 216*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

D.—OTHER RULES REGARDING PROCESSES

S. 89
Arrest on breach of bond for appearance.

When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

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1. Conditions for the application of s. 89.—

The following are the conditions for the issue of a warrant of arrest under s. 89, which reproduces *old* s. 92, with a verbal change:—

(a) A person must have been bound by a bond, under s. 88, to appear before a Court.

This person should be applied by the Court if the accused, [12] on bail, or a witness who is under a bond to appear, [13] retards the progress of the case by his non-appearance on the dates of hearing. [14]

(b) Such person fails to appear in terms of such bond. Under this section, the Court which granted bail to an accused is competent to cancel the bail bond, in case of non-appearance on the date fixed, and issue a warrant for re-arrest of the accused even though the offence be a bailable offence. [15]

If, before the date fixed by the bond for appearance, arrest by warrant of such person is sought, it is s. 87 [*old* s. 90], and not the present section which is to apply. [16]

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12 *Bomanji* *v.* *State* *of* *Mysore,* AIR 1955 Mys 96 .

13 *Amjadali* *v.* *Murad,* AIR 1938 Nag 103 105 .

14 *Bomanji* *v.* *State* *of* *Mysore,* AIR 1955 Mys 96 .

15 *Panna* *Lal* *v.* *Sinha,* AIR 1967 All 394 397 .

16 *Karuthan* , (1916) 38 Mad 1088.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VI
PROCESSES TO COMPEL APPEARANCE

D.—OTHER RULES REGARDING PROCESSES

S. 90
Provisions of this Chapter generally applicable to summonses and warrants of arrest.

The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

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1. Scope of s. 90.—

This section reproduces *old* s. 93.

2. 'Every warrant of arrest issued under this Code'.—

1. Though the foregoing provisions in Sections 79- 89 are placed under the Chapter relating to 'Processes to compel appearance',—by the present section these procedural provisions are made applicable to a warrant of arrest issued under the Code for other purposes as well, *e.g.* ,—

(a) For arresting an accused convicted if he is not before the Court [s. 418(2)].

(b) For processing against a person other than the accused, for trial jointly with the accused [s. 319(2)].

3. Court's jurisdiction to inquire why warrant of arrest has been returned unexecuted.—

When a warrant of arrest is returned unexecuted or is obstructed owing to interference by the Government or other authority the Court is entitled to enquire into the validity of the reasons why the warrant could not be executed. [17]

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17 *State* *v.* *Nanavati,* AIR 1960 Bom 502 [*LNIND 1960 BOM 32*](para 5).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

A.—Summons to produce

S. 91
Summons to produce document or other thing.

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect *Sections 123 and 124* of the *Indian Evidence Act, 1872* (1 of 1872), or the Bankers' Books *Evidence Act*, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

1. Scope of s. 91.—

This section corresponds to *old* s. 94, with the following changes:—

(i) In sub-section (1), the words 'or, in any place beyond the limits of the towns of Calcutta and Bombay' have been omitted, to make it clear that the officer in charge of Police station shall have this power in the Presidency towns of Bombay and Calcutta as well. [1]

(ii) Sub-section (3) has been split up into two clauses (a)-(b) and in clause (a), the words "or the Bankers' Books *Evidence Act* , 1891" have been inserted to ensure that the provisions of that Act shall override the general provisions in the present section of the Code. [2]

2. Sections 91(1) and 165(1).—

1. While s. 91(1) authorises an officer in charge of a police station to issue an order for the production of a document or thing, which, if not complied with may lead to a search-warrant issued by a Court [s. 39], s. 165(1) authorises an officer in charge of a Police station (while making an investigation) to cause a search to be made of a premises for a thing necessary for investigation, without first issuing a summons for production, or without having to resort to a Court for a search-warrant.

2. The power under s. 165(1) belongs not only to an officer in charge of a police station but also to any other police officer, provided he is making an investigation.

3. The power under s. 165(1) cannot be used to supplement s. 91(1) to authorise a Police officer to require the production of a document in connection with a non-cognizable case, which a Police officer cannot investigate without the order of a Magistrate under s. 155(2). [3]

3. Sections 91 and 166A.—

When the document or thing required to be produced is in a foreign country any Criminal Court in India may, at the instance of the investigating authority, issue a letter of request (or Letter *Rogatory*) to the appropriate Court or authority in that foreign country, under s. 166A,*post* , to examine the person in whose possession that document is, and to require that person to produce the required document or thing. [4]

4. Sections 91 and 233(3).—

Section 91 is to be distinguished from those provisions under which the accused has the *right* to obtain such process, unless the Court considers it vexatious or dilatory or defeating the ends of justice, *e.g* ., under s. 233(3) [*old* s. 251(9)]. [5] These latter provisions do not control the discretionary power under s. 91. [6]

5. Sections 91(1) and 243(2).—

1. Apart from s. 91(1), s s. 243(2) and 247 [*old* ss. 252, 257] empower a Magistrate to issue process for the production of any documents or thing. The points of distinction between the two provisions should be noted:—

(a) While s. 91(1) empowers a Court as well as a Police officer, s. 243(2) applies only to a Magistrate.

(b) Section 91(1) is a general power which may be exercised at any stage [7] of an investigation, inquiry or trial; s. 243(2) or s. 247 can be used only during the trial of a warrant case, at a particular stage.

While s. 243(2) can be invoked only after the accused has entered upon his defence, the discretionary power of the Magistrate under s. 91 can be resorted to at the stage of investigation, inquiry or trial even before any charge is framed. [8]

(c) S. 91(1) is only an enabling provision, and does not confer any right upon any person, though the accused is also entitled to apply to the Court for exercise of this power. The discretion of the Court, under s. 91(1) is to be exercised in conformity with the test of 'necessary or desirable', but it is not controlled by anything in s. 243(2). [9]

Section 243(2) confers a *right* upon the accused; [10] but subject to the discretion of the Magistrate to reject it where he considers the prayer vexatious, dilatory or defeating the ends of justice. [11] If there is no such exceptional circumstance, the Court cannot refuse the application of the accused. [12]

2. The general power under s. 91(1) is not, accordingly, controlled by anything in s. 243(2). [13]

6. Sub-section (1) : Conditions for application of s. 91.—

A summons or order to produce a document or thing may be issued under this section under the following conditions:

(a) It can be issued only by a Court or an officer in charge of a police station.

(b) It may be issued by such Court or officer *suo motu* or at the instance of any party to the proceeding, [14] including the prosecution [15] or complainant [16] or the accused. [17]

(c) Such Court or officer must be of the opinion that the production of the document or thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code before such Court or officer, [18] and it should give its reasons in support of its conclusions to enable the revisional Court to exercise its jurisdiction. [19]

(d) The particular document or thing required to be produced must be specified in the summons or order. A general direction to produce all papers 'relevant to the case' would be illegal. [20]

(e) Before issuing the summons, the Court must be satisfied, on proper materials, that the document or thing called for is in the possession of the person to be summoned. [21]

(f) When the Cheque Return Register is relevant for the decision of the case under *Sections 138 of Negotiable Instruments Act* and the evidence of the witness raises a doubt as to whether such document is maintained in the bank or not, the High Court has thought it fit to summon it to ascertain whether the bank really maintains such Register.[22]

In prosecution for the offence under *Sections 138 of the Negotiable Instruments Act* bank documents necessary for the effective cross-examination of the witness may be summoned.[23]

(g) The summons or order to produce may be issued only to the person in whose possession the document or thing is believed to be, whether he is a party to the proceeding or a stranger; [24] but *not the accused* [25] (*see post*).

(h) The document or thing must *not* be—

(i) A privileged document, coming under s s. 123-124 of the *Evidence Act, 1872* ; [26]

(ii) A document coming under the Bankers' Books *Evidence Act* , 1891.

(iii) A document or thing in the custody of a postal or telegraph authority, which is dealt with in s. 92,*below* .

Besides those just mentioned, there are no other exceptions to the discretionary power conferred by the present section. It follows that an order under s. 91(1) is not illegal merely because it violates the privilege, under *s. 125 of the Evidence Act* , relating to a statement made by an informant, [27] or the privilege between advocate and client, under s. 126 of that Act; [28] or because the document is subject to a solicitor's lien [29] or any other lien. [30]

The validity of any objection relating to such documents has to be decided by the Court after production; [31] of course, the Court would not exercise its discretion so as to conflict with the policy behind s. 125 or *s. 165 of the Evidence Act* . [32]

7. Discretion of the Court.—

(1) Under this section, the accused has no absolute right to ask for the summoning of any document. [33] It is only when the Court, on a consideration of the facts and circumstances, considers that the production of a document or thing sought for is necessary or desirable for the purpose of the trial or inquiry or proceeding by or before the Court, that it summons the same but not otherwise. [34]

The production of documents must be necessary or desirable for the decision of the Court. [35]

2. The discretion has to be judicially exercised, [36] and on the basis of sufficient materials. [37]

3. What the Court has to determine before issuing the summons [38] to produce is whether *prima facie* there is reason for supposing that the document is relevant. [39], [40] The fact that it eventually turns out to be irrelevant would not render illegal the order summoning the document or thing, so long as it is *prima facie* considered 'necessary or desirable' for the trial or inquiry. [41] He cannot evade the responsibility of determining this question when the application is made for the prosecution on the plea that he might have to hear the accused. [42]

4. 'Necessary or desirable' means that the document or thing must (a) have some relation to the subject-matter of investigation or inquiry or (b) throw some light on the proceeding or some link in the chain of evidence. [43] Hence, the power under the present section is not confined to documents forming the subject-matter of a criminal offence, but all documents which may be used as evidence in such case; [44] or, the proceeds of an offence. [45]

5. But relevancy is not the sole consideration to govern the exercise of the discretion of the Court under s. 91(1). [46] It may also take into consideration such circumstances as—

   (i) Where a number of witnesses were examined during investigation on the same point, it may not be desirable or necessary to compel the production of statements of all such witnesses, under s. 91(1). [47]

   (ii) Whether such document or thing is being suppressed or might be tampered with or destroyed by the party in whose possession it is. [48], [49]

   (iii) Where the party in whose possession the document is, voluntarily offers to produce it, there is no case for application of the discretionary power under s. 91(1). [50]

   (iv) Where the connection of the documents with the subject-matter of investigation is remote and their production is sought for with the object of securing a withdrawal of the prosecution. [51]

   (v) Where the records before the Court contain sufficient information which is sought to be brought before the Court by calling for the production of a public document. [52]

6. On the other hand, once the Court is satisfied as to the relevancy and necessity of a document or thing for the purposes of an investigation, inquiry or trial, he cannot refuse to order production upon a consideration as to whether an inspection [53] may be allowed of such document, or what order might subsequently be made as to its disposal. [54]

7. The expression 'for the purposes of investigation' is wider than 'during investigation', and would, therefore, include any stage earlier than inquiry or trial. [55]

8. The document must have some relation or connection with the subject matter of investigation, enquiry, trial or other proceedings. [56]

9. Such document must be essential for just decision of the case. [57]

10. Production of document must be necessary or desirable for the enquiry, trial or other proceeding. [58]

8. At what stage the summons or order for production may issue.—

1. As the word 'whenever' indicates, a summons or order under the present section may be issued, at the discretion of the Court or officer in charge of the Police station, at any stage of the investigation, inquiry or trial, provided the Court or the officer is satisfied that such production is necessary at that stage of the proceeding. [59] , [60]

2. Thus, it may be issued even before framing a charge in a warrant case. [61] Once the Court was satisfied as to the relevancy and necessity of the document, it could not reject the prayer of the prosecution for production on the ground that these documents could be summoned on behalf of the defence. [62] The complainant may apply under this section even at a stage subsequent to the inquiry under s. 202. [63]

9. Summons to produce the document or thing by the accused.—

A police officer may move Court for summoning and production of document at any stage, mentioned in the section. But the accused can seek such an order only at the stage of defence. No right is conferred upon the accused to produce a document in his possession to prove his defence at the stage of the framing of the charge to show his innocence. [64]

The accused sought records to be sent from the police station. If the Court is of the opinion that those documents are necessary for deciding the case, it may call them and peruse them. However, the accused has no right to pray before the Court to send for those records under *s. 91 Cr.P.C.* [65]

10. Not to be invoked against the accused.—

The Court has no power to issue summons upon the accused to produce summons upon the accused to produce document or thing which is incriminating against the accused. [66]

However, Patna High Court has held that direction to the accused to produce the gift deed in question available with the accused was necessary for ends of justice such direction was proper. [67]

11. Scope of the order under s. 91(1).—

1. The only order which the Court is competent to issue under this section is to issue summons upon the person having possession or power over the document or thing to attend and produce it, or to product it, at the time or place specified in the summons or order.
2. No Order like the following can, therefore, be made under this section:

(i) An order stopping payment of a bill or an order in the nature of attachment before judgment. [68]

(ii) An order on a Bank preventing an accused from operating his account. [69]

Search warrant not to be issued when s. 91 may be marked.

Section 91 does not authorise the Court to direct any person to convert a cash into bank draft and that too in the name of the person different from that in whose name account stands. [70]

12. Powers of a Police officer.—

1. Section 91 confers power on an officer in charge of a Police station, as on a Court, to order the production of a document or thing necessary or desirable for the purposes of an investigation or other proceeding before him.

2. As to 'officer in charge of a police station,' *see* s. 2(o), *ante* . This expression includes an officer who is superior in rank to an 'officer in charge of a police station' [s. 36,*ante*], who can, therefore, exercise the power under the present section, [71] throughout his jurisdiction. [72]

3. As in the case of a Court, so in the case of a Police officer, the power is not absolute. [73] He can order production of a document only after being *prima facie* satisfied as to its relevancy. [74]

4. Such order must be is writing; a verbal order would be illegal. [75]

5. As regards a non-cognizable case, s. 155(2) says that no police officer shall investigate into it without the order of a competent Magistrate. When a Magistrate so authorises an investigation into a non-cognizable case, the Police officer can order production of a document or thing for the purpose of such investigation only from that Magistrate, in conformity with the requirements of s. 91. [76] Hence,

Where a Magistrate authorises a Police officer to investigate into a non-cognizable case, but the documents are not demanded in connection with case, the Police officer cannot, on the basis of such authority given by the Magistrate, start a separate non-cognizable case, and use his powers as officer in charge of a Police station [under s. 91(1)], and make an order for production of the documents, without obtaining a summons from the Magistrate. [77]

(iii) An order to the Police to take possession of the document or thing. [78]

3. Apart from Sections 91- 92, the Code confers no general power upon a Court to demand security from a person for the production of a document, when required. [79] Of course, when a person appears after the issue of a process under s. 91- 93, the Court may stay execution of the process if the person executes a bond for its production, when required. [80]

4. Section 91 does not authorise a Court to make a verbal order. [81] But if a person is present in Court with a

document, the Court has inherent power to order him to produce it, without issuing a summons. [82]

13. Status of a person who produces a document in compliance with summons.—

A person summoned to produce, under the present section, does not become 'witness' in the proceeding before the Court, and he cannot be cross-examined unless and until he is called as a witness, under *s. 139, Evidence Act* . [83]

14. Power to grant inspection.—

1. The power to compel production includes the power to grant inspection. [84] But since the power to compel a person to produce or give inspection of his documents, in a dispute to which he is not a party, involves a serious inroad upon his normal rights as a citizen, Courts must set their faces against anything in the nature of roving or fishing commission to inspect documents. [85] Inspection should be granted only when particular documents are shown to be relevant. [86]

2. It must also not be supposed that a Court should give inspection of all documents which have been produced. [87] The question as to inspection should be considered at a later stage, either at the trial or inquiry, or on a special application at which it can hear the accused as well as the complainant, and it should give inspection to the complainant only of those documents or parts thereof [88] which the complainant satisfies are really relevant. [89]

3. Under the Code, no Court has the power to grant inspection of a document which has not been first produced under s s. 91-92,[90] or brought before the Court under a searchwarrant. [91]

4. It follows that an accused has no right to inspect those documents of the prosecution which he has not summoned to produce (under s. 91), until they are tendered in evidence or otherwise sought to be used at the trial by the prosecution. [92] Nor has he any right to insist that such documents must be put into evidence. [93]

5. *New* s. 207 [*old* s. 173(4)] requires the Court to furnish to the accused, in cases instituted on a police report, copies of documents sought to be relied upon by the prosecution. That apart, s. 91(1) does not empower the Court to direct the prosecution to give copies of any documents to the accused, [94] *e.g.* , in a complaint case. [95]

6. The Court cannot authorise the taking of photographic copies of the document produced. [1]

7. When a document is produced in compliance with Sections 91- 93, the prosecution is entitled to inspect it, in order to determine whether it should be put in evidence. [2]

8. A party complying with an order for production of a document or thing would not be precluded from subsequently objecting to its inspection. [3]

15. 'Any Court'.—

1. This refers to any of the Courts specified in s. 6 (see *ante*), and would *not* include a Civil Court, even when it considers an application under s. 340 [*old* s. 476]. [4]

2. Any Criminal Court would be entitled to issue a summons for production or a search-warrant whether or not any proceedings under the code have been initiated or are pending before it, [5] and would include an Executive Magistrate or a Judicial Magistrate, while act ing administratively. [6]

3. This power is available in all cases, including summons cases. [7]

4. A Civil Court has the power to order production of documents under the provisions in O. XVI, R. 6 of the C.P. Code. But the penalties in s s. 93-96 of the *Cr.P.C.* cannot be attracted to non-compliance with such an order under the CP Code.

16. 'Document or thing'.—

1. *Sections 3(18) of the General Clauses Act, 1897* , defines a document thus:—

> document shall include any matter written, expressed or described upon any substance by means of letter, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter;
>
> To the same effect is the definition in *s. 3 of the Evidence Act* .

2. The word 'thing' is not a technical term; it indicates a physical or material object. [8] The two words 'document' and 'thing' taken together would, literally, include anything tangible and movable which is capable of being produced. [9]

3. The following have been held to be included within the expression 'document or thing':—

   (i) Any decipherable information which is set down in a lasting form. [10]

   (ii) A statement of a witness or other person. [11]

   (iii) A currency note, [12] or its cash equivalent, if converted. [13]

4. The following, on the other hand, have been held *not* to be covered by the expression:—

   (i) The configuration of a wall or a place inside a house. [14]

   (ii) A woman. [15]

   (iii) An actionable claim, *e.g.* , money deposited in a bank. [16]

   (iv) A summons to give specimen signature or handwriting; [17] but a document showing the signature or handwriting would be a 'document' within the purview of this section. [18]

Of course, under *s. 73 of the Evidence Act* , the Court can take such specimen from the accused present in Court for purposes of comparison, but not for the purposes of any party. [19]

17. Who may be required to produce.—

1. The summons or order to produce may be issued to a person who is (a) either in possession of the document or thing, or (b) has power over it. [20]

2. A person may be said to have power in respect of a document or thing when it would be wrongful for the person in possession not to give up possession to the former, *e.g.* , where it is in the possession of an attorney, agent or servant of the person summoned; but not when the document has been filed in Court.

3. It may be issued to a person who is not a party to the proceeding, or the complainant or the State, but not the accused (as will be explained under the next caption).

4. An order under s. 91 cannot be made in respect of documents in the custody of Postal authority, [21] for which specific provision has been made in s. 92,*post* .

18. 'Person' does not include an accused person.—

1. It is now *settled* that, in view of *Art. 20(3) of the Constitution* , the word 'person' in sub-section (1) of this section must be interpreted as *excluding* an accused person. [22] Hence, an accused person cannot be asked to disclose documents or things [23] which are incriminatory and contain his statements. [24] It is not, therefore, permissible for a Police officer to issue an order or the Court to issue a summons to an accused person in his custody or present in Court, to attend and produce *any* document, [25] for such compulsory process amounts to 'compulsion' within the meaning of Art. 20(3). [26]

2. The view that it would be consistent with Art. 20(3) to order the accused to produce documents in his possession and then to exclude from the evidence those documents only which are incriminatory in relation to the accused, is not sound. [27]

3. But it would not be violative of Art. 20(3) to require the accused to produce—

   (i) documents not containing his own statements (as a witness, under *s. 139 of the Evidence Act*) [28] but documents of third parties in his possession;

   (ii) or documents merely to show his signature or thumb-impression; [29] , [30]

   (iii) or public documents maintained by the accused by virtue of his office and under an agreement to produce when required,—because there would be no 'compulsion' in requiring him to produce such documents under the present section. [31] , [32]

4. It would follow that no search warrant can be issued under s. 93(1)(a) [*old* s. 96] to search for documents *known to be in the possession of the accused* . [33] This would not, however, stand in the way of a search in course of an investigation, or under s. 165,[34] or a general search-warrant being issued by the Court, when the document is not known to be in the possession of any person [under s. 93(1)(b)- (c)]. [35]

5. 'Accused' means a person against whom a formal accusation has been made. [36] Hence, *Art. 20(3) of the Constitution* would not come in as a bar against issue of a summons under the present section against a person against whom no formal accusation has yet been made, [37] though he may be a suspect; or who has been summoned only as a witness. [38]

19. Constitutionality of s. 91.—

In view of the foregoing interpretation of s. 91 [*old* s. 91], which excludes an accused person from its ambit, it is clear that no question of the section offending against *Art. 20(3) of the Constitution* can any longer arise.

20. Sub-section (3): Privileged documents.

21. Clause (a): ss. 123-124, Evidence Act .—

1. Section 123, which relates to 'affairs of State', says—

"No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the Officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

The Supreme Court [39] has refused to give an exhaustive definition of 'affairs of State', the only essential feature of documents falling within this expression being that they contain matters of a public nature which cannot be disclosed without prejudice to the public interest. The expression would obviously include documents relating to 'State secrets', *i.e.* , documents relating to public security, defence and foreign relations. But documents relating to commercial and contractual activities of the State may also partake of this character in special circumstance, [40] though cases of this nature in time of peace must 'be rare indeed'. Minutes of meetings of Council of Ministers and advice tendered by the Public Service Commission may thus be withheld under s. 123. [41]

As to the power of the Court to decide the question of privilege, the Supreme court has held that the law in India differs from the English law in view of the provisions of *s. 162 of the Evidence Act* which says—

"A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matter of State, or take other evidence to enable it to determine on its admissibility."

(a) Where the document falls under s. 123 (affairs of State), the Court cannot hold an inquiry into the possible injury to public interest, which may result from the disclosure of the document in respect of which privilege is claimed, [42] or the injury resulting to the accused from its non-disclosure. [43]

But the Court is competent, and indeed is bound, to hold a *preliminary enquiry* and determine the validity of the objection to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under s. 123.

In this enquiry, the Court has to determine the character or class of the document. if it comes to the conclusion that the document does not relate to an affair of State then it should reject the claim of privilege. If it comes to the conclusion that the document relates to affairs of State it should leave it to the head of department to decide whether it should permit its production or not.

(b) When privilege is claimed under s. 123, the Court cannot inspect the document, by reason of the second part of s. 123, nor can the Court permit any evidence as to the *contents* of the document. This does not mean that no other *collateral* evidence can be produced by the Government which may assist the Court in determining the nature of the document. [44] Though the scope of such collateral evidence is narrow, the Court may call for proper affidavit or even cross-examine State witnesses to determine whether the document falls under s. 123.

II. Section 124 relates to official communications and provides—

"No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

(a) Communications ‘in public confidence’ would include not only communications made by one public officer to another, [45] but also communications made to a public officer in official confidence, by a private citizen. [46]

If the answer of the Court to the question whether the communication has been made in official confidence be

in the negative, the document has to be produced. [47]

(b) The determination of the question whether the production of a document made in public confidence would affect the public interests is for the public officer to determine. [48]

The Court will not interfere with the determination of the public officer on this second question unless the Court, on a perusal of the document, finds the determination of the public officer perverse or *mala fide* . [49]

It is clear from the observations in *State of Punjab v. Singh* , [50] that where privilege is claimed under s. 124, the Court is entitled to inspect the document and decide the question whether the claim of privilege should be entertained or not.

22. Section 5 of the Bankers' Books Evidence Act, 1891.—

This section provides—

"No officer of a bank in any legal proceeding to which the bank is not a party be compellable to produce any banker's book the contents of which may be proved under this Act ...., unless by order of the Court or Judge made for special cause."

1. Since s. 94(3) of the *old* Code did not mention the Bankers' Books *Evidence Act* , it was held that the Police could have inspection of such books even without the orders of a Court, [51] as referred to in s. 5 of the Bankers' Books *Evidence Act* , though the right of the Bank to object under the foregoing section was also acknowledged, [52] on the ground that the provision in the Bankers' Books *Evidence Act* , being a special provision would override the general provision in the *Cr.P.C.*

2. The proposition that s. 91 would *not* override the special provision in s. 5 of the Bankers' Books *Evidence Act* has been codified in s. 91(3)(a) of the *new* Code, by inserting the words "or the Bankers' Books *Evidence Act* ." [53] In the result, an order for the production of a Banker's book can only be made, for a special cause, by an order under s. 5 of that Act .

23. Privilege under the Income-tax Act, abolished.—

1. *Sections 54(1) of the Income-tax Act, 1922* , imposed an absolute prohibition upon a Court to require production of an income-tax return or other document specified in that section. [54] This prohibition was reproduced in s. 137 of the I.T. Act , 1961.

2. But the privilege or prohibition has been completely *abolished* by the repeal of s. 137 of the I.T. Act , 1961, by *Sections 32 of the Finance Act* , 1964.

24. Sections 91 and 162: Statement made to the Police.—

1. Under s. 162(1),*post* , a statement made to the Police cannot be used at any inquiry or trial for *any* [55] purposes other than those mentioned therein, *i.e.* , for the purpose of cross-examining [56] a prosecution witness by the accused. It cannot be used by the accused for the purpose of contradicting a Court witness, [57] or a defence witness by reference to his statement before the Police, [58] or by the prosecution to support the prosecution story. [59]

2. But for the limited purposes mentioned in the *Proviso* to s. 162, such statement is regarded as a confidential document, and a Court, exercising its power of production under s. 91, should not direct a production of a statement by an informant for any other purpose. [60]

3. A statement made to the Police by the accused would also be excluded, by reason of s. 162(1). [61]

25. S s. 91 and 207(iii): Statement of witness of the Police.—

1. Under s. 173(6), read with s. 207(iii), the accused is entitled from the Court, [62] for the purpose of cross-examining a prosecution witness, to (free) copies of statements of such witnesses examined by the Police under s. 161, excepting those parts which the Police officer requests to be excluded 'in the public interest' and *not* being 'essential in the interests of justice'. The duty imposed by s. 207 is mandatory and a violation thereof will vitiate the trial. [63] That the prosecution does not intend to rely on such statements is not valid excuse. [64] , [65]

2. The word 'whenever' in s. 91(1) indicates that even at the stage of consideration of the charge, the Court can issue summons to produce relevant documents on the prayer of the accused. [66]

26. Cl. (b) : Document or thing in Postal custody.—

The mode of calling for a document or thing in the custody of Postal or telegraph authority is laid down in s. 92, as a result of which the general provision in s. 91 cannot be resorted to in such cases (*see below*). [67]

27. Punishment for non-compliance.—

1. Intentional omission to produce a document or thing in compliance with a summons or order under this section is punishable under s. 175, I.P.C., if (a) it was in the custody of the person required to produce it, [68] and (b) its production was necessary for the decision of the case in which it was called for. [69]

2. What are not valid excuses for non-compliance have already been mentioned. [70]

3. It would, however, constitute no offence where the constitutional bar under *Art. 20(3) of the Constitution* [see *ante*] applies. [71]

28. Revision.—

1. Since the discretion of the Court is to be judicially exercised, the Court of revision will not interfere where the subordinate Court has exercised its discretion judicially, having regard to the circumstances of the case. [72]

2. On the other hand, the superior Court would quash the order summoning production of a document or thing, where it has been made improperly, [73] *e.g.* ,—

   (i) Where the document, thing or information is not being relief upon by the prosecution. [74]

   (ii) Where the object of calling for production of a letter was to humiliate the advocate of the accused and was not necessary for purposes of the trial. [75]

   (iii) Where there are no good reasons for interfering with the view of the trial Court that production of the document was not necessary. [76]

   (iv) Where the records do not show that the Court considered the question whether it was necessary or desirable that the document or thing should be produced for the purposes of the trial or inquiry or that they were *prima facie* relevant. [77]

3. But the Revisional Court's jurisdiction to interfere with an order under s. 94, at an *interlocutory* stage, has been taken away by *new* s. 397(2), except where the order complained of is without jurisdiction, *e.g.* , an order to attend Court to state on oath, without calling the person required to produce document, as a *witness* . [78]

4. Conversely, the superior Court would set aside the order of a Magistrate *improperly* refusing [79] an application for production of a document or thing which is relevant to the trial or inquiry, *e.g.* , where the application is refused without saying that the document was not necessary or giving any other reasons for not calling for it, [80] or on the ground that it is privileged under *s. 123, Evidence Act* , without ascertaining the views of the Head of the Department concerned. [81]

29. Disposal of document or thing produced.—

See under ss. 451-452 [*old* ss. 516-517], *post* .

1 41st Rep. of the Commission, Vol. 1 para 7.1.

2 41st Rep. of the Commission, Vol. 1 para 7.1.; 37th Rep. of the Commission, paras 242-43.

3 *Durga Das v. Emp.,* AIR 1943 Lah 28 31 .

4 Cf. *Union of India v. Chandha,* (1993) Crlj 859 (para 61) SC.

5 *Arumugam v. State,* AIR 1961 Mys 198 (para 11).

6 *Arumugam v. State,* AIR 1961 Mys 198 (para 11); *Raghottam* , in re., AIR 1963 AP 362 [*LNIND 1962 AP 121*].

7 *Reddy v. State,* (1975) Crlj 980 (AP) .

8 *Reddy v. State,* (1975) Crlj 980 (AP) .

9 *Reddy v. State,* (1975) Crlj 980 (AP) .

10 *Raghottam* , in re., AIR 1963 AP 362 [*LNIND 1962 AP 121*].

11 *Reddy v. State,* (1975) Crlj 980 (AP) .

12 *Haricharan v. State,* AIR 1955 Punj 17 ; *Rama Krishna v. State,* (1975) Crlj 980 (AP) .

13 *Haricharan v. State,* AIR 1955 Punj 17 ; *Rama Krishna v. State,* (1975) Crlj 980 (AP) .

14 *Arumugam v. State,* AIR 1961 Mys 198 (para 11).

15 *Laxmidas,*
(1903) 5 Bom LR 980 .

16 *Pratt* ,
(1920) 47 Cal 647 .

17 *Raghottam* , in re.,
AIR 1963 AP 362 [
LNIND 1962 AP 121].

18 *Somiah* , in re.,
(1970) 76 Crlj 618 (para 7) AP; *Shiv Dayal v. Sohan,* AIR 1970 P&H 468 (para 9).

19 *Somiah* , in re.,
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20 *Prankhang* *v.* *Emp.,*
(1912) 16 CWN 1078 ; *Bisser* ,
(1913) 41 Cal 261 .

21 *Kuttan* *v.* *Ramakrishnan,*
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1980 Crlj 196 : *Shyamlal v. State of Gujarat,*
AIR 1965 SC 1251 [
LNIND 1964 SC 352]:
(1965) 2 Crimes 256 .

22 *Subhas* *v.* *State,*
2007 Crlj 76 Del .

23 *Sandipan* *v.* *Ashok,*
2008 Crlj 154 Bom .

24 *Nizam* *v.* *Jacob,*
(1891) 19 Cal 52 (64).

25 *State of Gujarat* *v.* *Shyamlal,*
AIR 1965 SC 1251 [
LNIND 1964 SC 352].

26 *Emp.* *v.* *Bilal,*
AIR 1940 Bom 361 .

27 *Emp.* *v.* *Bilal,*
AIR 1940 Bom 361 .

28 *State of Gujarat v. Shyamlal,* [AIR 1965 SC 1251 *LNIND 1964 SC 352*].

29 *Allan v. Pramatha,* (1935) 62 Cal 1037 .

30 *Nizam v. Jacob,* (1891) 19 Cal 52 (64).

31 *P.P. v. Menoki,* [AIR 1939 Mad 914 *LNIND 1939 MAD 154*].

32 *Chandubhai v. State,* [AIR 1962 Guj 290 *LNIND 1961 GUJ 60*].

33 *Bashir v. Gulam,* [AIR 1966 Bom 253 *LNIND 1965 BOM 28*](Para 18); *State of A.P. v. Ismail* , 1973 79 Crlj 931 (para 15).

34 *State of A.P. v. Ismail,* (1973) 79 Crlj 931 (para 15).

35 *Om Prakash v. C.B.I.,* [AIR 2000 SC 2235 : (2000) 5 SCC 679 : 2000 SCC (Cri) 1014 *LNIND 2000 SC 705*] : 2000 Crlj 3478 ; *Pradeep v. State,* 1994 Crlj NOC 391Raj .

36 *Hussenbhoy v. Rashid,* AIR 1941 Bom 259 (FB) .

37 *Pratt* , (1920) 47 Cal 647 .

38 *Jackariah v. Ahmed,* (1888) 15 Cal 109 .

39 *Hussenbhay v. Rashid,* AIR 1941 Bom 259 (FB) .

40 *Rama Krishna v. State,* (1975) Crlj 980 (AP) .

41 *Nizam v. Jacob,* (1891) 19 Cal 52 (64).

42 *Graves* *v.* *Pitumal,*
AIR 1943 Sind 51 54 .

43 *Municipal* *Committee* *v.* *Hyat,*
(1914) 16 Crlj 225 .

44 *Municipal* *Committee* *v.* *Hyat,*
(1914) 16 Crlj 225 .

45 *Lloyds* *Bank* , in re,
AIR 1934 Bom 74 76 .

46 *Bashir* *v.* *Gulam,*
AIR 1966 Bom 253 [
LNIND 1965 BOM 28](para 18).

47 *Bashir* *v.* *Gulam,*
AIR 1966 Bom 253 [
LNIND 1965 BOM 28](para 18).

48 *Bashir* *v.* *Gulam,*
AIR 1966 Bom 253 [
LNIND 1965 BOM 28](para 18).

49 *Asstt.* *Customs* *Collector* *v.* *Melwani,*
AIR 1970 SC 962 [
LNIND 1968 SC 311](para 13) :
(1969) 2 SCR 438 [
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50 *Bashir* *v.* *Gulam,*
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LNIND 1965 BOM 28](para 18).

51 *Graves* *v.* *Pitumal,*
AIR 1943 Sind 51 54 .

52 *Krishna* *v.* *Emp.,*
(1940) MLJ 96 .

53 *Central* *Bank* *v.* *Shamdasani,*
AIR 1938 Bom 33 .

54 *Nizam* *v.* *Jacob,*
(1891) 19 Cal 52 (64).

55 *Raghottam* , in re., AIR 1963 AP 362 [*LNIND 1962 AP 121*].

56 *Subhasini Jena v. Commandant,* 1988 Crlj 1570 Ori .

57 *Pradeep v. State of Rajasthan,* 1994 Crlj NOC 391Raj .

58 *Om Prakash Sharma v. Central Bureau of Investigation,* AIR 2000 SC 2335 [*LNIND 2000 SC 705*]: (2000) 5 SCC 679 [*LNIND 2000 SC 705*] : 2000 SCC (Cri) 1014 [*LNIND 2000 SC 705*] : 2000 Crlj 3478 .

59 *Haricharan v. State,* AIR 1955 Punj 17 .

60 *Rahim v. Emp.,* AIR 1935 Sind 13 (FB) .

61 *Rahim v. Emp.,* AIR 1935 Sind 13 (FB) ; *Brojendra v. State,* (1994) Crlj 1194 (para 7); *Reddy v. State,* (1975) Crlj 980 (AP) .

62 *Rahim v. Emp.,* AIR 1935 Sind 13 (FB) .

63 *Samaresh v. State,* AIR 1953 All 781 782 .

64 *State of Orissa v. Debendra Nath Padhi,* AIR 2005 SC 359 [*LNIND 2004 SC 1186*]: (2005) 1 SCC 568 [*LNIND 2004 SC 1186*] : 2005 SCC (Cri) 415 [*LNIND 2004 SC 1186*].

65 *Stalin v. State,* 2008 Crlj (NOC) 191 (Mad).

66 *State v. Shyamlal,* AIR 1965 SC 1251 [*LNIND 1964 SC 352*]: (1965) 2 Crlj 356 ; *Lakhan Lal Baronia v. State of U.P.,* 1991 Crlj 2546 All ; *H. Mohammed Ibrahim Kaleel v. State,* 2008 Crlj 3167 : 2008 (2) MLJ (Cri) 394 .

67 *Lakshman Bhagat v. State of Bihar,* (2008) 3 Pat LJR 615 ; *Khursheed Anwar v. State of Bihar,* (2007) 1 Pat LJR 399 .

68 *Prafulla v. Suresh,* AIR 1952 Assam 24 .

69 *Makhan* , (1936) 40 CWN 96 .

70 *Stephen v. Chandra Mohan,* 1988 Crlj 308 Ker : 1987 Ker LJ 689 .

71 Cf. *Textile Traders v. State of U.P.,* (1), AIR 1959 All 337 339 [*LNIND 1958 ALL 184*].

72 Cf. *Textile Traders v. State of U.P.,* (1), AIR 1959 All 337 339 [*LNIND 1958 ALL 184*].

73 *Durga Das v. Emp.,* AIR 1943 Lah 28 31 .

74 *Hussenbhoy v. Rashid,* AIR 1941 Bom 259 (FB) .

75 *Bashir v. Jakhi,* AIR 1966 Bom 253 [*LNIND 1965 BOM 28*].

76 *Durga Das v. Emp.,* AIR 1943 Lah 28 31 .

77 *Durga Das v. Emp.,* AIR 1943 Lah 28 31 .

78 *Hari v. Girish,* (1910) 38 Cal 68 .

79 *Purna v. Sashi,* (1903) 7 CWN 522 .

80 *Kishori* , (1920) 47 Cal 164 .

81 *Durga Das v. Emp.,* AIR 1943 Lah 28 31 .

82 *Gangaram* , AIR 1936 All 212 .

83 *Parmeshwari v. State,* AIR 1977 SC 403 [*LNIND 1976 SC 442*]](para 5); *D. Veeraiah v. K. Veeraiah,* 1988 Crlj 274 AP .

84 *Krishna v. Emp.,* (1940) MLJ 96 .

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86 *Krishna v. Emp.,* (1940) MLJ 96 .

87 *Hussenbhoy v. Rashid,* AIR 1941 Bom 259 (FB) .

88 *Jackariah v. Ahmed,* (1887) 15 Cal 109 .

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90 *Lakshmidas* , in re., (1903) 5 Bom LR 978 .

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92 *Swaminathan* , in re., AIR 1944 Mad 419 420 .

93 *Jackariah v. Ahmed,* (1887) 15 Cal 109 .

94 *Asstt. Customs Collector v. Melwani,* AIR 1970 SC 962 [*LNIND 1968 SC 311*]](para 12) : (1969) 2 SCR 438 [*LNIND 1968 SC 311*]] : 1970 Crlj 885 .

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[ ](para 12) : [ ] : .

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4 *Kumaravel* *v.* *Shanmuga,*
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[ ](FB) .

5 *Clarke* *v.* *Brojendra,*
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10 *P.P.* *v.* *Amrath,*
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[ ].

11 *Chanlet* , in re.,
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[ ].

12 *Nizam* , in re.,
(1892) 19 Cal 52 .

13 *Nizam* , in re.,
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14 *jagannath* ,
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15 *Bisu* ,
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18 *State v. Parbhu,*
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19 *State v. Parbhu,*
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20 *Jackariah v. Ahmed,*
(1887) 15 Cal 109 .

21 *Textile Traders v. State of U.P.* (II),
AIR 1960 All 405 [
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22 *State of Gujarat v. Shyamlal,*
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LNIND 1979 SC 377](paras 8, 13) :
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23 Cf. *Bajrangi* ,
(1910) 38 Cal 304 (306).

24 *State of Bombay v. Kathi Kalu,*
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25 *Kuttan v. Ramakrishnan,*
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27 *State of Gujarat v. Shyamlal,* [
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36 *Dastagir* *v.* *State* *of* *Madras,* AIR 1960 SC 756 761 : (1960) 3 SCR 116 : 1960 Crlj 1159 . *See* Author's *Shorter Constitution of India* , Latest Edition.

37 Cf. *Narayanlal* *v.* *Maneck,* [*LNIND 1960 SC 186*]: AIR 1961 SC 29 [(1961) 1 SCR 417 *LNIND 1960 SC 186*] : [(1961) 1 SCJ 353 *LNIND 1960 SC 186*]; *Dalmia v. Delhi Administration,* [AIR 1962 SC 1821 *LNIND 1962 SC 146*]: [(1963) 1 SCR 253 *LNIND 1962 SC 146*] : (1962) 2 Crimes 805 .

38 Cf. *Laxmipat* *v.* *State* *of* *Maharashtra,* [AIR 1968 SC 938 *LNIND 1967 SC 372*]: [(1968) 2 SCR 624 *LNIND 1967 SC 372*] : 1968 Crlj 1134 .

39 Cf. *Laxmipat* *v.* *State* *of* *Maharashtra,* [AIR 1968 SC 938 *LNIND 1967 SC 372*]: [(1968) 2 SCR 624 *LNIND 1967 SC 372*] : 1968 Crlj 1134 .

40 *State* *of* *Punjab* *v.* *Sukhdev* *Singh,* [AIR 1961 SC 493 *LNIND 1960 SC 270*]: [(1961) 2 SCR 371 *LNIND 1960 SC 270*].

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71 *State* *v.* *Parbhu,* AIR 1964 Punj 325 .

72 *Asstt. Customs Collector v. Melwani,* AIR 1970 SC 962 [*LNIND 1968 SC 311*](para 13) 1970 Crlj 885 : (1969) 2 SCR 438 [*LNIND 1968 SC 311*]; *Somiah* , in re., (1970) 76 Crlj 618 (para 9) Andhra.

73 *Hari Charan* *v.* *State,* AIR 1955 Punj 17 .

74 *State of A.P.* *v.* *Ismail,* (1973) 79 Crlj 931 (para 16).

75 *Desai* *v.* *State,* AIR 1962 Guj 290 [*LNIND 1961 GUJ 60*].

76 *Asstt. Customs Collector v. Melwani,* AIR 1970 SC 962 [*LNIND 1968 SC 311*](para 13) 1970 Crlj 885 : (1969) 2 SCR 438 [*LNIND 1968 SC 311*].

77 *Ajay* *v.* *State,* (1971) 77 Crlj 1329 (para 5).

78 *Parmeshwari* *v.* *State,* AIR 1977 SC 403 [*LNIND 1976 SC 442*](paras 6-7) (1977) 2 SCR 160 : [*LNIND 1976 SC 442*] :

(1977) 1 SCC 169 [
LNIND 1976 SC 442] :
1977 Crlj 245 .

79 Cf. *Nizam v. Jacob,*
(1892) 19 Cal 52 .

80 *State of A.P. v. Ismail,*
(1973) 79 Crlj 931 (para 16).

81 *Pulin v. State,*
AIR 1965 Tripura 33 35 . [*See also Amar Chand v. Union of India,*
AIR 1964 SC 1958].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

A.—Summons to produce

S. 92
Procedure as to letters and telegrams.

(1) If any document, parcel or thing in the custody of a postal or telegraph authority is, in the opinion of the District Magistrate, Chief Judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the postal or telegraph authority, as the case may be, to deliver the document, parcel or thing to such person as the Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or Judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal or telegraph authority, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief Judicial Magistrate or Court under sub-section (1).

1. Scope of s. 92.—

1. This section corresponds to *old* s. 95, with the following verbal changes.

2. This section is in the nature of an exception to s. 91 and has to be read together with that section. [82]

2. S s. 91-92.—

1. By s. 91, power is given to a Court to issue summons to any person to produce documents in his possession or power. To this general power, a provision in the nature of an exception has been provided in s. 92 with regard to documents in the possession of Postal or Telegraph authority. [83]
2. As regards documents or articles in the custody of Postal or Telegraph authority, s. 92 makes a distinction between superior and inferior Courts:—

(a) Under sub-section (1), only the superior Courts specified therein, namely, the High Court, Court of Session, District Magistrate or Chief Judicial Magistrate may directly order the authority to deliver the documents *etc* . to such person as it directs.

(b) A Magistrate other than those specified in sub-section (1) *cannot* order the authority to deliver or produce the documents *etc* . His only power, under sub-section (2), is to direct the authority to make a search for such documents *etc* . and then detain them till he could find an order from a superior Magistrate or Court as specified in sub-section (1) for their delivery or production. [84]

3. S s. 92 and 102.—

Section 102(1),*post* , empowers a Police officer to 'seize' (*i.e.* , to take possession of) [85] any property alleged to have been stolen or which creates a suspicion of the commission of an offence. This power, however, cannot be used to direct the Postal authority to withhold money orders addressed to the Petitioner, which can be ordered only under s. 92(2), by a proper order. [86]

4. Conditions for the application of sub-section (1).—

1. An order under sub-section (1) shall be valid only if the following conditions are satisfied:—

(i) That a document, parcel or thing is, in the opinion of a Court, as specified in sub-section (1), such that its production is necessary or desirable [87] for the purpose of an investigation, inquiry, trial or other proceeding under the Code. Mere receipt of some information as to the commission of an offence is not enough. [88]

(ii) This decision must be the decision of a District Magistrate, Chief Judicial Magistrate, Court of Session or High Court.

(iii) Such document must be in the custody of Postal or Telegraph authorities. [89]

(iv) If the foregoing conditions are fulfilled, the Court or Magistrate may make an order requiring the Postal authority to *deliver* the document *etc* . to a person nominated by it.

2. A District Magistrate or Chief Judicial Magistrate may also issue a search-warrant to search for a document *etc* . in the custody of a Postal authority, if the conditions of s. 93 are satisfied [s. 93(3)]. Other Magistrates have no such power.

5. 'Document .... or thing'.—

1. See *ante* .
2. These words would include a postal or money order. [1]
3. In an order under sub-section (1), the document or thing required to be delivered must be specified; otherwise, the order shall be illegal, [2] *e.g.* , an order for delivery of such letters *etc* . addressed to the Petitioner, as were received by the Postal authority; [3] or were to be received in future. [4]

But while under sub-section (1), nothing can be handed over unless specified,—under sub-section (2), in the very nature of things, it is not possible to specify the documents to be detained until they are *prima facie* examined by the authority making the order under sub-section (2), to find out which of them would be necessary for investigation. Hence, an omnibus order of the Superintendent of Police to 'detain the entire mail addressed to the Petitioner', is not illegal. [5]

6. 'In the custody of'.—

These words indicate that an order under sub-section (1) of this section can be made only in respect of documents or things which are already in the custody of the Postal authority at the time of making of the order and that it cannot be made in respect of documents *etc* . which may be received by such authority in future. [6] , [7]

7. Conditions for an order under sub-section (2).—

1. An order under this section, read with s. 91(1),[8] may be made only by the following Courts or officers—

   (i) Any Executive Magistrate other than a District magistrate;

   (ii) Any Judicial Magistrate other than the Chief Judicial Magistrate;

   (iii) Any Commissioner of Police;

   (iv) Any District Superintendent of Police.

2. Such Magistrate or officer must be of the opinion that the production of a document or parcel or thing, in the custody of a postal or telegraph authority, is necessary or desirable for the purposes of any investigation, inquiry or trial. [9]
3. Such Magistrate or Officer cannot take action under sub-section (1), requiring the Postal authority directly to deliver the document *etc* . to him. He can only take action under sub-section (2), requiring the Postal authority to search for and *detain* such document *etc* ., so that it may be available, pending

the order of a Court or superior Magistrate under sub-section (1). [10] Even in this case, the Court or superior Magistrate, while making an order under sub-section (1), must be satisfied that the document *etc* . would be necessary for the purposes of an investigation, inquiry or trial [11] (see *ante*).

4. Such Magistrate or Police officer has no power to issue a search-warrant in respect of a document *etc* . in the custody of a Postal authority [s. 93(3)(b)]. If he does issue a search-warrant, it would be void, under s. 461(b) [*old* s. 530].

8. Revision.—

1. While under s. 465 [*old* s. 537] an irregularity or error is cured in the absence of a failure of justice, that section applies only after the case had been finally disposed of. It does not take away the power of a superior Court to remove illegal or *ultra vires* orders, during the pendency of the case, [12] *e.g.* ,—

(i) Where a Magistrate, other than a District Magistrate or Chief Judicial Magistrate act ing under s. 92(2) [*old* s. 95(2)], summons the Postal authority to produce the document, in contravention of s. 92(2), under which the power of such Magistrate was only to require the Postal authority to search for and detain such document, until an order from a Magistrate or Court mentioned in sub-section (1) for delivering the document could be available, the order under sub-section (2), summoning the Post Master to produce the document was set aside. [13]

(ii) Where the order was made in respect of documents which were *not* in the custody of the Postal authority at the time of making the order but which might be received in future. [14]

(iii) Where an order is passed by a Court or Officer, without applying his mind to the question whether the document or thing was necessary in connection with any investigation, inquiry or trial. [15]

2. In some cases, the High Court has interfered with illegal orders under its inherent powers under s. 482 [*old* s. 561A]. [16]

9. Petition under Art. 226.—

Remedy under *Art. 226 of the Constitution* also may be granted to cancel an illegal order made in contravention of s. 95(1). [17]

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82 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

83 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

84 *Om Prakash v. State,* (1969) 75 CrLJ 1190 (1192).

85 *Parmeshwari v. State,* AIR 1977 SC 403 [*LNIND 1976 SC 442*](paras 6-7) : (1977) 2 SCR 160 [*LNIND 1976 SC 442*] : (1977) 1 SCC 169 [*LNIND 1976 SC 442*] : 1977 Crlj 245.

86 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

87 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*].

88 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*].

89 *Amar Singh v. State,* AIR 1965 Raj 160.

1 *Kailash v. Supdt.,* AIR 1960 Punj 412 (para 4).

2 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*]; *Amar Singh v. State,* AIR 1965 Raj 160.

3 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

4 *Amar Singh v. State,* AIR 1965 Raj 160.

5 *Kailash v. Supdt.,* AIR 1960 Punj 412 (para 4).

6 *Om Prakash v. State,* (1969) 75 CrLJ 1190 (1192).

7 *Kailash* *v.* *Supdt.,* AIR 1960 Punj 412 (para 4).

8 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*].

9 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

10 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

11 *Textile Traders v. State of U.P.* (II), AIR 1960 All 40 [*LNIND 1959 ALL 104*].

12 *Nilratan* *v.* *Jogesh,* (1896) 23 Cal 983 .

13 *Om Prakash v. State,* (1969) 75 CrLJ 1190 (1193).

14 *Amar Singh v. State,* AIR 1965 Raj 160 .

15 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*].

16 *Textile Traders v. State of U.P.* (I), AIR 1959 All 337 [*LNIND 1958 ALL 184*].

17 *Kailash* *v.* *Supdt.,* AIR 1960 Punj 412 (para 4).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 93
When search-warrant may be issued.

(1)

(a) Where any Court has reason to believe that a person to whom a summons or order under Section 91 or a requisition under sub-section (1) of Section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be in the possession of any person, or

(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court, may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

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1. Scope of s. 93.—

1. This section combines *old* ss. 96 and 97 thus:—

   (i) Sub-sections (1) and (3) correspond to sub-sections (1) and (2) of *old* s. 96;

   (ii) Sub-section (2) reproduces *old* s. 91.

2. Apart from verbal changes, the words 'Chief Presidency Magistrate' have been substituted by the words 'Chief Judicial Magistrate'.

2. Analogous provisions.—

1. As to the various provisions of the Code relating to search, *see* under s. 47,*ante* .

2. Instead of issuing a search-warrant under s. 93, a Magistrate may direct a search to be made in his presence [s. 103 : *old* s. 105]. [18]

3. S s. 91, 93.—

1. Section 93(1) provides a more efficacious method for the production of a document or thing than s. 91(1); while under s. 91(1), the summons or order to produce is addressed to the person who has its custody, a warrant under s. 93(1), is addressed to a Police officer for execution.

2. Under s. 91(1), not only a Court but an officer in charge of a police station can issue the summons or order, under s. 93(1), the warrant can be issued only by a Court.

3. While Cls. (a)-(b) of s. 93(1) relate back to an order under s. 91(1), Cl. (c) of s. 93(1) is independent of s. 91(1). [19] It follows that a general warrant under Cl. (c) cannot be issued in aid of *investigation* , [20] while Cls. (a)-(b) may be used for investigation also. [21]

4. Constitutionality of search and seizure.—

The constitutionality of s. 93 and of search and seizure under this section and similar laws does not appear to

have yet been fully examined.

I. As regards Art. 20(3), there is a consensus of opinion that a search and seizure of documents, at such, is not testimonial compulsion, within the purview of Art. 20(3). [22] Moreover, since s. 91 has been held inapplicable to an 'accused person', [23] no scope it left for issuing a search-warrant under Cl. (a) of s. 93(1). [24] Of course, in *Kathi Kalu's case* [25] a general search of the nature referred to in Cl. (b) or (c) of s. 93(1) was held to be permissible even when it is carried on in a premises occupied by an accused person; [26] but, then, it has been held therein that any document containing the statements of such accused person cannot be seized at that search. [27]

II. As regards Arts. 19(1)(f)- (g), the Supreme Court has held [28] that the invasion of the premises or business being temporary and having been made through judicial intervention, it must be held to be a *reasonable* restriction.

III. Some High Courts [29] have, accordingly, held that when such search is held, not through a search-warrant issued by a Court, but by an executive or administrative authority, *e.g.* , under *Sections 37(2) of the Income-tax Act, 1922* [s. 132 of the I.T. Act , 1961], it cannot be held to be a 'reasonable restriction' on the rights guaranteed to the individual under Art. 19(1)(f)- (g), in the absence of adequate safeguards.

But the power, even of a general search, has been held not to be arbitrary or unreasonable where, in the nature of things, *e.g.* , in income-tax or customs investigation, what document or thing would be useful for the investigation cannot possibly be anticipated before the search is actually held, and the procedural provisions of s. 165 of the Code are generally made applicable to a search held by a statutory authority. [30]

5. Search-warrant.—

1. A search-warrant is a warrant issued by a Court for the search of a place to be executed in the same way as a warrant for arrest of a person [s. 99], subject to the special safeguards provided in s. 100.

2. This is a more efficacious remedy than a mere summons to produce a document or thing, and is, accordingly, a more drastic step, and a serious invasion of the rights and privacy of the individual. [31] A search-warrant should not, therefore, be lightly issued merely on the statement of the Police that it is necessary for the purpose of investigation. [32] It can be issued only if the Court, on applying his judicial mind to the materials before him, comes to the conclusion that any of the conditions for a search-warrant, as specified in sub-section (1) is present. [33] The proceedings are liable to be quashed if these conditions are not present or the power is used for a collateral purpose. [34]

3. Issuing a search-warrant is a judicial act ; [35] which can be done only if there are sufficient materials on the record to induce the Court to be *prima facie* satisfied that the conditions specified in sub-section (1) are present. [36]

4. As the word 'may' suggest, it is not obligatory but discretionary with the Court to issue a search-warrant under either of the three clauses of s. 93(1). He may, instead, direct an investigation by the Police before issuing a summons for production or search warrant, [37] or make a search himself or in his presence, without issuing a warrant [s. 103,*post*]. [38]

6. Conditions for issue of search-warrant.—

1. A search-warrant may be issued by a Court only in any of the three specified circumstances [s. 93(1)]—

   (i) Where the Court has reason to believe that summons for production of a document or thing will not be obeyed;

   (ii) Where the document or thing is not known to be in possession of any person or Court;

   (iii) Where a *general search* or inspection is considered necessary for the purpose of trial or inquiry or other proceeding under the Code whether pending or in contemplation.

2. Since a search-warrant is a drastic invasion upon the privacy of an individual, the Code subjects this power to certain limitations—

   (1) The document or thing must be distinctly specified.

   (2) The Magistrate must exercise his judicial discretion and shall not issue the search-warrant unless the conditions specified above are present.

   (3) The search should be made in the presence of two or more respectable witnesses of the locality and a list of things seized in the course of such search and of the places in which they are expected to be found, shall be prepared by the searching officer and signed by such witnesses. The occupant of the place searched or some person in his behalf shall be permitted to appear and a copy of the list prepared and signed by the witnesses, shall be delivered to such occupant or person on his behalf [s. 100].

   (4) A Magistrate other than a District Magistrate or a Chief Judicial Magistrate cannot issue a warrant for search of a document or thing in the custody of a Postal or telegraph authority [s. 93(3)]. If he does, his order and the warrant will be void [s. 461(b), *old* s. 530(b)].

   But—

   A search-warrant is not bad merely because—

   (a) No reasons for its issue are mentioned in it, if it is shown that there were ample materials before the Court from which they or the Court could be satisfied that the conditions precedent for the issue of the warrant under the section were present. [39] [*See* , further, *below* .]

   (b) The boundaries of the place to be searched are not mentioned or its description is faulty, if it is possible to identify the place without any ambiguity. [40]

3. This power may be used not only where an inquiry is pending but also where it is about to be made, [41] under the Code. [42]

4. When a complaint case based on hire purchase agreement did not disclose but the signatures of the complainant were taken on blank paper, then such complaint does not disclose any criminal offence under s. 420 I.P.C. So, the complaint as well as the search warrant issued by the Court has been quashed by the High Court. [43]

5. Where no petition has been filed under s. 91 or s. 92, s. 83(1)(a) is not applicable. [44]

7. Sub-section (1): 'Court'.—

A Magistrate may issue a search-warrant even when he is not sitting judicially with respect to any proceeding pending before him. [45] It may be issued for the purpose of an inquiry about to be made. [46]

8. Cl. (a): 'Reason to believe'.—

1. 'Reason to believe' means a belief arrived at, judicially, from the materials before the Court that the process under s. 91 or 92(1) for the production of the document or thing has not been or would not be complied with; mere suspicion is not enough. [47] It may be a credible information, [48] an affidavit, [49] or oral evidence, [50] as to such facts as may lead the Court to form the belief that a summons or order under s. 91 will not produce the desired effect, [51] which is the condition precedent for issuing the warrant. [52] If necessary for this purpose, the Court may hold an inquiry. [53] If he acts on a complaint, the complainant should be examined on oath. [54] But once the belief is objectively formed, there is no obligation to hold an inquiry or to wait until the evidence for the prosecution is recorded. [55]
2. In the absence of other materials to satisfy the Court as to the need for issuing a search-warrant, *i.e.* , the ineffectiveness of a summons, [56] the following are *not* sufficient for causing such belief:—

   (i) Statement of the Police as to such need. [57]

   (ii) A telegram received by the Police. [58] , [59]

   (iii) A statement of the counsel for the complainant. [60]

   (iv) An affidavit which does not state when the applicant became aware of the offence complained of or the circumstances under which a summons would be insufficient or ineffective. The information received from a complainant should be in the nature of a complaint or information coming under s. 190(1),*post* . [61]

3. An order under Cl. (a) must relate to a specific document or thing. [62] Ineffectiveness of the summons or requisition to produce governs the issue of the search-warrant under Cl. (a) only, and not Cls. (b)-(c). [63] In other words, the present clause relates to s. 91(1), while Cls. (b) and (c) are not concerned with s. 91(1). [64]
4. Since the conditions for the application of the three clauses of s. 93(1) are different, it would be desirable for the Court to indicate under which of the Cls. (a)-(c), the search-warrant was being issued. [65]
5. It is, however, not necessary that a proceeding must be pending before the Court which issues the search-warrant for production of the document or thing before itself. [66]
6. The existence of 'reason to believe' is an objective condition, so that a superior Court would interfere if the records do not disclose sufficient materials from which the Magistrate could come to such belief. [67]

7. The drastic power under the present section cannot be allowed to be abused for extraneous purposes, *e.g.* ,—

(a) To serve the purposes of an attachment before judgment of property in the hands of a third person, the title to which is disputed. [68]

(b) To get possession of a thing in terms of a hire purchase agreement, which is enforceable by a civil act ion. [69]

9. Whether reasons have to be recorded.—

1. It is now settled [70] that since the Court's order under this clause (which is discretionary) [71] is open to judicial review by a superior Court on the ground that he did not apply his mind to this condition or that he had no reason to form this belief, the Court issuing the warrant should, in brief, record his reasons, unless such reasons are apparent on the face of the record; [72] otherwise, the power of judicial review would be rendered ineffective. [73]

2. Of course, where such reasons are not given in the order itself, evidence may still be given from other materials, when the order is challenged, that the Magistrate had reasons for such belief. [74] But a clear application of mind by the Magistrate must be discernible in the order itself. [75]

3. But, where the order of issue of the search-warrant is challenged on the ground that the Court had no reason to form the belief required by this clause, the superior Court cannot sit as a Court of appeal, but has only to see that there were materials from which the Court could be *prima facie* satisfied as to the ground for issuing the warrant. [76]

4. It should not be issued on mere asking. The Magistrate should appropriate inquiry, apply his judicial mind, satisfy himself objectively about its necessity and record reasons in support of his satisfaction, otherwise the order will be illegal. [77]

10. No search warrant against accused.—

No search warrant can be issued to search for document known to be in possession of the accused but a general search warrant may be issued and in execution of such search warrant, the premises even in possession of the accused may be searched and the document found therein may be seized irrespective of the fact that the said document may have tendency to incriminate the accused. But he may not be required to participate in the search. He may remain a passive spectator. He may even remain absent. [78]

11. 'Document or thing'.—

Any document or thing which was required by the summons under s. 91 (see *ante*) or the requisition under s. 92(1), may be the subject of a search-warrant.

12. 'Summons or order ... has been, or might be addressed'.—

These words make it clear that a search-warrant may be issued not only where a summons to produce has been issued and not complied with but also where the Court has reason to believe that even though a

summons be issued, the person in question would not produce the document or thing. In other words, the issue of a summons or requisition under s s. 91-92 is not an indispensable condition, in all cases, for the issue of a search-warrant under the present section. [79]

13. Whether party entitled to copy of Court's order.—

Since a search-warrant is issued by a Court, as a judicial act [see *ante*), on general principles, the party against whom it is issued should be entitled to get a copy of the order issuing the searchwarrant, [80] though there is no express provision for it; but not the report of the Police containing the materials collected in investigation. [81]

14. Cl. (b): 'Document ... not known to be in the possession of any person'.—

In this case, too, the document or thing to be searched for must be specified in the warrant, as under Cl. (a), but the previous issue of a summons for production thereof is not and could not possibly be a condition for the issue of a warrant under Cl. (b). [82]

15. Cl. (c): General search.—

1. While Cls. (a)-(b) of sub-section (1) relate to the issue of a warrant for the search of a *specified* document or thing, Cl. (c) confers the power to issue warrant for a 'general' search, that is to make a search without specifying any particular object for recovery in the warrant. It may be issued only where the Court is not aware that the document or thing required is to be found at a particular place or with a particular person. [83]

2. A 'general search' means a roving inquiry for the purpose of discovering objects which might involve persons in criminal liability. [1]

3. The condition precedent for the exercise of this wide power is that the Court, before issuing such warrant, must be satisfied that a general search would be necessary for the purposes of any inquiry, trial or other proceeding under the Code. [2]

4. The warrant will be illegal if it is issued by the Court without applying its mind to this condition, [3] and the gravity of the step taken. [4] Though the previous issue of a summons under s. 91 is not a condition for the issue of a search-warrant under the present section, nevertheless the Court cannot issue it for the mere asking. [5] There must be sufficient materials before the Court to justify the drastic act ion under this section. [6] A superior Court would interfere where it appears that the step was taken on insufficient materials. [7]

5. But the words 'the purposes of' are wide and indicates that the power of general search may be issued not only for documents forming the subject of a charge in the case before the Court but also documents sought to be used as *evidence* in such case. [8]

6. A general search under the present clause is not controlled by anything in s. 91(1),[9] and is permissible only where the document to be searched for is *not* known to be in the possession of any particular person; it would be illegal if it is issued in a case where the document is known to be in the possession of a particular person. [10] Nor would the present clause be applicable where a specific document is required. [11]

7. The officer executing a general warrant must also bear in mind that such wide power has been granted to him on the assumption that he will use the power for seizing such documents or things as will be useful for an inquiry or proceeding under the Code. If the validity of a seizure under such warrant is

challenged in Court, the State will have to prove how the documents seized are likely to be useful for any proceeding under this Code; but the mere circumstance that a large number of documents have been seized is not a ground for holding that the action of the officer executing the warrant has been *mala fide* . [12]

8. The word 'inspection' in sub-cl. (c) refers to inspection of a place, [13] not documents [14] . An officer executing a general warrant may first inspect a place, make a general search thereof and then seize the documents or things which the Court considers necessary for the purposes of investigation, inquiry or trial. [15]

9. The power under sub-cl. (c) is not curtailed by anything in sub-cl. (b). [16]

10. The power to authorise a general search is given by this section only to a Court. A Police officer making an investigation under s. 165 has no power to make a general search. [17]

16. Instances of proper cases for issue of a general search-warrant under sub-cl. (c).—

The issue of a general search-warrant has been held to be justified in the following circumstances, *inter alia* :

Where the allegation was of a criminal breach of trust against the office-bearers of a public institution and they were kept in the office of the institution and neither the premises nor the documents required for the purpose of trial could be said to be in the possession of any individual accused. [18]

17. Search and seizure under the special Act .—

The provisions of ss. 93 and 102 of the Code relating to the search and seizure has to be followed during the course of search and seizure conducted in exercise of the power conferred under s. 4(d) of Arm Forces (Special Powers) Act, 1958. [19]

18. 'Inquiry, trial or other proceeding'.—

1. The word 'investigation' being absent in Cl. (c), a Magistrate cannot issue a general warrant under this section to *help* the Police in making an investigation, [20] which may or may not result in an inquiry. [21]

2. At the same time, a search-warrant may be issued at a pre-inquiry state, [22] if the Court is reasonably satisfied that, if the expected material is found on search, it would, in the normal course, lead to an 'inquiry' under the Code. [23] But it would not justify a 'general search' in aid of a Police investigation. [24] , [25]

19. State at which a search-warrant may be issued.—

1. It is settled since the Privy Council decision [26] that the pendency of an inquiry, trial or other proceeding is not a condition precedent for issuing a search-warrant under Cl. (c) of the present section. It may also be issued "before any proceedings of any kind are initiated and in view of an inquiry about to be made", [27] *e.g.* , where a District Magistrate issued a

search-warrant to investigate into offences against the public tranquility, which it was his duty to inquire into. [28]

2. Of course, there may be special Acts which provide that a search-warrant may be issued only during the pendency of a proceeding under that Act, *e.g.* , *Sections 25 of the Arms Act* , 1878.

3. But even though no proceeding need be pending before the Court issuing a search-warrant under the present section, the things seized at the search must be produced before the Court (*vide* Form No. 10, 2nd Sch., *post*). [29]

4. Once the Court has taken cognizance of a case, it would be open to him to issue a search-warrant, without considering whether he would order investigation by the Police or call upon the Petitioner to stand his trial. [30]

20. Stay of search-warrant.—

1. Neither s. 91 nor s. 93 authorises the Court to demand security for production of a document or thing when required, instead of issuing the process. [31]

2. But on an application to stay the operation of the warrant, the Magistrate may allow such stay on the person's executing a bond for production of the document or thing when required. [32]

21. Form of search-warrant.—

1. The Form to be used for a warrant for search of a [Cls. (a)-(b)] specified document or thing is Form No. 10 of the First Sch., *post* .

2. No separate form is prescribed for a general search under Cl. (c) of sub-section (1); Form No. 11 (relating to general search for stolen property) may be used with necessary alterations.

3. Authorising the Police to make a search (except under s. 103), without issuing a warrant, in proper form, would be illegal. [33]

22. Search outside Court's jurisdiction.—

See under s. 99,*post* .

23. Sub-section (2): Place to be searched.—

Though a search-warrant, under sub-Cls. (a)-(b) of sub-section (1), must specify the particular document or thing to be searched for, it is not obligatory for the Court to specify the particular place where the search is to be made. But this sub-section enables the Court to make such a specification, and when that is done, any search outside the place to which it has been confined by the warrant shall be illegal.

Even in a general search-warrant, under sub-Cl. (c), the place of search may be specified, *e.g.* , the office of a

public institution. [34]

24. Sub-section (3): Warrant for search of document or thing in Postal custody.—

1. Under s. 92(1), a District Magistrate or a Chief Judicial Magistrate may require the Postal or Telegraph authority to deliver to such person as such Magistrate directs, a document or thing in the custody of the authority [see *ante*].

2. Under the present sub-section, the District Magistrate or Chief Judicial Magistrate is empowered to issue a search-warrant to the Police to search for any such document in the custody of such authority, if required. No other Magistrate shall have this power.

25. Power to seize document or thing in course of search.—

1. The power to seize any document or thing in course of a search in execution of a warrant under s. 93 is implied [35] in s s. 100(5), 101,*post* .

2. Even where the search itself is illegal, the seizure of an incriminating article is not vitiated [36] for the purposes of the trial. [37]

3. On the other hand, a Magistrate has no power under the Code to direct the Police to ‘take possession’ of any documents in the custody of a person, without issuing a search-warrant under the present section. [38]

26. Use of seized document.—

1. Where a document or thing is seized in execution of a search-warrant, and brought before the Court, it would be open to inspection by the party who sought for it [39] to the extent that it is relevant to the inquiry or trial before the Court. [40]

2. If the document or thing is otherwise admissible, it may be used in evidence, notwithstanding any illegality in the search, [41] though, of course, because of the illegality of the search, the Court may be inclined to examine carefully the evidence relating to the seizure. [42]

3. Where the search-warrant was issued because an order issued by the Officer in charge of a Police station, under s. 91(1), was not complied with, the Court may, instead of handing over the seized document to the Police officer, direct its return to the person from whom it was seized, if it is satisfied that it was not necessary for investigation. [43]

27. Disposal of seized articles.—

1. Sections 451- 452 [*old* ss. 516A-517] provide for disposal of property which is produced before the Court ‘during any inquiry or trial’. If it is not produced ‘during any inquiry or trial’, the provision

applicable is s. 457 [*old* s. 523]. [44] But an order under s. 457 can be passed only at the conclusion of the inquiry or trial and not at any stage earlier than that for which the Magistrate is not competent to hold any inquiry or trial. [45]

2. Where they are seized in execution of a warrant of a Court to another jurisdiction, the procedure under s. 101 is to be followed.

3. The general rule is that the seized property should be returned to the person from whose custody it was seized, [46] unless there are special circumstances which warrant a contrary order or direction, say, for keeping the property in the custody of the Court or for sale, *e.g.* ,—

   (a) Where title to the property is in dispute. [47] But the Court would not be justified in not returning the property to the person from whom it was seized, where he had a 'right to possess' it, even though he might not be the owner. [48]

   (b) Where the property is proved not to belong to the person from whom it had been seized, *e.g.* , in case of theft. [49]

4. But where, under the law, such person had a 'right to possess it', *e.g.* , where he had obtained a currency note in good faith without any knowledge or suspicion that it was involved in the commission of an offence, the Court should not refuse to return it to him. [50]

28. Default in execution of search-warrant.—

Wilful neglect or failure to execute a search-warrant issued by a Court would constitute contempt of Court on the part of the person to whom it was directed or made over for execution. [51]

29. Power to search person during search of place. —

See under s. 100(3),*post* .

30. Obstruction to search-warrant.—

1. Voluntary obstruction to a search-warrant is punishable under s. 186, I.P.C., but *not* where—

   (a) The warrant is illegal, being in contravention of some statutory provisions, [52] and the entry of search, accordingly, constitutes trespass. [53]

   (b) The search is conducted in contravention of the provisions of s. 165. [54] But the person whose premises are searched cannot go further and compel the Police officer to do something contrary to his volition. [55] [*See* , further, under next caption.]

2. Where the search was illegal [56] or in contravention of the provisions of the Code, the persons offering resistance, even if violent, [57] would be entitled to the protection of s. 99 of the I.P.C. (private defence), [58] except where it is shown that the officer executing the warrant was act ing in good faith under colour of his office. [59] s. 99 does not cover cases of complete *absence* of jurisdiction, as distinguished from excess of jurisdiction, [60] or mere irregularity. [61]

3. Where, on the other hand, the obstruction is not justified in law, the executing officer would have an implied power to remove the obstruction, by the use of reasonable force. [62]

4. Even where the search is illegal, it would not justify any *criminal act* being committed against the officer conducting the search, particularly after the search or investigation is over. [63]

31. Illegality of search.—

1. A search may become *illegal* on the following grounds, *inter alia* ,—

   Where the warrant is illegal, being in contravention of some statutory provision, *e.g.* ,—

   (i) Where, instead of issuing a search-warrant as required by the present section, the Magistrate simply endorsed the word 'approved' on the Police officer's petition for issuing a search-warrant. [64]

   (ii) Where the warrant is not in accordance with Form No. 10 of the 2nd Sch., *post* , or does not bear the seal of the Court. [65]

   (iii) Where the warrant was issued in the name of an officer who was not correctly designated and the house searched was not the house mentioned in the warrant [s. 93(2)]. [66]

   (iv) Where the warrant was issued by a Court without applying his judicial mind to the necessity for issuing it, having regard to the circumstances specified in s. 93(1),[67] or that it was issued for a collateral purpose. [68] The Magistrate should give reasons for issuing the search-warrant. [69]

   (v) Where the search is conducted in contravention of the provisions of s. 165. [70]

2. Absence of independent witnesses, or of recording of reasons by the Police officer before entering the premises are instances of *irregularity* . [71]

32. Irregularity not to vitiate the trial.—

1. Section 465(1) [*old* s. 537] provides, *inter alia* , that no sentence or order of a competent Court shall be reversed on the ground of any irregularity [72] (not amounting to illegality) [73] in the warrant of search, unless a failure of justice has been occasioned thereby.

2. Even the omission to obtain a search-warrant has been held to be curable under s. 465 [*old* s. 537]. [74] Thus, conviction for possession of illegal cocaine was upheld even though it was found on a search held without a legal warrant. [75] The test in such cases is the conclusiveness of the evidence or record relating to the offence with which the accused stands charged. [76]

33. Instances of 'irregularity'.—

As instances of 'irregularity' within the meaning of s. 465(1), which do not go to the root of the jurisdiction of the

Court which issued the search-warrant or caused the search, may be mentioned—

(i) Defects in the description of the premises to be searched which do not prevent the property from being identified, without any ambiguity. [77]

(ii) Where the date on the warrant is not given by the Magistrate in his own hand but he signs at the foot of the warrant with his seal. [78]

34. Revision.—

Though an irregularity in a search-warrant would not, in the absence of a failure of justice, suffice for setting aside a trial or conviction, the order under s. 93(1), together with the search-warrant, may be set aside under s. 439 [*old* s. 435], if revision is sought for in time, on the ground of illegality (see *ante*) or contravention of the relevant statutory provisions, *e.g.* ,—

(i) The warrant was contrary to law or arbitrarily granted; or granted without applying the Court's judicial mind to the necessity for issuing it, [79] or on insufficient materials. [80]

(ii) A general search-warrant was issued where the documents were known to be in the possession of the accused. [81]

(iii) Where, owing to the delay in disposing of an application for search-warrant by the Court, the very object of issuing a search-warrant would be defeated. [82]

35. Inherent jurisdiction under s. 482.—

The inherent jurisdiction of the High Court has been exercised to quash a search-warrant which was without jurisdiction, having been issued against an accused, in contravention of *Art. 20(3) of the Constitution* . [83]

36. Constitutional remedy against illegal or unconstitutional search.—

A petition under Art. 226 lies for quashing an illegal search-warrant (see *ante*) and also for returning the documents or things seized under such illegal warrant. [84] The search may be challenged on the following grounds, *inter alia* ,—

(a) That the law which authorises the search is unconstitutional, *e.g.* , on the ground that it violates fundamental right [85] or that it had been repealed. [86]

(b) That the search-warrant was issued by a person who was not empowered by law so to do.

(c) That the warrant was issued without complying with the statutory conditions for issue of the same, [1] *e.g.* , without applying his mind to the question of issuing it; [2] or that it was used for a collateral purpose. [3]

(d) That the power was used *mala fide* , *i.e.* for a purpose other than that for which it was conferred by the statute, [4] *e.g.* , where the search carried out was 'indiscriminate', [5] or that the documents seized were not useful for or relevant to the proceeding under the law in question. [6]

(e) That the search or seizure was made in contravention of the requirements of s. 100. [7]

(f) That the documents or things seized were *retained* in contravention of the conditions laid down by the relevant law or without complying with its requirements. [8]

37. Civil remedy for illegal search.—

1. Since a search contrary to law would constitute an act ionable trespass [9] a suit for damages would lie against the persons who executed such illegal warrant. [10]

2. In order to raise a valid plea in defence, the statutory conditions for the search must be complied with. [11]

3. A Magistrate who issues an illegal warrant or authorises a search by the Police (not in his presence) without issuing a warrant, may also be liable if the immunity offered by the Judicial Officers' Protection Act, 1850 [12] is not available. [13]

38. Procedure for search by Police officer, without warrant.—

See under s. 165,*post* , which authorises an officer in charge of a police station or a police officer making an investigation to make a search, without warrant, for anything necessary for the purposes of investigation, under the conditions specified therein.

39. General Search under other laws.—

1. A power to make a general search is to be found in *Sections 105(1) of the Customs Act, 1962* , under which it has been held [14] that the object of grant of this power to the officer of Customs is not the search for a particular document or thing but of documents or things which may be useful or necessary for proceedings *whether pending or contemplated* under the Act . It is only after the search is made and the documents found therein are scrutinised that their relevance or utility can be determined. To require a specification of the documents in advance is to misapprehend the purpose for which the power is granted. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, *i.e.* , the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched. [15]

2. It has been held that *Sections 132(1) of the Income-tax Act, 1961* , confers a power to make a general search, without specifying in the warrant the particulars of the document or

thing to be searched for.[16] But the Court can interfere in case of a collateral or *mala fide* use of the power. [17]

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18 *Clarke* *v.* *Brojendra,* (1912) 39 Cal 953 PC .

19 *Pagla* *Baba* *v.* *State,* AIR 1957 Orissa 130 (para 29).

20 *Hoshide* *v.* *Emp.,* AIR 1940 Cal 97 .

21 *Hoshide* *v.* *Emp.,* AIR 1940 Cal 97 .

22 *State of Bombay v. Kathi Kalu,* AIR 1961 SC 1808 [*LNIND 1961 SC 259*]: (1962) 3 SCR 10 [*LNIND 1961 SC 259*] : (1961) 2 Crimes 856 ; *Casebook (I)* , p. 437 *et seq; Dastagir v. State of Madras,* AIR 1960 SC 756 [*LNIND 1960 SC 57*]: (1960) 3 SCR 116 [*LNIND 1960 SC 57*] : 1960 Crlj 1159 .

23 *State of Bombay v. Kathi Kalu,* AIR 1961 SC 1808 [*LNIND 1961 SC 259*]: (1962) 3 SCR 10 [*LNIND 1961 SC 259*] : (1961) 2 Crimes 856 . *Casebook (I)* , p. 437 *et seq.*

24 *Dastagir v. State of Madras,* AIR 1960 SC 756 [*LNIND 1960 SC 57*]: (1960) 3 SCR 116 [*LNIND 1960 SC 57*] : 1960 Crlj 1159 .

25 *State of Bombay v. Kathi Kalu,* AIR 1961 SC 1808 [*LNIND 1961 SC 259*]: (1962) 3 SCR 10 : (1961) 2 Crimes 856 . *Casebook (I)* , p. 437 *et seq.*

26 *State of Gujarat v. Shyamlal,* AIR 1965 SC 1251 [

LNIND 1964 SC 352](para 37) :
(1965) 2 Crimes 256 .

27 *State of Gujarat v. Shyamlal,*
AIR 1965 SC 1251 [
LNIND 1964 SC 352](para 37) :
(1965) 2 Crimes 256 .

28 *Sharma v. Satish,*
AIR 1954 SC 300 [
LNIND 1954 SC 40](302-07).

29 *Doongarmal Agency v. Johnson,*
AIR 1964 Assam 1 (paras 107, 117, 176).

30 *Sreeram v. Dy. Collector, Customs,*
AIR 1965 AP 294 [
LNIND 1964 AP 221](para 4); *I.T.O. v. Seth Bros.,*
AIR 1970 SC 292 [
LNIND 1969 SC 212](para 8) :
(1969) 2 SCC 324 [
LNIND 1969 SC 212] :
(1970) 1 SCR 601 [
LNIND 1969 SC 212].

31 *I.T.O. v. Seth Bros.,*
AIR 1970 SC 292 [
LNIND 1969 SC 212](para 8) :
(1969) 2 SCC 324 [
LNIND 1969 SC 212] :
(1970) 1 SCR 601 [
LNIND 1969 SC 212].

32 *Hoshide v. Emp.,*
AIR 1940 Cal 97 .

33 *Hoshide v. Emp.,*
AIR 1940 Cal 97 .

34 *I.T.O. v. Seth Bros.,*
AIR 1970 SC 292 [
LNIND 1969 SC 212](para 8) : (1969) 2 SCC 324 :
(1970) 1 SCR 601 [
LNIND 1969 SC 212].

35 *Pagla Baba v. State,*
AIR 1957 Orissa 130 (para 29).

36 *Pukhraj v. Kohli,*
AIR 1962 SC 1559 1563 : (1962) Supp (3) SCR 866.

37 *Melicio* *v.* *Mohan,*
AIR 1966 Goa 23 (para 7).

38 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 PC .

39 *Kanailal* *v.* *Ramakrishna,*
AIR 1958 Cal 128 [
LNIND 1957 CAL 163].

40 *Emp.* *v.* *Govind,*
AIR 1941 Nag 16 .

41 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 (PC) .

42 *Hoshide* *v.* *Emp.,*
(1940) 44 CWN 82 (87).

43 *Prakash* *Chand* *v.* *Manick,*
2006 Crlj 3707 :
(2006) 2 Bom CR 282 [
LNIND 2005 NGP 164](Cri) (Bom) .

44 *G. Subhas Chandra Babu* *v.* *Suresh Kumar,*
2001 Crlj 3258 :
(2001) 2 KLT 370 [
LNIND 2001 KER 85](Ker) .

45 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 PC .

46 *Srivastava* *v.* *Gajanand,*
AIR 1956 Cal 609 [
LNIND 1956 CAL 49](para 7).

47 *Walvekar* ,
(1926) 53 Cal 718 (727).

48 *Pagla* *Baba* *v.* *State,*
AIR 1957 Orissa 130 141 .

49 *Chetty* *v.* *Jehangir,*
AIR 1918 Mad 587 .

50 *Pratt* *v.* *Emp.,*
(1920) 47 Cal 597 .

51 *Niranjan* *v.* *State,* (1963) 2 Crlj 61 (62).

52 *Srivastava* *v.* *Gajanand,* AIR 1956 Cal 609 [*LNIND 1956 CAL 49*](para 7).

53 *Ajoy* *v.* *Bose,* (1928) 33 CWN 369 (370).

54 *Hari Lal* , (1897) 22 Bom 949.

55 *Ajoy* *v.* *Bose,* (1928) 33 CWN 369 (370).

56 *Chetty* *v.* *Jehangir,* AIR 1918 Mad 587 .

57 *Mul Chand* *v.* *Emp.,* (1911) 12 Crlj 175 (178); *Jagannath* , (1920) 24 CWN 405 (408).

58 *Pratt* *v.* *Emp.,* (1920) 47 Cal 597 .

59 *Hari Lal* , (1897) 22 Bom 949.

60 *Mul Chand* *v.* *Emp.,* (1911) 12 Crlj 175 (178); *Jagannath* , (1920) 24 CWN 405 (408).

61 *Hari Lal* , (1897) 22 Bom 949.

62 *Shiv Dayal v. Sohanlal,* AIR 1970 P&H 468 (para 8).

63 *Shiv Dayal v. Sohanlal,* AIR 1970 P&H 468 (para 8); *Sharma v. Satish,* AIR 1954 SC 300 306 : 1954 Crlj 865 : 1954 SCR 1077 [*LNIND 1954 SC 40*].

64 *Shiv Dayal v. Sohanlal,* AIR 1970 P&H 468 (para 8).

65 *Sharma* *v.* *Satish,* AIR 1954 SC 300 306 : 1954 Crlj 865 : 1954 SCR 1077 [*LNIND 1954 SC 40*].

66 *Clarke* *v.* *Brojendra,* (1912) 39 Cal 953 PC .

67 *Pagla* *Baba* *v.* *State,* AIR 1957 Orissa 130 141 .

68 *Nizam* , in the matter of, (1891) 19 Cal 52 .

69 *Hrishikesh v. Michael,* 67 CLJ 569.

70 *Kuttan* *v.* *Ramakrishnan,* AIR 1980 SC 185 [*LNIND 1979 SC 377*](paras 11, 15) : (1980) 1 SCC 264 [*LNIND 1979 SC 377*] : 1980 Crlj 196 .

71 *Kuttan* *v.* *Ramakrishnan,* AIR 1980 SC 185 [*LNIND 1979 SC 377*](paras 11, 15) : (1980) 1 SCC 264 [*LNIND 1979 SC 377*] : 1980 Crlj 196 .

72 *Kuttan* *v.* *Ramakrishnan,* AIR 1980 SC 185 [*LNIND 1979 SC 377*](paras 11, 15) : (1980) 1 SCC 264 [*LNIND 1979 SC 377*] : 1980 Crlj 196 ; There are some Acts which expressly require the reasons to be recorded, e.g., *Sections 25(3) of the Arms Act* , 1788 [*Pagla Baba v. State,* AIR 1957 Orissa 130].

73 *Vide* Author's *Administrative Law* , Latest Edition.

74 Cf. *Kanailal* *v.* *Ram,* AIR 1958 Cal 128 [*LNIND 1957 CAL 163*]; *Sreeram v. Dy. Collector Customs,* AIR 1965 AP 294 [*LNIND 1964 AP 221*](para 53).

75 *Kuttan* *v.* *Ramakrishnan,* AIR 1980 SC 185 [*LNIND 1979 SC 377*](paras 11, 15) : (1980) 1 SCC 264 [*LNIND 1979 SC 377*] : 1980 Crlj 196 .

76 Cf. *Pukhraj* *v.* *Kohli,* AIR 1962 SC 1559 1563 : 1962 Supp(3) SCR 866.

77 *Gangadharan* *v.* *Kochappi,*
1985 Crlj 1517 Ker : 1985 Crlj NOC 49Mad .

78 *Kilton* *Pillai* *v.* *Ramakrishnan,*
AIR 1980 SC 185 [
LNIND 1979 SC 377]:
1980 Crlj 196 :
(1980) 1 SCC 264 [
LNIND 1979 SC 377]; *Rajmal v. Manmal,*
1989 Crlj 1279 MP ; *State v. Shyamlal,*
AIR 1965 SC 1251 [
LNIND 1964 SC 352]:
(1965) 2 Crlj 256 .

79 *Ganga* *Ram* *v.* *Habib,*
AIR 1936 All 212 214 .

80 *Kalinga* *Tubes* *v.* *Suri,*
AIR 1953 Orissa 49 .

81 *Kalinga* *Tubes* *v.* *Suri,*
AIR 1953 Orissa 49 .

82 *Kalinga* *Tubes* *v.* *Suri,*
AIR 1953 Orissa 49 .

83 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185 [
LNIND 1979 SC 377](paras 11, 15) :
(1980) 1 SCC 264 [
LNIND 1979 SC 377] :
1980 Crlj 196 .

1 *Paresh* *v.* *Jogendra,*
AIR 1927 Cal 93 .

2 Cf. *I.T.O.* *v.* *Seth,*
AIR 1970 SC 292 [
LNIND 1969 SC 212](para 20) read with para 26 :
(1969) 2 SCC 324 [
LNIND 1969 SC 212] :
(1970) 1 SCR 601 [
LNIND 1969 SC 212] of *Seth Bros. v. I.T. Commr.,*
AIR 1965 All 487 .

3 Cf. *I.T.O.* *v.* *Seth,*
AIR 1970 SC 292 [
LNIND 1969 SC 212](para 20) read with para 26 : (1969) 2 SCC 324 :
(1970) 1 SCR 601 [
LNIND 1969 SC 212] of *Seth Bros. v. I.T. Commr.,*
AIR 1965 All 487 .

4 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185
LNIND 1979 SC 377
(1980) 1 SCC 264
LNIND 1979 SC 377
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[ ](paras 11, 15) : [ ] : .

5 *Pratt* *v.* *Emp.,*
AIR 1920 Cal 43 .

6 *Hoshide* *v.* *Emp.,*
AIR 1940 Cal 97 .

7 *Hoshide* *v.* *Emp.,*
AIR 1940 Cal 97 .

8 *Lakshmidas* , in re.,
(1903) 5 Bom LR 980 .

9 *Lakshmidas* , in re.,
(1903) 5 Bom LR 980 .

10 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185
LNIND 1979 SC 377
(1980) 1 SCC 264
LNIND 1979 SC 377
1980 Crlj 196
[ ](paras 11, 15) : [ ] : .

11 *Shiv Dayal v. Sohan Lal,* AIR 1970 P&H 468 (para 6).

12 Cf. *I.T.O.* *v.* *Seth,*
AIR 1970 SC 292
LNIND 1969 SC 212
(1970) 1 SCR 601
LNIND 1969 SC 212
AIR 1965 All 487
[ ](para 20) read with para 26 : (1969) 2 SCC 324 : [ ] of *Seth Bros. v. I.T. Commr.,* .

13 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185
LNIND 1979 SC 377
(1980) 1 SCC 264
LNIND 1979 SC 377
1980 Crlj 196
[ ](paras 11, 15) : [ ] : .

14 *Jackariah* *v.* *Ahmed,*
(1887) 15 Cal 109 .

15 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185
LNIND 1979 SC 377
(1980) 1 SCC 264
[ ](paras 11, 15) : [

LNIND 1979 SC 377] :
1980 Crlj 196 .

16 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185 [
LNIND 1979 SC 377](paras 11, 15) :
(1980) 1 SCC 264 [
LNIND 1979 SC 377] :
1980 Crlj 196 .

17 *Kalinga* *Tubes* *v.* *Suri,*
AIR 1953 Orissa 49 ; *Paresh v. Jogendra,*
AIR 1927 Cal 93 .

18 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185 [
LNIND 1979 SC 377](paras 11, 15) :
(1980) 1 SCC 264 [
LNIND 1979 SC 377] :
1980 Crlj 196 .

19 *Naga Peoples' Movement of Human Rights v. Union of India,*
AIR 1998 SC 431 [
LNIND 1997 SC 1511]:
(1998) 2 SCC 109 [
LNIND 1997 SC 1511] :
1998 SCC (Cri) 514 [
LNIND 1997 SC 1511].

21 *Jagannath* ,
(1920) 24 CWN 405 .

22 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 PC [*see* under next caption].

23 *Kaverappa* *v.* *Sankannaya,*
AIR 1965 Mys 214 (219-20); *Kalinga Tubes v. Suri,*
AIR 1953 Orissa 153 .

24 *Hoshide* *v.* *Emp.,*
AIR 1940 Cal 97 .

25 *Piyare* *Lal* *v.* *Thakur,*
(1915) 17 Crlj 60 (61).

26 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 PC [*see* under next caption].

27 *Pagla* *Baba* *v.* *State,*
AIR 1957 Orissa 130 142 ; *Mohomed* , in re.,
AIR 1934 Bom 104 .

28 *Clarke* *v.* *Brojendra,*
(1912) 39 Cal 953 PC [*see* under next caption].

29 *Serajuddin* *v.* *Misra,*
(1962) 1 Crlj 692 696SC.

30 *Ajoy* *v.* *Bose,*
AIR 1929 Cal 176 .

31 *Purna* *v.* *Sashi,*
(1903) 7 CWN 522 (524).

32 *Kishori* *v.* *Haridas,*
(1919) 47 Cal 164 .

33 *Nidhi* *v.* *State,*
(1955) 59 CWN 649 .

34 *Kuttan* *v.* *Ramakrishnan,*
AIR 1980 SC 185 [
LNIND 1979 SC 377]:
(1980) 1 SCC 264 [
LNIND 1979 SC 377] :
1980 Crlj 196 .

35 Cf. *Calcutta Cycle Co. v. Collector of Customs,*
AIR 1956 Cal 253 [
LNIND 1955 CAL 156](para 29).

36 *Radha Krishan v. State of U.P.,*
AIR 1963 SC 822 [
LNIND 1962 SC 315]: 1963 Supp (1) SCR 408 :
(1963) 1 Crimes 809 .

37 *State of Maharashtra v. Natwarlal,*
AIR 1980 SC 593 [
LNIND 1979 SC 482]:
(1980) 4 SCC 669 [
LNIND 1979 SC 482] :
1980 Crlj 429 ; *Shyam v. State of M.P.,*
AIR 1972 SC 886 [
LNIND 1972 SC 100]:
(1972) 1 SCC 764 [
LNIND 1972 SC 100] :
1972 Crlj 638 .

38 *Hari Charan* *v.* *Girish,*
(1910) 38 Cal 68 .

39 *Srivastava v. Gajanand,* 1956 Cal 609 (para 7).

40 *Central Bank v. Shamdasani,* (1938) Bom 119.

41 *Radha Krishan v. State of U.P.,* AIR 1963 SC 822 [LNIND 1962 SC 315]: 1963 Supp (1) SCR 408 : (1963) 1 Crimes 809; *State of Maharashtra v. Natwarlal,* AIR 1980 SC 593 [LNIND 1979 SC 482]: (1980) 4 SCC 669 [LNIND 1979 SC 482] : 1980 Crlj 429; *Shyam v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100]: (1972) 1 SCC 764 [LNIND 1972 SC 100] : 1972 Crlj 638; *Hari Charan v. Girish,* (1910) 38 Cal 68 .

42 *Hari Charan v. Girish,* (1910) 38 Cal 68 .

43 *A.P.P. v. Secy., Aluminium Industry,* (1959) Ker 165 .

44 *Brijendra v. Gupta,* (1976) Crlj 467 (All) ; *Balaji v. State of A.P.,* (1976) Crlj 1461 (AP) .

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49 *Pushkar v. State of M.P,* AIR 1953 SC 508 : 1954 Crlj 153.

50 *State Bank v. Rajendra,* AIR 1969 SC 401 [

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51 *Bengal Coal Co. v. Biswanath,*
(1960) 74 CWN 321 (325).

52 *I.T.O. v. State,*
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53 *Nidhi v. State,*
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54 *Shyam Lal v. State of M.P.,*
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56 *Bajrangi* ,
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57 *Bajrangi* ,
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58 *State of U.P. v. Ram,*
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AIR 1957 Orissa 130 .

59 *Abdul v. Emp.,*
(1896) 23 Cal 896 .

60 *Bisu* ,
(1907) 11 CWN 836 .

61 *Emp. v. Pukot* , (1895)19 Mad 349.

62 Cf. *Matajog v. Bhari,*
(1955) 2 SCR 925 [
LNIND 1955 SC 89] (936).

63 *Shyam Lal v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100](para 5) : (1972) 1 SCC 764 [LNIND 1972 SC 100] : 1972 Crlj 638 .

64 *Nidhi v. State,* (1955) 59 CWN 649 .

65 *Siddanna v. State of Mysore,* AIR 1966 Mys 289 293 .

66 *Ahmed v. State,* AIR 1952 J&K 14.

67 *Kuttan v. Ramakrishnan,* AIR 1980 SC 184 (para 17) : (1980) 3 SCC 55 : 1980 SCC (Cr) 534; *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [LNIND 1967 SC 224](para 19) : (1968) 1 SCR 148 [LNIND 1967 SC 224].

68 Cf. *Nawal Kishore v. State of Punjab,* AIR 1964 Punj 268 (FB) .

69 *Kuttan v. Ramakrishnan,* AIR 1980 SC 184 (para 17) : (1980) 3 SCC 55 : 1980 SCC (Cr) 534; *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [LNIND 1967 SC 224](para 19) : (1968) 1 SCR 148 [LNIND 1967 SC 224].

70 *State of Rajasthan v. Rehman,* AIR 1960 SC 210 [LNIND 1959 SC 183]: (1960) 1 SCR 991 [LNIND 1959 SC 183] : 1960 Crlj 286 .

71 *Shyam Lal v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100](para 6) : (1972) 1 SCC 764 [LNIND 1972 SC 100] : 1972 Crlj 638 .

72 *Ali Ahmed* , (1923) 46 All 86 (87).

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80 *Hoshide v. Emp.,* AIR 1940 Cal 97 .

81 *Shiv Dayal v. Sohan Lal,* AIR 1970 P&H 468 (para 9).

82 *Bilas v. Ram Gopal,* (1918) 22 CWN 719 .

83 *Bimal v. Chandrasekhar,* (1986) Crlj 689 (Or) .

84 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

85 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

86 Cf. *Nawal Kishore v. State of Punjab,* AIR 1964 Punj 268 (FB) .

1 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

2 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

3 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

4 Cf. *I.T.O. v. Seth Bros.,* AIR 1970 SC 292 [*LNIND 1969 SC 212*](paras 8, 21); Cf. *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*](para 19).

5 *C.I.T. v. Jawahar Lal,* (1970) II SCWR 215.

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7 *Sundaram v. State of T.N.,* AIR 1972 Mad 313 [*LNIND 1971 MAD 449*][*see* , further, under Section 100,*post*].

8 *C.I.T. v. Jawahar Lal,* (1970) II SCWR 215.

9 Cf. *Nidhi v. State,* (1955) 59 CWN 649 (651).

10 Cf. *Kaverappa v. Sankannayya,* AIR 1965 Mys 214 221 .

11 *Clarke v. Bojendra,* (1912) 39 Cal 953 (PC) .

12 *See* C5, Vol. V, pp. 451-52.

13 Cf. *Babulal v. Prov. of Orissa,* (1954) Cut 171 (191).

14 *Durga Prasad v. Supdt.,* [AIR 1966 SC 1209 : LNIND 1965 SC 361](para 14) ; *Gopikisan v. Asstt. Collector,* [(1966) 2 SCR 991 : AIR 1967 SC 1298 : LNIND 1967 SC 3](para 7) ; [(1967) 2 SCR 340 : LNIND 1967 SC 3] : 1967 Crlj 1194 .

15 *Durga Prasad v. Supdt.,* [AIR 1966 SC 1209 : LNIND 1965 SC 361](para 14) ; *Gopikisan v. Asstt. Collector,* [(1966) 2 SCR 991 : AIR 1967 SC 1298 : LNIND 1967 SC 3](para 7) ; [(1967) 2 SCR 340 : LNIND 1967 SC 3] : 1967 Crlj 1194 .

16 *I.T.O. v. Seth Bros.,* [AIR 1970 SC 292 : LNIND 1969 SC 212](para 9) : [(1969) 2 SCC 324 : LNIND 1969 SC 212] : [(1970) 1 SCR 601 : LNIND 1969 SC 212].

17 *I.T.O. v. Seth Bros.,* [AIR 1970 SC 292 : LNIND 1969 SC 212](para 9) : [(1969) 2 SCC 324 : LNIND 1969 SC 212] : [(1970) 1 SCR 601 : LNIND 1969 SC 212].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 94
Search of place suspected to contain stolen property, forged documents, etc.

(1) If a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose of it in some place of safety,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

(2) The objectionable articles to which this section applies are—

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under *Sections 11 of the Customs Act, 1962* (52 of 1962);

(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in *Section 292 of the Indian Penal Code (45 of 1860)* ;

(g) instruments or materials used for the production of any of the articles mentioned in Clauses (a) to (f).

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1. Scope of s. 94: Search for stolen property, etc.—

This section corresponds to *old* s. 98, with the following changes:—

(i) The list of objectionable articles in the several paragraphs of *old* sub-section (1) have been placed separately in *new* sub-section (2)—

(a) with the addition of the new item—Counterfeit currency note (as recommended by the Joint Committee). [18]

(b) with the transposition of 'obscene objects' from para. 4 of *old* sub-section (1), in order to confer the power in respect of such objects upon all Magistrates of the First class, besides a District Magistrate and Sub-divisional Magistrate (as recommended by the Law-Commission). [19]

(ii) Since all objectionable articles have been placed in a separate sub-section, in the nature of a definition clause, appropriate verbal changes have been made in the different clauses of sub-section (1), in order to give reference to 'objectionable articles'.

(iii) In *old* sub-section (2)(c), only instruments or materials for making pieces of metal in contravention of the Metal Tokens Act, 1889, were mentioned; in new Cl. (g) the scope has been widened, to include instruments or materials used for the production of any of the objectionable articles mentioned in the foregoing Cls. (a)-(f).

2. Section 93- 94.—

The scope and application of s. 94 should at once be distinguished from those of s. 93:—

(i) While a search-warrant under s. 93(1) may be issued by all Magistrates, Executive and Judicial, as well as a Court of Session, a warrant under s. 94(1) can be issued only by a District Magistrate, Sub-Divisional Magistrate or a Judicial Magistrate of the first class.

(ii) While the power under s. 93 extends to any document or thing, the power under s. 94 can be used only with respect to stolen property or an 'objectionable article' as enumerated in sub-section (2) of this section, i.e., counterfeit coin, etc., provided the place to be searched is used for the purpose of deposit, sale or production of such article.

(iii) While s. 93 may be used in connection with any offence, s. 94 can be used only with respect to the particular offences, just mentioned, in respect of stolen property or an 'objectionable article'.

(iv) While a warrant under s. 93 may be directed to a Police officer as well as other person, by reason of s. 72 [see *ante*], under s. 99, post, a warrant under s. 94(1) can be directed only to a Police officer above the rank of a constable [as expressly mentioned in sub-section (1) of s. 94].

(v) While the power to seize and to take possession has to be implied under s. 93 [see *ante*], that power is expressly conferred by Cl. (c) of s. 94(1).

(vi) Section 94(1)(e) authorises the executing Police officer to arrest and to take before a Magistrate any person found in the place of search, who appears to have been a 'privy' to the deposit, sale or production of an 'objectionable' article, with knowledge or reasonable cause to believe that such article is an objectionable article. There is no such power under s. 93.

(vii) As under s. 93, the pendency of any criminal proceeding is not a condition precedent for the issue of a search-warrant under s. 94. [20]

(viii) Both s. 93- 94 confer a discretionary power upon the Magistrate. He is not bound to issue the warrant as a rubber stamp. [21] He must exercise the discretion judicially. [22]

3. Sub-section (1) : Conditions for a search-warrant under s. 94.—

The conditions for issuing a warrant under this section are—

(a) The warrant may be issued only by a District Magistrate, Sub-divisional Magistrate or Magistrate, first class [*see* s. 460(a) and p. 384, *post*], as to the effect of the issue of warrant by any other Magistrate.

(b) There must be some allegation or information before such Magistrate, which he believes, that a particular place is used for the deposit or sale of stolen goods, [23] or for the manufacture of forged documents or any other objectionable article as specified in sub-section (2); [24] or that any such objectionable article is *deposited* in such place. [25] But the pre-existence of any criminal proceeding against any person is not a requisite for the issue of a warrant under this section. [26]

(c) He must make *some* inquiry, as he thinks necessary before he issues the warrant. [27]

(d) The Police officer authorized to execute the warrant must be above the rank of a constable. But he cannot *endorse* it to another officer, of the same rank, because s. 74 is made applicable to the present section, by s. 99 (*post*).

4. 'Has reason to believe'.—

1. See *ante* .
2. It is not obligatory to record reasons while issuing a warrant. [28] But where it appears from the records that the Magistrate did not apply his mind to the requirements of the section, his order would be quashed. [29]
3. The belief must be something more than mere suspicion [30] and implies that the Magistrate must apply his judicial mind with reference to the materials or information before him, 'after making some inquiry', as may be necessary [31] [sub-section (1)], though the nature of such inquiry is not laid down by the section. [32]
4. Where the Magistrate act s upon an information, as distinguished from a formal complaint, he should, if possible, examine the informant, unless he takes upon himself the responsibility of considering the weight of the information preparatory to the issue of an order of such serious nature. [33]
5. *Sine-a-qua* non for issuing a search warrant and production of property under s. 94 of the Code is that the Magistrate must have reasons to believe that the property is stolen property but it has nothing to do with the rights of parties, such as, right to possession by the financier under hire purchase agreement. So, in such a case, s. 94 of the Code will not be attracted. [34]
6. The Magistrate must give reasons before issuing search warrant under s. 94 of the Code and failure to do so will render such order to be illegal. [35]
7. As the power under s. 94 of the Code is extra-ordinary in nature, it must be exercised with care and circumspection, as it constitutes an inroad into the enjoyment of the right guaranteed under *s. 19(1) (a) of the Constitution* . [36]

5. Stolen property'.—

See [37] ss. 410, 413, I.P.C..

6. Cl. (d) : Production before Magistrate.—

Though the pendency of any proceeding before the Court is not a condition for issue of a warrant under this section, as under s. 93 (see *ante*), things seized during search must, nevertheless, be produced before a Magistrate. [38]

7. Sub-section (2) : Cl. (a) : 'Counterfeit coin'.—

See ss. 28, 230-231, I.P.C. [39]

8. Cl. (d) : 'Forged document'.—

See ss. 463-464, 470, I.P.C. [40]

9. Cl. (f) : Obscene objects, as defined in s. 292, I.P.C..—

1. Though this clause refers to s. 292, I.P.C., in order to describe the offence which makes the connected article as 'objectionable article', s. 292, I.P.C., itself does not give any definition of 'obscenity' [41] beyond excepting the following articles from the ambit of the offence—

   (i) Any book *etc* . kept or used *bona fide* for religious purposes;

   (ii) Any representation sculptured, engraved, painted or otherwise represented on or in any temple or any car used for the conveyance of idols, or kept or used for any religious purpose.

2. The test of obscenity has, therefore, to be drawn from general principles as explained by a number of Supreme Court decisions, [42] the more important of which may be summarised as follows:—

   (a) The test of obscenity, still followed in India, [43] notwithstanding changes in judicial standards in the West, is that laid down in the English decision in *R. v. Hicklin* , [44] which is—

   > "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

   (b) Whether a publication is obscene is to be determined by the Court in each case, having regard to the contemporary moral standard [45] of the community and the tendency or potentiality of the publication to deprave and corrupt those whose prurient minds take delight in secret sexual desire from erotic writings, pictures, *etc* . [46]

   (c) Obscenity consists in treating sex in a manner appealing to the carnal side of human nature, or having that tendency. It cannot have the protection of free speech and expression guaranteed by Art. 19[(]2[)] of the *Constitution of India* .[47]

   (d) Where art and obscenity are mixed up, it is to be determined which element is preponderating, and the impact on the society should be judged by *our* national standards. A publication having social importance will be *prima facie* protected unless the obscenity is so gross that the interests of the public dictate the other way. [48]

   (e) The Court should also bear in mind that conditions in India, too, are changing. [49] What was considered depraved even a quarter of a century ago, may not now be so considered, [50] in view of the great mass of literature which is available both to adults and adolescents. Hence, what the Court has to see, in determining obscenity is whether a *class* , not an isolated case, into whose hands the book *etc* . falls suffer in their moral outlook or become depraved by reading it or might have impure thoughts around their minds. [51]

10. Cl. (g) : 'Instruments or materials'.—

Issue of a warrant for the search of a locker for finding the specimen signature of the person in whose name the forged cheque was to be drawn is legitimate because the specimen signature is a material needed for forging. [52]

11. Form of search-warrant under s. 94.—

1. *See* Form No. 11 of the 2nd Sch., *post* .
2. A defect in the Form used, however, would not vitiate the warrant if the requirements of the section, are complied with. [53]

12. Search outside Magistrate's jurisdiction.—

Procedure prescribed in ss. 78-79 to be followed, by reason of s. 99.

13. Production of seized articles before Magistrate and their disposal.—

See under s. 93,*ante* , ss. 452-457; *post* . The disposal of things found in search beyond jurisdiction is provided for in s. 101,*post* .

14. Sections 94 and 451.—

While s. 94 authorises a Magistrate of the specified class, *inter alia* , to take into custody property suspected to be *stolen property* , found in a place *searched* under a warrant issued upon information that a certain place is used for the deposit or sale of stolen property,— s. 451 [*old* s. 516A] authorises any Court to make such order as it thinks fit for the proper custody of property pending conclusion of the inquiry or trial before it, when such property has been *produced* before the Court during any inquiry or trial. [*See* also under s. 102(2),*post* .]

15. Procedure for search by Police officer.—

See under s. 165,*post* . A search without obtaining a warrant under s. 94(1), for the recovery of an 'objectionable article' would be illegal, if the case is not otherwise covered by s. 165. [54]

16. Illegality of search.—

A search under this section would be a nullity in the following circumstances, in which case, the issue of the warrant, the seizure of property, and the inquiry under s. 457 [*old* s. 523], which follows, can have no legal validity: [55]

(a) There is no allegation or information, which the Magistrate believes, before issuing the warrant, that the particular place to be searched is used for the deposit or sale or production of any objectionable article, as mentioned in sub-section (2). [56]

(b) The warrant being issued by a Magistrate *other than* a District Magistrate, Sub-Divisional Magistrate or a Magistrate of the First Class, unless he has acted erroneously and in good faith [s. 460(a),— *old* s. 529].

(c) Where the Magistrate who issued the search warrant had no jurisdiction in view of the provisions of some special Act . [57]

In such a conviction founded on such search must be set aside. [58] But the question whether the illegally seized goods should be returned to the person from whose custody they were seized is a different question. [59] Nor will it affect *further* investigation. [60]

(d) A general search for stolen property is not authorised by s. 165 and cannot, therefore, be made even by an investigating Police officer, without a warrant under the present section. [61] , [62] But when a Police officer is investigating a charge of theft, duly empowered under s. 165, he may, as incidental to investigate, search a house which he suspects to contain stolen property, without a search warrant, [63] if he has a definite list of the stolen articles and he is making a search for those specified articles. [64]

(e) When search and seizure is improper, consequently that evidence of search and seizure has to be examined with care [65] on the basis of such illegal search and seizure. [66]

17. Revision.—

A warrant under this section and a seizure of property in pursuance thereof may be set aside on revision [s. 397] on the grounds, *inter alia* ,—

(a) That there was no allegation or information before the Magistrate as to the deposit, sale or production of an objectionable article as required by sub-section (1). [67] , [68]

(b) That the Magistrate did not apply his mind to the foregoing requirement. [69]

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18 Rep. of the Joint Committee on the Bill of 1970, p. (x).

19 41st Rep. of the Commission, Vol. I, para 7.4.

20 *Rash Behari* , (1908) 35 Cal 1076 (1081).

21 *Srivastava v. Gajanand,* AIR 1956 Cal 609 611 [*LNIND 1956 CAL 49*].

22 *Srivastava v. Gajanand,* AIR 1956 Cal 609 611 [*LNIND 1956 CAL 49*].

23 *Lourence v. Euclidas,* AIR 1969 Goa 48 49 .

24 *Amina v. Dukhmoni,* (1957) 61 CWN 298 .

25 *Yellappachari v. State of Mysore,* (1974) 80 Crlj 878 .

26 *Rash Behari* , (1908) 35 Cal 1076 (1081); *Srivastava v. Gajanand,* AIR 1956 Cal 609 611 [*LNIND 1956 CAL 49*].

27 *Srivastava v. Gajanand,* AIR 1956 Cal 609 611 [*LNIND 1956 CAL 49*].

28 *P.P. v. Mahaveer,* (1972) 78 Crlj 1546 (para 6) AP.

29 *Yellappachari v. State of Mysore,* (1974) 80 Crlj 878 .

30 *Walvekar v. Emp.,* AIR 1926 Cal 966 .

31 *Walvekar v. Emp.,* AIR 1926 Cal 966 .

32 *Walvekar v. Emp.,* AIR 1926 Cal 966 .

33 *Mul Chand v. Emp.,* (1911) 12 Crlj 175 (All) .

34 *Dinesh Auto Finance v. State of A.P.,* 1998 Crlj 1876 : (1998) 1 Crimes 511 (AP) (DB) .

35 *Revanappa v. S.N. Ragunath,* 1983 Crlj 321 Kant .

36 *S.S. Hamdard Trust v. State of Punjab,* 1992 Crlj 1002 .

37 *See Ajendra v. State of M.P.,* AIR 1964 SC 170 [*LNIND 1963 SC 126*]: (1964) 3 SCR 289 [*LNIND 1963 SC 126*] : (1964) 1 Crimes 129 .

38 *Srivastava v. Gajanand,* AIR 1956 Cal 609 611 [*LNIND 1956 CAL 49*].

39 *See State of U.P. v. Hafiz,* AIR 1960 SC 669 [*LNIND 1960 SC 29*]: (1960) 2 SCR 911 [*LNIND 1960 SC 29*] : 1960 Crlj 1017 ; *Ranchod* , (1961) II Crlj 472.

40 *See Shiv Bahadur* , AIR 1954 SC 322 [*LNIND 1954 SC 30*]: 1954 SCR 1098 [*LNIND 1954 SC 30*] : 1054 Crlj 910 ; *G.S. Bansal v. Delhi Administration,* AIR 1963 SC 1577 [*LNIND 1963 SC 72*]: (1964) 2 SCR 470 [*LNIND 1963 SC 72*] : (1963) 2 Crimes 439 ; *Rama Rao v. Narayan,* AIR 1960 SC 724 .

41 *Chandrakant v. State of Maharashtra,* (1969) 2 SCC 687 [*LNIND 1969 SC 293*] : AIR 1970 SC 1390 [*LNIND 1969 SC 293*]: 1970 Crlj 1273 .

42 These have been elaborately discussed in Author's *Casebook (I)* , Latest Edition; *Commentary on the Constitution of India* , Latest Edition.

43 *Ranjit v. State of Maharashtra,* (1965) 1 SCR 65 [*LNIND 1964 SC 205*] (74) : AIR 1965 SC 881 [

LNIND 1964 SC 205]:
(1965) 2 Crlj 8 ; *Casebook (I)* , Latest Edition.

44 *R.* *v.* *Hicklin,*
(1868) 3 QB 360 (371).

45 *Chandrakant* *v.* *State* *of* *Maharashtra,*
(1969) 2 SCC 687 [
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52 *Kanti v. State of U.P.* , (1968) SC [Cr AIR236/67, dated 3-5-1968].

53 *Legal Remembrancer v. Mozam,* (1918) 20 Crlj 47 (Cal) ; *Gora Mian v. Abdul,* (1912) 39 Cal 403 .

54 *Bajrangi v. Emp.,* (1910) 38 Cal 304 .

55 *Amina v. Dukhimoni,* (1957) 61 CWN 298 .

56 *Amina v. Dukhimoni,* (1957) 61 CWN 298 .

57 *Subhayya v. State of Karnataka,* [AIR 1979 SC 711 *LNIND 1979 SC 57*]: [(1979) 2 SCC 115 *LNIND 1979 SC 57*] : 1979 Crlj 651 .

58 *Subhayya v. State of Karnataka,* [AIR 1979 SC 711 *LNIND 1979 SC 57*]: [(1979) 2 SCC 115 *LNIND 1979 SC 57*] : 1979 Crlj 651 .

59 *Kusum v. I.T.O.,* [AIR 1991 SC 236 *LNIND 1990 SC 347*].

60 *State of Maharashtra v. Natwarlal,* [AIR 1980 SC 593 *LNIND 1979 SC 482*]: [(1980) 4 SCC 669 *LNIND 1979 SC 482*] : 1980 Crlj 429 .

61 *Bajrangi v. Emp.,* (1910) 38 Cal 304 .

62 *Sitaram v. Emp.,* AIR 1944 Pat 222 224 .

63 *Nirmal v. Emp.,* (1917) 20 Crlj 695 696All.

64 *Paresh v. Jogendra,* (1916) 27 Crlj 1195 (Cal) .

65 *Sarajini Ammal v. Union of India,* 1992 Crlj 3110 Ker .

66 *Faujdari Mistri v. State of Bihar,* 2002 Crlj 4821 : (2002) 2 Pat LJR 545 (Pat) .

67 *Amina v. Dukhimoni,* (1957) 61 CWN 298 .

68 *Lourence v. Euclidas,* AIR 1969 Goa 48 .

69 *Yellappachari v. State of Mysore,* 1974 Crlj 878 .

End of Document

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 95
Power to declare certain publications forfeited and to issue search-warrants for the same.

(1) Where—

(a) any newspaper, or book, or

(b) any document,

wherever printed, appears to the State Government to contain any matter the publication of which is punishable under Section 124A or Section 153A or Section 153B or Section 292 or *Section 293* or *Section 295A* of the *Indian Penal Code (45 of 1860)*, the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in Section 96—

(a) "newspaper" and "book" have the same meaning as in the *Press and Registration of Books Act, 1867* (25 of 1867);

(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of Section 96.

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1. Scope of s. 95 : Power to forfeit objectionable publications.—

1. This section corresponds to *old* Sections 99A and 99G, the scope of which was widened by the *Indian Penal Code* Amendment Act, 1969. The *new* section adds the offence under s. 153B to the list, [70] so that the power under the section can now be used to proceed against a publication which contains a matter punishable against any of the following offences:—

Section 124A: Sedition; s. 153A: Promoting enmity between classes; s. 153B: Matter prejudicial to national integration; ss. 292-293: Obscene Publication; [71] s. 295A: Malicious insult to religion or religious beliefs of any class.

2. Other changes are textual, *e.g.* ,—

(i) Sub-section (2) of the *old* section has been split up into two clauses, and the words "as defined in the Press & Registration of Books Act, 1867" have been transported to Cl. (a) of sub-section (2), conveying the same effect.

(ii) *Old* s. 99G has been made sub-section (3) of the present section.

(iii) The description of the offences in the *old* section has been replaced by the number of the sections of the I.P.C. in order to obviate any discrepancy between the description given in this Code and that contained in the I.P.C., as arose in some cases. [72]

3. Section 95- 96 have to be read together as they embody a scheme, which was distributed amongst a number of sections in the old Code [s. 99A- 99G], [73] the objection of that scheme being the maintenance of public order, morality or the like, which are legitimate grounds of restriction upon the freedom of expression under *Art. 19(2) of the Constitution* . [74]

2. Constitutionality of s s. 95-96.—

1. The constitutionality of the relevant sections of the I.P.C. constituting the substantive offences specified in sub-section (1) has been upheld:

   Sections 124A; [75] 153A; [76] 292; [77] 295A. [78]

2. The constitutionality of the present section [*old* s. 99A] and s. 96 [*old* s. 99B], has also been upheld, against challenge under Art. 19(1)(a), (f), (g) [79] of the *Constitution* , as constituting reasonable restrictions in the public interest.

   (i) The restriction cannot be held to be excessive on the ground that it is enforceable throughout India, because the mischiefs of sedition, religious, communal or class hatred are, in their nature, nation-wide in their repercussions. [80]

   (ii) Though the order is made on the subjective satisfaction of the State Government, without a hearing, it is open to judicial review, on the merits, by the High Court, under s. 96. [81]

   (iii) The State Government may issue a notification by stating the ground of its opinion by passing an order under s. 95 of the Code and the said order cannot be said to be violative of *Article 29(1)(a) of the Constitution* offending freedom of speech. On the other hand, it is issued in pursuance of the reasonable restriction imposed by the Parliament and it is neither violative of Article 19(1)(a) nor *Article 19(1)(g) of the Constitution* . So, if an article or book outrages the religious feelings of any section of the people, there appeared justifiable ground for issuing the notification under s. 95 of the Code. [82]

3. Sub-section (1) : Conditions for a declaration under.—

A declaration of forfeiture under sub-section (1) can be made only when—

(a) The State Government has formed an opinion as to the nature of the publication, [83] namely, that it is punishable under any of the specified sections of the I.P.C.

(b) Such publication must be a newspaper, book or document, within the meaning of sub-section (2) [*see below*].

(c) The State Government has stated the *grounds* of its opinion. [84] If the Government does not state the grounds for its opinion, the High Court must set aside the order, [85] as in the case where the grounds stated by the Government do not justify the order. [86] Particulars must be given in the order as to the grounds of the opinion of the Government that the publication was punishable, *e.g.* , which communities were alienated from each other or whose religious feelings had been wounded. [87] Mere recital of the sections of the I.P.C. or reproducing the text thereof would not suffice. [88]

   The reason why s. 95(1) requires the Government to state the grounds of its opinion is to enable the High Court (under s. 96) to set aside the order of forfeiture if it was not satisfied of the propriety

of *those* grounds. [89] , [90]

(d) If the order recites one ground for the forfeiture (*e.g.* , an offence under s. 295A), it cannot be justified on *another* ground (*e.g.* , under s. 153A, I.P.C.). [91]

(e) The State Government has, in the notification, specified the particular issues or passages of the publication which contains the offensive matter, [92] though it is not necessary to reproduce them all, [93] it should appear on the face of the order in what manner and whose religious feelings are wounded; [94] or how it promoted hatred or enmity between different classes. [95]

(f) A full Bench of the P. & H. High Court [96] has held that, in the nature of things it is not practicable to give an opportunity of being heard to the person contained before the passing of the order of forfeiture under s. 95. The section contains inbuilt safeguards and does not therefore, offend *Art. 21 of the Constitution* . [97]

(g) Though there is no requirement of issuing any notice upon the persons to be affected by an order of forfeiture under s. 95(1),s. 96(1) [*old* s. 99B] implies that the order does not become effective until it is published in the Official Gazette, from the date of which publication the limitation for an application by the aggrieved party to set aside the order is to run. [1]

As specific remedy has been provided for in s. 96, it is not necessary that prior to the issue of the order, the State Government should issue notice to the party or parties and give them an opportunity of being heard. [2]

4. Power how to be exercised.—

The power under s. 95 of the Code being an extraordinary power has to be exercised with care and circumspection. [3]

To judge whether a particular publication is liable to be forfeited, it has to be judged as a whole. Moreover, absence of grounds of the Government opinion as to why the order is necessary vitiates the order. [4]

The order making forfeiture must state the grounds. Such provisions are mandatory. [5]

Grounds must be stated in the notification itself. [6]

The infirmity cannot be cured if the same are mentioned in the affidavit filed in the Court, when the grounds have not been mentioned in the notification itself. [7]

Mere re-production of language of ss. 124A, 153A, 153B, 292 or 295A I.P.C. in the notification is not enough. [8]

5. Order when can be passed.—

Sections 95 and *96* *Cr.P.C.* when read with together are clearly preventive in nature and are designed to prevent any disturbance to the public order. At the same time, s. 95 does not create any criminal offence and reference to the various sections of the *Indian Penal Code* is merely descriptive of the kind of offences which need to be prevented by a declaration under s. 95. Therefore, contention that onus of proof would lie on the State Government is not acceptable as the intention has, to some extent, been inferred from the nature of the publication. It is true that forfeiture of a newspaper or book or document is a serious encroachment on the right of the citizen, but if forfeiture is called for in the public interest, it must without doubt have a pre-eminence over any individual interest.[9]

The power can only be exercised and notification can only be issued if the Government forms an opinion that the publication contains matter which is an offence punishable under any of the ss. 124A or 153A or 153B or 292 or 293 or 295A I.P.C. When the State failed to show that the publication of the book had resulted in disturbance of the public tranquility or maintenance of harmony between the various groups, the notification declaring the book forfeited under *s. 195 Cr.P.C.* was set aside.[10]

6. To which publications s s. 95-96 are applicable.—

A. In the absence of any definition of the words ‘newspaper’ and ‘book’, sub-section (2)(a) refers to the definitions in *Sections 1 of the Press and Registration of Books Act, 1867* , for the interpretation of these words.[11]

B. " *Document* ’.

C. *See* under s. 91(1),*ante* .

D. Sub-section (2)(b), further makes it clear that the word, as used in this section, would include a painting, drawing or photograph or other visible representation. Since this is an inclusive definition, the definition given in *Sections 3(18) of the General Clauses Act, 1897* , may be referred to—

> "Document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter.

In fact, the inclusive enumeration in s. (2)(b) is taken from the illustrations to the definition of the word in *s. 3 of the Evidence Act, 1872* , and it sought to supplement the definition in the *General Clauses Act* . The words ‘other visible representation’ are so wide as to include even a caricature, if depicted upon any substance, provided there is an element of permanence, as the word ‘record’ suggests.[12] It would also include a bank cheque [*vide* illustration to

Sections 3(18) of the General Clauses Act], and a coin, which is expressed on a metal and a currency note, which is printed on a paper, with letters, figures,*etc* . [13]

E. According to a Single Judge of the Calcutta High Court, [14] religious books, as a class, are exempt from the purview of s. 95, though the section, as it stands, does not say so.

7. No opportunity of being heard to be given. —

It is neither possible nor desirable to give an opportunity of being heard before passing an order of forfeiture under s. 95 of the Code. [15]

8. Not violative of Article 21. —

The restriction imposed by this section is not disproportionate to the evil sought to be remedied by s. 95 of the Code and the mandate of *Article 21 of the Constitution* is adequately satisfied. [16]

9. To which offences the power relates.—

(a) Section 124A: Sedition.—

A publication is punishable under this section only if it incites violence or creates public disorder or has a tendency to do so [17] with a view to subverting the Government established by law in India. [18]

(b) Section 153A: Promoting enmity between classes.—

1. Though intention is not mentioned in the main part of s. 153A, the *Expl.* excepts representations made without any malicious intention with a view to redress wrongs. Hence, intention is the gist of an offence under this section [19] as under s. 295A (*see post*). Of course, malice may be inferred from grossly offensive language, read with the surrounding circumstances relating to the publication of the offending matter. [20]
2. In some cases under *old* s. 99A, read with s. 153A, I.P.C., it was held that the Government, in forfeiting a publication, had no concern with the intention beyond the language used in the offending publication, [21] if the publication does promote [22] hatred, *etc* . because in *old* s. 99A(1), the relevant words were 'promotes *or* is intended'.

   But this view does not appear to be correct inasmuch as the Explanation to s. 153A clearly states that it would be no offence in the absence of a malicious intention where the writer honestly agitates for the removal of a supposed wrong. [23] The better view is that the essence of the offence under s. 153A is the malicious intention of the writer, [24] , [25] and that, accordingly, where the matter

is brought before the Court, the Court is to consider not only the language of the alleged offending passages but also extraneous evidence to show such intention, *e.g.* , surrounding circumstances, object of the writer, and contemporary state of feelings between the communities in question. [26] The anomaly in the language has also been removed by omitting the words 'promotes or is intended' and simply referring to s. 153A.

3. Of course, where the language is grossly offensive, the onus may shift on the author or publisher to establish that he had no malicious intention. [27] Even the truth of the statement or that it is supported by authority would not suffice for this purpose. [28] But that is another matter.

4. The alleged offensive passages have to be read in the context of the book as a whole, [29] giving it a commonsense interpretation. [30]

5. It is not an essential ingredient of the offence under s. 153A that the attempt to incite enmity or ill-feelings must be successful. [31]

6. Full bench of the Bombay High Court has held that when the publication does not disclose any offence under s. 153A I.P.C. and the State Government has failed to show that the publication has resulted in disturbance of public tranquility or maintenance of harmony between the various groups, the forfeiture of the book is not proper. There mere vandalisation of a research institute after publication of the book is not sufficient to issue notification of forfeiture of the book under s. 95 of the Code. [32]

(c) Section 153B : Imputations or assertions prejudicial to national integration.—

1. The expression 'integrity of India' was inserted in Cl. (2) of *Art. 19 of the Constitution* by the *Constitution* (Sixteenth Amendment) Act, 1963, as a permissible ground for restriction of the freedom of expression. It was in 1972 that this amendment was sought to be implemented by legislation, by inserting s. 153B in the *Indian Penal Code* , by *s. 2(b) of the Criminal Law (Amendment) Act, 1972* .

2. The Joint Committee recommended that the offence under s. 153B should be included in s. 95(1) of the new Code. [33]

(d) Section 292: Obscene publication.— *See* under s. 94(2)(f), *ante* .

(e) Section 295A: Deliberately and maliciously outraging religious feeling of any class.—

1. In order that a publication may be punishable under this section, it must— (i) insult or attempt to insult the religion or religious belief of a class of citizens; (ii) with the deliberate and malicious intention of outraging the religious feelings of that class, [34] as distinguished from unwritten or careless remarks. [35]

2. The burden is upon the State to establish such intention from the language used, in the background of surrounding circumstances. [36]

10. Which State Government may make the declaration under s. 95(1).—

The words 'any book', 'wherever printed', 'wherever found', make the ambit of sub-section (1) very wide and make it clear that the place of printing or publication or even its repercussions within a particular area is not relevant to give jurisdiction to a State Government. An order under s. 95(1) can, accordingly, be made by the Government of any State to which this Code applies, which comes to form an opinion that such book *etc* , is punishable under any of the specified sections of the I.P.C., even though the objectionable literature may not have any circulation within its territory. [37]

11. Effects of the order under s. 95(1).—

1. The effects of a declaration under s. 95(1) made by a State Government are also wide in its application. Though it is made by a particular State Government, it will be operative throughout India, *i.e.* , the territories to which this Code extends [s. 2(f); see *ante*], so that as soon as a notification under s. 95(1) is made by a State Government, the following consequences would ensue :

   (i) Every copy of such publication would stand forfeited to Government.

   (ii) It enables any Police officer of any State in India to seize such copies wherever found in India; [38]

   (iii) Any Magistrate of any State in India [39] may by warrant authorise any police officer not below the rank of a Sub-Inspector to enter upon and search for the same in any premises in India.

   (iv) The effect of confirmed forfeiture under s. 95 of the Code is to shut out its publication and distribution for all time. [40]

2. The State Government issuing an order under s. 95(1) has no discretion to restrict the operation of the order to an area lesser than the whole of India. [41] The reason for giving such wide application to an order under this section is that the offensive publications coming under its ambit have the tendency, by their very nature, to affect the national life in every part of the country and they cannot be allowed to thrive in other States, thus defeating the object of the declaration made by one State Government. [42]

12. 'Seize'.—

Seizure under the authority of law involves a deprivation of possession and not merely the custody. When, therefore, a document or thing is seized by the police, possession thereof vests in the Police. [43]

13. Power to revoke the order under s. 95(1).—

1. Though s. 95(1) does not specifically provide for a withdrawal or revocation of an order made under the section if, at any time, the reasons which impelled the passing of such order cease to exist, it has been held that such power follows from *Sections 21 of the General Clauses Act* .[44]

2. If the order or notification under s. 95(1) is revoked, the State Government must return the copies seized to the persons from whom they were seized, because the validity of the seizure would lapse with the withdrawal of the order. [45]

3. But because of *Sections 21, General Clauses Act* , it is competent for the State Government to make a fresh order after withdrawing or revoking the first order for some defect.[46]

14. Sub-section (2): 'Newspaper', 'book', 'document'.—

See *ante* .

15. Sub-section (3): Remedy.—

1. This sub-section, which reproduces *old* s. 99G, provides that an order of forfeiture made under s. 95(1) shall not be called in question except by an application under s. 96(1) to the High Court of the State, which made the declaration of forfeiture, to set it aside.

2. If the order is made by the Government of one State and is re-published in another State, the High Court of the latter State would have no jurisdiction to set aside the order or to entertain the application therefor. [47]

3. The present sub-section cannot exclude the constitutional remedy under *Art. 226 of the Constitution* where the declaration of forfeiture or the subsequent act s are challenged as unconstitutional (*see* under s. 96,*post*).

16. Effect of acquittal of the offence.—

Where the owner or publisher of the offending publication is prosecuted and acquitted of the offence in respect of which the declaration of forfeiture had been made, the Court has no power to destroy or confiscate the publication; it must restore it to the authorities who had seized them. [48]

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70 As recommended by the Joint Committee on the Bill of 1970 [p. x on Cl. 95].

71 41st Rep. of the Commission, Vol. I, para 7.6.

72 E.g., *Harnam v. State of U.P.*, AIR 1957 All 538 540 [LNIND 1957 ALL 126].

73 The provision in *old* Section 99C relating to procedure in High Court and courts, has been omitted from the *new* Code.

74 *Veerabrahmam v. State of A.P.*, AIR 1959 AP 572 [LNIND 1959 AP 70](para 8).

75 *Kedar Nath v. State of Bihar*, AIR 1962 SC 955 [LNIND 1962 SC 519]: 1962 Supp(2) SCR 769 : (1962) 2 Crimes 103 [under Art. 19(1)(a)].

76 *Wajihuddin*, (1963) 2 Crlj 4 (All) ; *Godse v. Union of India*, AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 43-55).

77 *Ranjit v. State of Maharashtra*, (1965) 1 SCR 65 [LNIND 1964 SC 205] (74) : AIR 1965 SC 881 [LNIND 1964 SC 205]: (1965) 2 Crlj 8 ; *Casebook (I)* , Latest Edition.

78 *Ramji Lal v. State of U.P.*, AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 [LNIND 1957 SC 36] : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram*, AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26].

79 *Godse v. Union of India*, AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 43-55).

80 *Godse v. Union of India*, AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 43-55); *Barjinder Singh v. State of Punjab*, 1993 Crlj 2040 (P&H) FB; *Baragur Ramachandrappa v. State of Karnataka*, 2007 Crlj 2933 : (2007) 5 SCC 11 [LNIND 2007 SC 586].

81 *Wajihuddin*, (1963) 2 Crlj 4 (All) .

82 *Baragur Ramachandrappa v. State of Karnataka,* [(2007) 5 SCC 11 LNIND 2007 SC 586] : (2007) 2 SCC 429 (Cri) : 2007 Crlj 2933 : *Baragur Ramachandrappa v. State of Karnataka,* 1998 Crlj 3639 Kant FB affirmed.

83 E.g., *Harnam v. State of U.P.,* AIR 1957 All 538 540 [LNIND 1957 ALL 126].

84 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art. 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26].

85 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26].

86 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26].

87 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26].

88 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [LNIND 1957 SC 36]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [LNIND 1968 ALL 15][under Arts. 25- 26]; *Chinana v. State,* AIR 1971 Mad 448 [LNIND 1971 MAD 56](para 9) FB; *Khalid v. Chief Commr.,* AIR 1968 Delhi 12 15 FB; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333](paras 8-9).

89 *Kedar Nath v. State of Bihar,* AIR 1962 SC 955 [*LNIND 1962 SC 519*]: 1962 Supp(2) SCR 769 : (1962) 2 Crimes 103 [under Art. 19(1)(a)].

90 But a Full Bench of the Allahabad High Court [*Azizul v. State,* (1980) Crlj 448 (paras 13-14) All FB] has upheld an order which, though it did not specify the grounds, reproduced the passages from the offending publication from which the Court was satisfied that they offended s. 153A, I.P.C., as mentioned in the order.

91 *Uday v. State of M.P.,* AIR 1982 MP 173 [*LNIND 1982 MP 121*](paras 9-12) FB.

92 *Arun v. State of W.B.,* (1955) 59 CWN 495 .

93 *Uday v. State of M.P.,* AIR 1982 MP 173 [*LNIND 1982 MP 121*](paras 9-12) FB.

94 *Chinna v. State,* AIR 1971 Mad 448 [*LNIND 1971 MAD 56*](para 9) FB.

95 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 [*LNIND 1957 SC 36*]: 1957 SCR 860 : 1957 Crlj 1006 . [under Art. 19(1)(a)]; *Henry* , (1962) II Crlj 564 [under Art 25(1)]; *Sant Das v. Babu Ram,* AIR 1969 All 436 [*LNIND 1968 ALL 15*][under Arts. 25- 26].

96 *Barjinder v. State of Punjab,* 1993 Crlj 2040 (paras 21-22) P&H (FB).

97 *Barjinder v. State of Punjab,* 1993 Crlj 2040 (paras 21-22) P&H (FB).

1 *State of U.P. v. Lalai Singh,* 1971 Crlj 1519 SB (paras 3, 6) [*See* Report of the Jain Committee, p. (xi), on clause 96]; *Veerabrahman v. State of A.P.,* AIR 1959 AP 572 576 [*LNIND 1959 AP 70*].

2 *Piara Singh Bhaniara v. State of Punjab,* (2009) 1 Punj LR 766 .

3 *S.S. Hamdard Trust v. State of Punjab,* 1992 Crlj 1002 (P&H) (DB) .

4 *Nand Kishore* v *State,* 1985 Crlj 797 Pat (SB) .

5 *State of U.P. v. Lalai Singh,* AIR 1977 SC 202 [*LNIND 1976 SC 333*] : 1977 Crlj 186 : (1976) 4 SCC 213 [*LNIND 1976 SC 333*]; *Deb Dutt v. State of Manipur,* 1979 Crlj 1402 Gau (FB) ; *Uday v. State of MP.,* 1987 Crlj 1131 MP (FB) .

6 *P. Venkateswarhi v. State,* (1982) 2 Andh LT 217 .

7 *Mohammed Khalid v. Chief Commissioner,* AIR 1968 Del 13 [*LNIND 1967 DEL 43*]: 1968 Crlj 50 FB .

8 *Virendra Bandu v. State,* AIR 1980 Raj 241 : 1980 RLW 139FB .

9 *Baragur Ramachandrappa v. State of Karnataka,* (2007) 5 SCC 11 [*LNIND 2007 SC 586*] : (2007) 2 SCC 429 (Cri) : 2007 Crlj 2933 : *Baragur Ramachandrappa v. State of Karnataka,* 1998 Crlj 3639 Kant FB affirmed.

10 *Shangaraj Damodar Rupawati v. Nitin Gadre,* 2007 CrLJ 3860 (3863) : (2007) 4 Mah LJ 461(Bom) FB .

11 *P.P. v. Amrath,* AIR 1960 AP 176 [*LNIND 1959 AP 180*](para 4).

12 *P.P. v. Amrath,* AIR 1960 AP 176 [*LNIND 1959 AP 180*](para 4).

13 *Shyama Charan v. S.D.M.,* AIR 1962 Tri 50 [The contrary view taken in *Krishnan v. Enforcement Officer,* AIR 1968 Ker 208 [*LNIND 1967 KER 225*](para 7) that currency notes are excluded from the definition in *Sections 3(18) of the General Clauses Act* , is not sound; but 'Indian' currency would be naturally excluded because there cannot be any question of forfeiture by the Government of documents made by the Government.]

14 *Chandanmal v. State of W.B.,* (1986) Crlj 182 (para 30) Cal.

15 *Barjinder Singh v. State of Punjab,* 1993 Crlj 2040 (P&H) (FB) .

16 *Barjinder Singh v. State of Punjab,* 1993 Crlj 2040 (P&H) (FB) .

17 *Kedar Nath v. State of Bihar,* AIR 1962 SC 955 [LNIND 1962 SC 519] : 1962 Supp. SCR 769 : (1962) 2 Crimes 103 .

18 *Patel v. State of Gujarat,* (1972) Crlj 373 (Guj) [publication of Mao literature].

19 *Hemendra* , AIR 1927 Cal 215 .

20 *Ramaswami* , (1962) 2 Crlj 146 ; *Shiv Ram* , (1955) Crlj 337 .

21 E.g., *Harnam v. State of U.P.,* AIR 1957 SC 538 (para 3); *Premi v. Chief Secy.,* AIR 1951 Raj 113 [LNIND 1950 RAJ 11] (para 13).

22 *Gautam v. Emp.,* AIR 1936 All 561 .

23 *Lalai v. State of U.P.* , (II), (1971) Crlj 1773 (para 4).

24 *Hemendra* , AIR 1927 Cal 215 .

25 *Banomali* , (1942) 22 Pat 48.

26 *P.K. Chakrabarti* , (1926) 54 Cal 59 (64); *Kali Charan v. Emp.,* AIR 1927 All 649 (FB) .

27 *Kanchanlal* , AIR 1930 Bom 177 ; *Gupta v. Emp.,* AIR 1936 All 314 316 ; *Premi v. Chief Secy.,* AIR 1951 Raj 113 116 .

28 *Godse v. Union of India,* AIR 1971 Bom 56 [LNIND 1969 BOM 50] (para 64); *Khalil v. State,*

AIR 1960 All 715 [
LNIND 1960 ALL 96](para 27).

29 *Godse v. Union of India,*
AIR 1971 Bom 56 [
LNIND 1969 BOM 50](para 64); *Khalil v. State,*
AIR 1960 All 715 [
LNIND 1960 ALL 96](para 27).

30 Cf. *State of Bihar v. Shailabala,*
AIR 1952 SC 329 [
LNIND 1952 SC 41]:
1952 SCR 664 :
1952 Crlj 1373 .

31 *Premi v. Chief Secy.,*
AIR 1951 Raj 113 116 ; *Godse v. Union of India,*
AIR 1971 Bom 56 [
LNIND 1969 BOM 50](para 64); *Khalil v. State,*
AIR 1960 All 715 [
LNIND 1960 ALL 96](para 27).

32 *Sangharaj Damodar Rupawate v. Nitin Gadre,*
2007 Crlj 3860 Bom FB .

33 Rep. of the Joint Committee, p. 354.

34 *Ramji Lal v. State of U.P.,*
AIR 1957 SC 620 [
LNIND 1957 SC 36]:
1957 SCR 860 [
LNIND 1957 SC 36] :
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35 *Ramji Lal v. State of U.P.,*
AIR 1957 SC 620 [
LNIND 1957 SC 36]: 1957 SCR 860 :
1957 Crlj 1006 .

36 *Veerabrahmam v. State of A.P.,*
AIR 1959 AP 572 [
LNIND 1959 AP 70](paras 20, 58).

37 *Godse v. Union of India,*
AIR 1971 Bom 56 [
LNIND 1969 BOM 50](para 64); *Khalil v. State,*
AIR 1960 All 715 [
LNIND 1960 ALL 96](para 27).

38 Cf. *Godse v. Union of India,*
AIR 1971 Bom 56 [
LNIND 1969 BOM 50](paras 2, 45-46).

39 Cf. *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](paras 2, 45-46).

40 *Baragur Ramchandrappa v. State of Karnataka,* [(2007) 5 SCC 11 LNIND 2007 SC 586] : (2007) 2 SCC 427 : (Cri) : 2007 Crlj 2933 .

41 *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](para 64); *Khalil v. State,* [AIR 1960 All 715 LNIND 1960 ALL 96](para 27).

42 *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](para 64); *Khalil v. State,* [AIR 1960 All 715 LNIND 1960 ALL 96](para 27).

43 *Gian Chand v. State of Punjab,* AIR 1962 SC 496 499 : (1962) 3 SCR 364 : (1962) 1 Crimes 481 .

44 Cf. *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](para 2, 45-46).

45 Cf. *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](para 2, 45-46).

46 Cf. *Godse v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50](para 2, 45-46).

47 *Gopal v. Union of India,* [AIR 1971 Bom 56 LNIND 1969 BOM 50].

48 *Kapur* , in re., [AIR 1955 Mad 429 LNIND 1954 MAD 246].

End of Document

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 96
Application to High Court to set aside declaration of forfeiture.

(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under Section 95, may, within two months from the date of publication in the Official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of Section 95.

(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the Judges of that High Court.

(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of Section 95, set aside the declaration of forfeiture.

(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

1. Scope of s. 96.—

This section combines *old* ss. 99B-99E and gives the person interested in the publication which has been forfeited a right to apply to the High Court to set aside the order of forfeiture. It can be made on any ground which, if established, would require the High Court to set aside the order under sub-section (4) [*old* s. 99D]. [49]

Section 96 itself takes care of any misuse of the authority conferred under s. 95 and the right of an individual *vis--vis* the larger public interest can be put under scrutiny as the final decision is left to the High Court Bench of (if possible) three Judges. [50]

2. Sub-section (1) : Conditions for an application under sub-section (1).—

In order to maintain an application under this sub-section, the following conditions must be satisfied, the burden of proof [51] of which lies on the applicant:

(a) That there has been a declaration of forfeiture under s. 95(1). In the absence of such order, no application under the present section is maintainable, [52] simply because some books *etc* . have been seized. [53]

(b) That the declaration is illegal or improper on the grounds mentioned therein. [54] In other words, that the matter published is not punishable under that section of the I.P.C. which is mentioned in the declaration and on the grounds stated therein in support of the order of forfeiture. [55]

On the question whether the alleged matter constitutes an offence, the Court has to examine it with reference to the facts and circumstances as stated in the order. [56] , [57] What was not considered offensive by one State Government might be so considered by another State Government; but that would not be conclusive on this point. [58] Again, what was not offensive when a book or any part of it has been first published, may constitute an offence with the change of circumstances, *e.g.* , under s. 153A. [59] If the High Court finds that, on the grounds and particulars stated in the order of forfeiture, the charge that it constitutes an offence as mentioned in s. 95(1) would be unsustainable in a Criminal Court, the order of forfeiture must be set aside. [60]

If the High Court is in doubt, say, because the alleged passages are open to two interpretations, [61] the declaration should be set aside. But, in construing the alleged objectionable passages, the Court is to consider the cumulative effect of the statements contained in the publication, as distinguished from the alleged passage, standing alone. [62]

(c) That the applicant is a person ‘having interest’ in the forfeited document. The interest must be substantial; thus, every reader of a literary work cannot claim that he has a personal interest. [63]

But the following persons, *inter alia* , would come within the category of persons interested in the forfeited document:

(i) The author, printer or publisher [64] of the book;

(ii) A person or institution sponsoring the publication of the book [65] or having interest in its circulation. [66]

(iii) In the case of a religious book, propounding the cult or belief of a particular sect, anybody owing allegiance to that cult. [67]

(iv) The owner of any single copy of the book which has been forfeited. [68]

(v) The full bench of Bombay High Court held that a citizen having an interest in the right to be informed, as a larger part of his right of freedom of speech and expression will a person having an interest. [69]

(d) That the application has been presented within two months from the date of publication of the notification in the Official Gazette. [70]

3. Jurisdiction.—

1. It is that High Court which has jurisdiction over the authority which made the declaration and order under s. 95(1), which has competence to set aside the order under s. 96, and not any other High Court within whose jurisdiction the declaration may have been re-published for information. [71]

2. If, however, any part of the cause of action arises within the jurisdiction of the High Court of another State, *e.g.* , where copies of the forfeited publication have been seized, that High Court would have jurisdiction to set aside the order and seizure, on a petition under Art. 226, read with Cl. (1A) [72] of that article.

3. The High Court can interfere with the act ual order of forfeiture under s. 96 of the Code, but the validity of the instruction of forfeiture or seizure issued by the State Government can only be challenged by invoking the writ jurisdiction of the High Court [73] .

4. The order of forfeiture can be upheld only on the basis of the grounds mentioned in the notification but not on the ground sought to be mentioned in the affidavit. [74]

4. Limitation for application.—

1. The application under this section will be barred unless presented to the High Court from two months of the date of publication of the declaration made by the State Government under s. 95(1); the limitation cannot be computed from the date on which the declaration is republished, for the purpose of information, by another State Government. [75]

2. No effective order of forfeiture can be held to have been made until it is published in the Official Gazette; hence, the limitation is to be computed from the date of such publication. [76]

3. Prior to the *Limitation Act, 1963* , it was held [77] that this period of two months cannot be extended under *Sections 5 of the Limitation Act* . But, for reasons explained at p. 54, 55, *ante* , the contrary view must be taken now. [78]

4. Obviously, the limitation under s. 96(1) governs an application under that section and not an application under *Art. 226 of the Constitution* . [79]

5. Sub-section (2).—

This sub-section, which corresponds to *old* s. 99C, provides that an application under the present section must be heard by a Special Bench of three Judges of High Court, [80] or of all the Judges where the High Court consists of less than three judges.

6. Sub-section (3) : Evidence in the case of a newspaper.—

1. This sub-section [*old* s. 99E], relates to evidence in a proceeding under s. 96 where the publication involved is a newspaper; it does not apply to any publication other than a newspaper. [81]

2. It means that in such a proceeding, the State may put into evidence, in support of the alleged nature or tendency of the issue of the newspaper which has been forfeited, *other* issue of the same newspaper, [82] which may be relevant on the point. [83] Consequently, it would be open to the Petitioner, too, to tender other issues of the newspaper to counteract the effect of the issues admitted to support the order of forfeiture. [84] The provision, in short, is an acknowledgment of the principle that, as in the case of a book, parts other than the offending passages, are to be considered in judging the cumulative effect of the book, so in the case of a newspaper the offending issue has to be considered in the light of other relevant issues.

3. It does not exclude any other evidence that may be admissible to prove the nature or tendency of the forfeited issue. [85]

4. The admissibility of other copies of the newspaper shall be restricted to one point only, *viz* ., the nature or tendency of the forfeited copy and will not extend to other points; moreover, it can be utilised only 'in aid of the proof' which is offered by the offending issue itself. [86]

7. Sub-section (4) : Scope of inquiry.—

1. Under *old* s. 99D [which is reproduced in *new* s. 96(4)], it was held by some High Courts, following the text of the provision, that the only ground on which the High Court could set aside an order of forfeiture under the present provision was that the document *etc* . did not contain any matter offending against any of the provision of the I.P.C. mentioned in s. 95(1) [*old* s. 99A], so that even though the State Government omitted to state, in its order, the reason for its opinion, the High Court could not grant relief under the present provision, on that ground. [87]

2. But the foregoing view [88] has been *overruled* by the Supreme Court [89] and it is now *settled* that the High Court can interfere not only on the foregoing ground but also on any other ground under which the order of the Government ceases to be an order under s. 95(1). [90]

3. Hence, under the present provision, the High Court may set aside an order of forfeiture on the following grounds—

(a) That the book *etc* . does not come within the mischief of the offence charged under s. 95(1),[91] *e.g.* , where the offence charged is under s. 295A, I.P.C., that there is no deliberate or malicious intention, [1] on the part of the author; [2] or that, judged by the test of a man of ordinary common sense and prudence, the book could not be said to be outrageous to the religious feelings of a community. [3]

(b) That the Government has not, in its order under s. 95(1), stated the grounds for its opinion; [4] or has stated a ground other than that upon which it is sought to be justified in the proceeding under this section. [5] *e.g.* , if the order relies upon s. 295A, I.P.C., the order cannot be upheld by the High Court under s. 153A. [6]

(c) That the grounds stated do not justify the order or, in other words, the Court is not satisfied that such opinion of the Government could be arrived at on the grounds stated in the notification. [7] The order would be set aside if the grounds stated in the order do not support it. [8]

(d) That the order did not give particulars on which the opinion of the Government was founded, [9] *e.g.* , indicating the offending passages; [10] or the classes of citizens between whom feelings of enmity would be promoted [11] or whose religious feelings would be offended; [12] or any other reasons [13] why it considered the matter objectionable.

4. Where the Government has not stated the grounds for its opinion it is not the duty of the Court of find out from the contents of the book *etc* ., if it contains any matter constituting any of the specified offences, for that would be making an order of forfeiture by the High Court itself instead of the Government. [14] , [15] The order cannot, therefore, be upheld on a ground other than that stated by the Government in the notification. [16]

5. Where the order itself does not give the grounds, it is vitiated, and it cannot be cured by subsequently stating the grounds in the affidavit in opposition to the application under this section. [17]

6. No person other than that State Government is entitled to intervene or to be heard in support of the order. [18]

7. The onus is on the Government to establish that the publication in question involves an offence punishable under any of provisions of the I.P.C. mentioned in s. 95(1); [19] that is to say, if produced before the Criminal Court, it would secure a conviction. [20]

The Petitioner may have to open his case [21] in support of the Petition under s. 96, as in the case of any other Petition, but it is for the Government to establish that the requirements of s. 95 have been complied with, as laid down by the Supreme Court. [22]

8. If the alleged objectionable passage is capable of bearing two interpretations [23] or leaves the Court in doubt, [24] after hearing the application, it should set aside the declaration of forfeiture. But in coming to this conclusion, the Court should, besides the alleged offending passages, consider the cumulative effect of the statements in the book or document, [25] to gather the general effect which the whole composition would have on the mind of the public. [26]

8. Application dismissed .—

When on reading the entire novel written by the applicant, the High Court is satisfied that the opinion formed by the State Government to issue the notification under s. 95, was quite just and proper, as it designating the character of a lady who was worshipped by the followers "B". If an article or book outrages the religious feelings of a section of the people, the Court would come to an inference that there existed a deliberate and malicious intention on the part of the author. So, the High Court dismissed the petition filed under s. 96 of the Code. [27]

9. Effects of the application being allowed.—

1. If the application under this section is allowed, the High Court should—

   (i) set aside the declaration of forfeiture made under s. 95(1);

   (ii) return the books *etc* . to the person from whom they were seized. [28]

2. The judgment of the High Court under this section would be admissible under s *s. 11* and *13* of the *Evidence Act* at the subsequent trial for the substantive offence, *e.g.* , under s. 153A. [29]

3. The state may appeal to the Supreme Court under Art. 136. [30]

10. Constitutional remedy.—

1. Apart from the remedy under the present section of the Code, a petition under *Art. 226 of the Constitution* would lie to quash the order of forfeiture issued under s. 95(1), on the ground that—

   (a) The order of forfeiture is *ultra vires* , not being justified by s. 95(1); [31] is *mala fide* , disclosing a non-application of mind on the part of the State Government. [32]

   (b) The order of forfeiture is unconstitutional because it affects the fundamental right of the author or publisher under *Art. 19(1)(a) of the Constitution* , on the finding that it does not contain any objectionable matter in view of which the freedom of expression could be legitimately restricted. [33]

2. The Petitioner may also apply to the Supreme Court under Art. 32 where he complains of an invasion of his fundamental rights. [34] Where the alleged objectionable matter does not constitute an offence within the ambit of the s. 95(1), the Petitioner's fundamental right under Art. 19(1)(a) would obviously be infringed by the order of forfeiture of a publication under s. 95(1). [35]

3. If the Petitioner succeeds in his petition under Art. 32 or 226, the Court may not only quash the order of forfeiture and restrain the Government from taking any steps in furtherance thereof but also return the publications seized to the Petitioner or other person from whose custody they had been seized. [36]

11. Section 96 and inherent power of High Court, under s. 482.—

Even where an application under s. 96 is found to be not maintainable, the High Court is competent to exercise its inherent power under s. 482 [*old* s. 561A] to order a restoration

of the articles seized from the custody of the applicant, if it is satisfied that there was no legal authority for such seizure [37] and even grant compensation to the aggrieved party. [38]

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49 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 .

50 *Baragur Ramchandrappa v. State of Karnataka,* (2007) 5 SCC 11 [*LNIND 2007 SC 586*] : (2007) 2 SCC 427 (Cri) : 2007 Crlj 2933 .

51 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 ; *Nawal Kishore v. State Punjab,* AIR 1964 Punj 269 .

52 *Nawal Kishore v. State Punjab,* AIR 1964 Punj 269 .

53 *Nawal Kishore v. State Punjab,* AIR 1964 Punj 269 .

54 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 .

55 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 .

56 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 .

57 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 58, 63).

58 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 58, 63).

59 *Godse* *v.* *Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 58, 63).

60 *Godse* *v.* *Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 58, 63).

61 *Saigal* *v.* *Emp.,* AIR 1930 All 401 .

62 *Baijnath* *v.* *Emp.,* AIR 1925 All 195 196 .

63 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3).

64 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3).

65 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3).

66 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3); Cf. *Patel v. State of Gujarat,* (1972) Crlj 373 (para 2).

67 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3).

68 *Ramlal* *v.* *State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](para 13, 30); Cf. *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 [*LNIND 1967 DEL 43*](paras 2, 3).

69 *Sangharaj Damodar Rupwate* *v.* *Nitin Gadre,* 2007 Crlj 3860 Bom-FB .

70 *Veerabrahmam v. State of A.P.,* AIR 1959 AP 572 [LNIND 1959 AP 70](para 55).

71 *Ghulam , in re.,* AIR 1962 AP 527 ; *Gulam v. State of Bihar,* AIR 1963 Pat 284 ; *Godse v. Union of India,* AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 32-35).

72 *Godse v. Union of India,* AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 32-35).

73 *S.S. Hamdard Trust v. State of Punjab,* 1992 Crlj 1002 (P&H) (DB) .

74 *Harnam v. State of M.P.,* AIR 1961 SC 1662 [LNIND 1961 SC 214]: (1961) 2 Crlj 815 ; *Ram Lal v. State,* AIR 1971 MP 152 [LNIND 1970 MP 17]: 1971 Crlj 1026 FB .

75 *Ghulam , in re.,* AIR 1962 AP 527 ; *Gulam v. State of Bihar,* AIR 1963 Pat 284 .

76 *Azizul v. State,* (1980) Crlj 448 (All) FB (para 8).

77 *Abdul v. Emp.,* AIR 1914 Lah 8 (SB) .

78 *Godse v. Union of India,* AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 32-35); *Azizul v. State,* (1980) Crlj 448 (All) FB (para 8).

79 *Veerabrahmam v. State of A.P.,* AIR 1959 AP 572 [LNIND 1959 AP 70](para 55).

80 *Godse v. Union of India,* AIR 1971 Bom 56 [LNIND 1969 BOM 50](paras 32-35).

81 *Amrita Bazar Patrika ,* AIR 1920 Cal 478 .

82 *Amrita Bazar Patrika* , AIR 1920 Cal 478 .

83 *Annie Besant v. Govt. of Madras,* AIR 1918 Mad 1210 1243 .

84 *Amrita Bazar Patrika* , AIR 1920 Cal 478 .

85 *Amrita Bazar Patrika* , AIR 1920 Cal 478 .

86 *Amrita Bazar Patrika* , AIR 1920 Cal 478 ; *Annie Besant v. Govt. of Madras,* AIR 1918 Mad 1210 1243 .

87 *Veerabrahman v. State of A.P.,* AIR 1959 AP 572 [LNIND 1959 AP 70]; *Premi v. Chief Secy.,* AIR 1951 Raj 113 [LNIND 1950 RAJ 11]; *Khalil v. State of U.P.,* AIR 1960 All 715 [LNIND 1960 ALL 96].

88 *Veerabrahman v. State of A.P.,* AIR 1959 AP 572 [LNIND 1959 AP 70]; *Premi v. Chief Secy.,* AIR 1951 Raj 113 [LNIND 1950 RAJ 11]; *Khalil v. State of U.P.,* AIR 1960 All 715 [LNIND 1960 ALL 96].

89 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [LNIND 1972 SC 261]: (1972) 3 SCC 676 [LNIND 1972 SC 261] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333]: (1976) 4 SCC 213 [LNIND 1976 SC 333] : 1977 Crlj 186 .

90 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.,* AIR 1957 All 538 [LNIND 1957 ALL 126], and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [

LNIND 1972 SC 261]:
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91 *Harnam Das v. State of U.P.,*
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1 *Ramji Lal v. State of U.P.,*
AIR 1957 SC 620 623 : 1957 SCR 860 :
1957 Crlj 1006 .

2 *Ramlal v. State,*
AIR 1971 MP 152 [
LNIND 1970 MP 17](paras 23, 34, 36); *Uday v. State of M.P.,*
AIR 1982 MP 173 [
LNIND 1982 MP 121](paras 9-12) FB.

3 *Ramlal v. State,*
AIR 1971 MP 152 [
LNIND 1970 MP 17](paras 23, 34, 36); *Uday v. State of M.P.,*
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LNIND 1982 MP 121](paras 9-12) FB.

4 *Harnam Das v. State of U.P.,*
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AIR 1972 SC 2086 [
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1972 Crlj 1323 ; *State of U.P. v. Lalai,*
AIR 1977 SC 202 [
LNIND 1976 SC 333]:
(1976) 4 SCC 213 [
LNIND 1976 SC 333] :
1977 Crlj 186 .

5 *Ramji Lal v. State of U.P.,* AIR 1957 SC 620 623 : 1957 SCR 860 : 1957 Crlj 1006 .

6 *Ramlal v. State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](paras 23, 34, 36); *Uday v. State of M.P.,* AIR 1982 MP 173 [*LNIND 1982 MP 121*](paras 9-12) FB.

7 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [*LNIND 1972 SC 261*]: (1972) 3 SCC 676 [*LNIND 1972 SC 261*] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [*LNIND 1976 SC 333*]: (1976) 4 SCC 213 [*LNIND 1976 SC 333*] : 1977 Crlj 186 .

8 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [*LNIND 1972 SC 261*]: (1972) 3 SCC 676 [*LNIND 1972 SC 261*] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [*LNIND 1976 SC 333*]: (1976) 4 SCC 213 [*LNIND 1976 SC 333*] : 1977 Crlj 186 .

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10 *Ramlal v. State,* AIR 1971 MP 152 [*LNIND 1970 MP 17*](paras 23, 34, 36); *Uday v. State of M.P.,* AIR 1982 MP 173 [*LNIND 1982 MP 121*](paras 9-12) FB; *Khalid v. Chief Commr.,*

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11 *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 15 [LNIND 1967 DEL 43].

12 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [LNIND 1972 SC 261]: (1972) 3 SCC 676 [LNIND 1972 SC 261] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333]: (1976) 4 SCC 213 [LNIND 1976 SC 333] : 1977 Crlj 186 .

13 *Chinna v. State,* AIR 1971 Mad 448 [LNIND 1971 MAD 56](para 12) FB.

14 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [LNIND 1972 SC 261]: (1972) 3 SCC 676 [LNIND 1972 SC 261] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333]: (1976) 4 SCC 213 [LNIND 1976 SC 333] : 1977 Crlj 186 .

15 *Arun v. State of W.B.,* (1955) 59 CWN 495 .

16 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815 , reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [LNIND 1972 SC 261]: (1972) 3 SCC 676 [LNIND 1972 SC 261] : 1972 Crlj 1323 ; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333]: (1976) 4 SCC 213 [LNIND 1976 SC 333] : 1977 Crlj 186 .

17 *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 15 [LNIND 1967 DEL 43].

18 *Ramlal v. State,* AIR 1971 MP 152 [LNIND 1970 MP 17](paras 23, 34, 36); *Uday v. State of M.P.,* AIR 1982 MP 173 [LNIND 1982 MP 121](paras 9-12) FB.

19 *Baij Nath v. Emp.,* AIR 1925 All 195 196.

20 *Lajpat,* , AIR 1928 Lah 245 (FB).

21 *Gupta v. Emp.,* AIR 1936 All 314 315.

22 *Harnam Das v. State of U.P.,* AIR 1961 SC 1662 1664 : (1962) 2 SCR 371 : (1961) 2 Crimes 815, reversing *Harnam v. State of U.P.* , AIR1957 All, 538, and *overruling* the High Court decisions in the preceding footnote; *Narayan v. State of M.P.,* AIR 1972 SC 2086 [LNIND 1972 SC 261]: (1972) 3 SCC 676 [LNIND 1972 SC 261] : 1972 Crlj 1323; *State of U.P. v. Lalai,* AIR 1977 SC 202 [LNIND 1976 SC 333]: (1976) 4 SCC 213 [LNIND 1976 SC 333] : 1977 Crlj 186.

23 *Saigal v. Emp.,* AIR 1930 All 401 (FB).

24 *Kali v. Emp.,* AIR 1927 All 649.

25 *Baij Nath v. Emp.,* AIR 1925 All 195 196.

26 Cf. *State of Bihar v. Sailabala,* AIR 1925 SC 329.

27 *Baragur Ramachandrappa v. State of Karnataka,* 1998 Crlj 3639 Kant (FB) ; upheld in *Baragur Ramachandrappa v. State of Karnataka,* 2007 Crlj 2933 : (2007) 5 SCC 11 [LNIND 2007 SC 586].

28 *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 15 [*LNIND 1967 DEL 43*].

29 *Kali v. Emp.,* AIR 1927 All 649.

30 *State of U.P. v. Lalai,* AIR 1977 SC 202 [*LNIND 1976 SC 333*]: (1976) 4 SCC 213 [*LNIND 1976 SC 333*] : 1977 Crlj 186.

31 *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 15 [*LNIND 1967 DEL 43*].

32 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 35, 287, 295, 297).

33 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 35, 287, 295, 297); *Yeerabrahman v. State,* AIR 1959 AP 572 [*LNIND 1959 AP 70*](para 55).

34 *Khalid v. Chief Commr.,* AIR 1968 Delhi 13 15 [*LNIND 1967 DEL 43*].

35 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 35, 287, 295, 297).

36 *Godse v. Union of India,* AIR 1971 Bom 56 [*LNIND 1969 BOM 50*](paras 35, 287, 295, 297).

37 *Nawal Kishore v. State of Punjab,* AIR 1964 Punj 269.

38 *Barjinder Singh v. State of Punjab,* (1993) Crlj 2040 (P&H) (FB).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 97
Search for persons wrongfully confined.

If any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

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1. Scope of s. 97 : Search warrant for person wrongfully confined.—

1. This section corresponds to *old* s. 100 with verbal changes. As suggested by the Commission, [39] the 'District Magistrate' has been added, and the mention 'Presidency Magistrate' has been considered unnecessary since he will be included in the class of 'Magistrate of the first class'.

2. This is an emergency provision [40] under which a search-warrant may be issued by a specified Magistrate when he has 'reason to believe' that any person has been wrongfully confined, [41] without holding any inquiry in the nature of that required by s. 94.

2. Section 97- 98.—

See under s. 98,*post* .

3. Conditions for issue of search-warrant under s. 97.—

1. A search-warrant for the discovery of a person wrongfully confined may be issued under this section, only under the following conditions:

(a) It may be used only by—

(i) A District Magistrate;

(ii) A Sub-divisional Magistrate;

(iii) A Magistrate of the first class.

(b) Such Magistrate must have, from the materials before him, [42] 'reason to believe [43] that any person has been wrongfully confined. The Magistrate must judicially arrive at the belief on the materials before him. [On the expression 'reason to believe', see *ante* .]

(c) Such confinement must be in such circumstances as to constitute an 'offence', [44] that is to say, it must fall under the ingredients of the offence of 'wrongful confinement', as defined in s. 340, I.P.C., [45] whether or not such person is also a victim of kidnapping or abduction, [46] or whether such person is a male or female, child or adult. (Cases of abducted females for illegal purpose are dealt with under the next section.) In order to constitute wrongful confinement there must be a 'wrongful restraint' within the meaning of s. 339, I.P.C., that is to say, a confinement against the wishes of the person alleged to have been confined to proceed wherever he or she wishes to proceed and has a right to proceed.

Hence, there is no room for either a search-warrant or an order under the concluding part of this section where a wife, who is a major, is living with her parents of *her free will* , and refuses to go over to her husband. [47] Hence, though the present section may be resorted to by a husband [48] where his wife is confined by a third party against her will, it is of no avail where the wife, being a major, denies having been confined against her will. [49]

When the mother of two minor children left them and became missing and the children were living with their grandmother and their father, the mother after return cannot apply under s. 97 or s. 98 of the Code for a search warrant to have their custody because continued custody of the children with the grandmother is not unlawful detention for any unlawful purposes. [50]

When nine years old child is in the custody of his father, the father being the natural guardian, it cannot be said that the father has wrongfully confined the child which would amount to an offence. Therefore, on the prayer of the mother, no search warrant can be issued by the Magistrate for production of the said nine year old child who is in the custody of his father. [51]

2. It follows that in the absence of an allegation before the Magistrate that the confinement of the person constitutes an 'offence', as explained above, the Magistrate shall have no jurisdiction to issue the warrant merely on the ground that such confinement would impair her reputation or the like. [52] Unless the Magistrate is satisfied, from the materials before him, that the confinement amounts to an offence, the issue of the search-warrant would be without jurisdiction. [53] On the other hand, if he has such belief, at the time of issue of the search-warrant, the search would be lawful [54] even though the Police officer who is to execute it may come to a contrary opinion from the circumstances on the spot. [55]

3. It is a judicial order to be made by the Magistrate after applying his mind to the available materials, without ignoring the other side of the controversy, as far as possible, to the question whether the confinement is such that it amounts to an offence. [56]

4. Such determination by the Magistrate would not require any detailed inquiry in presence of the person complained against or to determine his guilt. [57] At the same time, he cannot act merely upon the allegation of the Petitioner. [58] He must have reason to believe about the truth of the allegation [59] and such belief must be founded on some facts, as distinguished from a mere suspicion. [60] But it would be enough if there are materials for the Magistrate's satisfaction, as distinguished from a clear proof of the commission of an offence. [61]

   As the provision is intended for an emergency, it does not require the issue of a notice to the other side before issuing the search-warrant, if the Magistrate is satisfied from the averments in the Petitioner's affidavits. [62]

   Whether he should make any inquiry and, if so, of what nature, would depend upon the circumstances which call for the exercise of his discretionary power and for the formation of a reasonable belief. [63] Thus, it has been held [64] that where the application under this section is against a husband for keeping his wife in wrongful confinement, it would be proper for the Court to issue a notice to show cause to the husband before issuing a search-warrant.

5. Though the section speaks only of a 'search for the person detained', the words 'shall be ... taken before a Magistrate' imply the power to arrest, if needs be. It is, therefore, lawful for a warrant to direct the arrest of such person. [65]

6. Therefore before issuing search warrant under s. 97 of the Code, the Magistrate must be satisfied that the confinement amount, to an offence. [66]

   Though the detailed enquiry is not necessary but the power has to be exercised with due care and caution. [67]

7. The order passed by the Magistrate must be a reasoned one. When the order has been passed under s. 97 of the Code without any petition filed by any body and without assigning any reason, it is illegal. [68]

4. Magistrate not disqualified to try the case.—

Though the order under the present section is a judicial order, the Magistrate who issues a search-warrant against a person under the present section is not disqualified from subsequently trying the case against that person for kidnapping or other offence involved. [69] , [70] The reason is that in issuing the search-warrant, the Magistrate need not have to make any determination as to the person's guilt, but only to act upon a *prima facie* belief [71] that the confinement involved is an offence. He did not become a party to the case thereby. [72]

5. Warrant for search beyond local jurisdiction of Magistrate.—

1. The power conferred by this section is *not* limited to the search of persons confined within the local limits of the jurisdiction of the issuing Magistrate. [73] It would be enough if a confinement has taken place, amounting to an offence, anywhere in India, and the Magistrate approached for the issue of a search-warrant belongs to one of the specified categories. [74] s. 101 makes s. 77 (see *ante*) applicable to a search-warrant.

2. But where the search is to be made at a place outside such jurisdiction [s. 77], the procedure laid down in ss. 78-79 [*old* ss. 82-83] must be followed.

6. Executive interference with power conferred by this section.—

Any interference by the Executive, by means of an executive circular or otherwise, with the power of the Magistrate to issue a search-warrant in a case coming under this section would be illegal, [75] even though it might be to further the cause of labour movement. [76]

7. Form of warrant under s. 97.—

1. No form having been prescribed specifically for a search-warrant to be issued under the present section, it is obvious that Form No. 10 (under s. 93) of the 2nd Sch., *post* , may be used, with necessary alteration. [77]

2. It may provide for the arrest of the person confined, if necessary. [78]

8. Duty of the executing officer.—

1. It is for the Magistrate to determine whether there is reason to believe that there has been a confinement amounting to an offence; the Police officer executing the warrant cannot refuse to execute the warrant on the ground that the circumstances in which the person is found by him do not justify such belief. [79]
2. As the section explicitly says, the search shall be made ‘in accordance therewith’; hence,

   if the warrant directs the search of a particular house or place, the Police officer to whom it is issued cannot take the person in custody from another place or endorse it to another officer with direction to execute it at another place. [80]

9. Procedure after execution of warrant.—

1. After the person confined is found after search, he or she should be immediately taken before the issuing Magistrate or any other Magistrate.

2. The Magistrate should then hear the parties and make such inquiry as may be necessary in order to make a proper order. [81] Where the wife had been removed from the husband's house in his absence, the Magistrate should have summoned him before making his order. [82]

3. The Magistrate before whom such person is produced by the executing officer is to make a proper order, according to the circumstances of each case. The words 'such order as in the circumstances ... seems proper' would not authorise the Magistrate to order the detention of any person who is *sui juris* and for whose detention there is no other legal provision. [83] In short, no directions regarding the custody of an adult woman can be given by a Magistrate under this section, where she states that she has not been illegally detained or wrongfully confined, and that she was living of her own accord at the place from where she has been recovered. [84]

A. The following have been held to be lawful orders under the present section:

(a) Where the person confined is a female child, the Magistrate may restore the child to the person entitled to her lawful custody, *e.g.* , husband, parent, guardian or other person 'having the lawful charge of the child' [s. 98,— *old* s. 552]. [85]

(b) In the case of an adult woman, she is to be set at liberty, [86] unless, of course, she is an accused, [87] or a witness (in which case, the Magistrate might require her to execute a bond for her appearance to depose). [88]

B. The following orders have been held *not* to be proper orders under the present section:

(i) Depriving an adult [1] man or woman of his or her liberty, and to send him to jail custody, [2] or to make him or her over to the custody of some other person. [3] Section 98 [*old* s. 552] is clear on this point. [4]

(ii) Nor can an adult woman be detained in a Rescue Home, [5] against her will. [6]

C. A Magistrate shall have no jurisdiction of make an order under the concluding portion of this section where—

(i) No search-warrant has been issued under the first part of this section, and the person was brought before the Court by the other party. [7]

(ii) Where a search-warrant was issued, but the person alleged to be confined appears before the Magistrate voluntarily. [8]

(iii) Where the person being a major, on being brought before the Court in execution of the search-warrant, denies having been wrongfully confined (*i.e.* , against her will) by the person from whose custody she had been brought, and desires to go back there. In such a case, the Magistrate has no jurisdiction to keep her confined in a Rescue Home or other place, against her will, to ascertain her real will, free from any influence. [9]

10. Search warrant for recovery of child.—

When the Magistrate issues search warrant for recovery of a baby of five years from the custody of the mother without having regard to *Sections 6 of the Hindu Minority and Guardianship Act, 1956* , the Magistrate has acted illegally.[10]

Under *Sections 6 of the Hindu Minority and Guardianship Act, 1956* , mother is also a natural guardian and the custody of the children with the mother is neither illegal nor are they wrongfully confined.[11]

However, when the father can have lawful custody of a child below five years of age, no search warrant can be issued for recovery of his son. The wife may have recourse to *Guardians and Wards Act* .[12]

Similarly when the child aged nine years is living with his own father, s. 97 of the Code is not attracted to have custody of such child. [13]

11. Recovery of wife by search warrant under s. 97 of the code.—

Search warrant for recovery of wife can only be issued on being satisfied that she is in wrongful confirmant. [14]

When by virtue of a search warrant issued at the instance of the husband, the wife aged about eighteen years of age have been recovered, the Supreme Court holding that she being *sui juris* has right to reside anywhere, she was directed to be released to proceed to stay wherein she likes. [15]

12. Effects of illegality.—

1. Where the search-warrant or its execution is illegal, resistance to it would not be punishable as an offence (see *ante*), *e.g.* , where it omits to mention the name and designation of the officer who is to execute it. [16]
2. It may even excuse violence if committed in the exercise of private defence. [17]
3. But there would be no right of private defence under s. 99, I.P.C., where the executing Police officer has act ed in good faith, [18] even though the warrant was defective.

13. Revision.—

1. The question of an 'irregularity' being cured under s. 465 [*old* s. 537] arises only if the challenge on the ground of irregularity of procedure is raised after the conclusion of the trial or other proceeding. [19] But if the challenge is made at any earlier stage, the superior Court, in exercise of its power of revision, would rectify not only an illegality but also an irregularity. Hence, an order under this section would be quashed on the grounds, *inter alia* :

   (i) Where the Magistrate did not apply his mind to the question whether the alleged confinement could, under the law, constitute an 'offence'. [20]

   (ii) Where the circumstances before the Magistrate did not disclose that the confinement amounted to an offence, *e.g.* ,—

      (a) Where there was no allegation that an adult woman was being confined against her will, in her parents house; [21] or even in the house of some other person where she went from her father's house voluntarily and there was no allegation that her confinement amounted to an 'offence'. [22]

      (b) Where a wife, who is minor, is in the custody of her parent, without any circumstances involving an offence. [23] The same principle applies where the custody of a minor wife is sought by a parent against her husband. [24]

      (c) Where a child is in the custody of his or her mother, in the absence of any incriminating circumstances. Thus, it is no offence for a Hindu wife to keep her child below 5 years even against the claim of her husband [25] because of the Proviso to *Sections 6 of the Hindu Minority and Guardianship Act, 1956* .

   (iii) Where the order made by the Magistrate before whom the person confined is produced, is not a proper order under the section. [26] , [27]

2. But a Court of revision may *not* interfere on the following grounds, *inter alia*—

   (i) where the conditions necessary for the application of s. 97 are stated in the application, merely because the age of the person confined is not mentioned. [28] The reason is that s. 97 applies to both adults and minors, male or female;

   (ii) where a wrong Form is used but the substance of s. 97 is stated by making necessary alterations. [29]

3. If any question as to the age of the confined arises on the application for a search-warrant, it is for the Magistrate to determine that question, *prima facie* , on the materials before him. The revisional Court cannot interfere with that finding on an objective basis if the materials before the Magistrate were sufficient to induce a reasonable belief that, in the circumstances, the confinement amounted to an offence. [30]

4. No revision would lie where the order is an 'interlocutory order', in view of s. 397(2),*post* , *e.g.* ,—

An order regarding the custody of person found on search. [31]

14. Constitutional remedy.—

1. Where a search is made in contravention of the provisions of s. 97, the custody of the person taken by the police in pursuance of such illegal order becomes illegal and *habeas corpus* lies to obtain release of such person. [32]

2. *Habeas corpus* under Art. 226 may be issued in cases of unlawful detention by a private person, [33] particularly when the factum of detention is admitted but it is justified as legal. [34] Where the factum is disputed, the proper remedy would be a proceeding under *s. 97* or *98* , *Cr.P.C.* , where issues of fact may be better investigated.[35]

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39 41st Rep. of the Commission, Vol. I, p. 46.

40 *Banarsi* *v.* *Neelam,* AIR 1969 Delhi 304 [*LNIND 1969 DEL 88*](para 13).

41 *Judhistir* *v.* *Dalimba,* (1990) Crlj 1085 (para 8) Or.

42 *Rajendra* *v.* *Anukul,* AIR 1957 Cal 139 [*LNIND 1956 CAL 156*].

43 *Ashok* *v.* *Ramesh,* (1982) Crlj 1446 (para 11) DB.

44 *Banarsi* *v.* *Neelam,* AIR 1969 Delhi 304 [*LNIND 1969 DEL 88*](para 13).

45 *Harihar* *v.* *State of U.P.,* (1963) 2 Crlj 541 (542); *Lokumal v. Vivek,* (1972) Crlj 1564 (paras 10, 11) Bom; *Ramachandran v. Kuttan,* (1975) Crlj 1531 (Ker) .

46 *Lalmani* *v.* *State,* AIR 1957 Pat 689 .

47 *Lokumal* *v.* *Vivek,*
(1972) Crlj 1564
(1975) Crlj 1531
(paras 10, 11) Bom; *Ramachandran v. Kuttan,* (Ker) .

48 *Ikram* *v.* *State of U.P.,*
AIR 1964 SC 1625
[LNIND 1963 SC 230]
(1964) 5 SCR 86
[LNIND 1963 SC 230]
(1964) 2 Crimes 590
(para 13) : [ ] : .

49 *Lokumal* *v.* *Vivek,*
(1972) Crlj 1564
(1975) Crlj 1531
(paras 10, 11) Bom; *Ramachandran v. Kuttan,* (Ker) .

50 *Zeenath* *K.* *v.* *Kadeeja,*
2007 Crlj 600
Ker .

51 *Lily* *Manna* *v.* *State,*
2008 Crlj 625
Cal .

52 *Anuara* *v.* *Habil,*
(1962) 2 Cr LJ 159
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53 *Banarsi* *v.* *Neelam,*
AIR 1969 Delhi 304
[LNIND 1969 DEL 88]
[ ](para 13).

54 *Anuara* *v.* *Habil,*
(1962) 2 Cr LJ 159
AIR 1951 All 637
[LNIND 1951 ALL 50]
; *Khuda Bux v. State,* [ ].

55 *Banarsi* *v.* *Neelam,*
AIR 1969 Delhi 304
[LNIND 1969 DEL 88]
[ ](para 13).

56 *Kallan* *v.* *Emp.,*
AIR 1936 All 306
.

57 *Srihari* , in re.,
AIR 1964 AP 220 229
.

58 *Abdul* *Aziz* *v.* *Emp.,*
(1916) 17 Crlj 491
AIR 1945 Oudh 170
494Lah ; *Khahgan v. Emp.,* .

59 *Srihari* , in re.,
AIR 1964 AP 220 229
.

60 *Khaliqan* *v.* *Emp.,* AIR 1945 Oudh 170 .

61 *Rajendra* *v.* *Anukul,* AIR 1957 Cal 139 [*LNIND 1956 CAL 156*].

62 *Saheb Begum v. Ahmed,* (1963) 1 Andh WR 376.

63 *Chepa* *v.* *Emp.,* AIR 1928 Pat 550 .

64 *Abdul Aziz* *v.* *Emp.,* (1916) 17 Crlj 491 494Lah.

65 *Khuda Bux* *v.* *State,* AIR 1951 All 637 [*LNIND 1951 ALL 50*].

66 *Durjodhan Mahanta* *v.* *Savarmati Mahanta,* 1992 Crlj 2231 Ori .

67 *Pravin Singh* *v.* *Biharilal Singh,* 1989 Crlj 1386 Bom .

68 *A.P. Jain v. B.K. Parikh,* 1985 Crlj NOC 49Mad .

69 *Srihari, in re.* , AIR 1964 AP 220 229 .

70 *Ali Khan* *v.* *Emp.,* AIR 1926 All 428 .

71 *Rajendra* *v.* *Anukul,* AIR 1957 Cal 139 [*LNIND 1956 CAL 156*].

72 *Gyaso* *v.* *State,* AIR 1957 MP 7 [*LNIND 1956 MP 43*].

73 *Rajendra* *v.* *Ankul,* AIR 1957 Cal 139 [*LNIND 1956 CAL 156*](para 7); *Jay Engineering v. State of W.B.,* AIR 1968 Cal 407 [*LNIND 1967 CAL 171*](paras 32, 88).

74 *Rajendra* *v.* *Ankul,* AIR 1957 Cal 139 [LNIND 1956 CAL 156](para 7).

75 *Jay Engineering* *v.* *State of W.B.,* AIR 1968 Cal 407 [LNIND 1967 CAL 171](paras 32, 88).

76 *Jay Engineering* *v.* *State of W.B.,* AIR 1968 Cal 407 [LNIND 1967 CAL 171](paras 32, 88).

77 *Supdt.* *v.* *Mozzam,* (1918) 45 Cal 905 .

78 *Khuda Bux* *v.* *State,* AIR 1951 All 637 [LNIND 1951 ALL 50].

79 *Kallan* *v.* *Emp.,* AIR 1936 All 306 .

80 *Chepa* *v.* *Emp.,* AIR 1928 Pat 550 .

81 *Sher Shah* *v.* *Sakina,* (1910) 11 Crlj 450 (Lah) .

82 *Sher Shah* *v.* *Sakina,* (1910) 11 Crlj 450 (Lah) .

83 *Bholanath* *v.* *Commr. of Police,* (1957) 61 CWN 330 ; *Lalmani v. State,* AIR 1957 Pat 689 ; *Lokulmal v. Vivek,* (1972) Crlj 1564 (paras 11-12).

84 *Anuara Begum* *v.* *Habil,* (1962) 2 Crlj 159 .

85 *Lalmani* *v.* *State,* AIR 1957 Pat 689 .

86 *Lalmani* *v.* *State,* AIR 1957 Pat 689 .

87 *Sher Shah* *v.* *Sakina,* (1910) 11 Crlj 450 (Lah) ; *Bholanath v. Commr. of Police,* (1957) 61 CWN 330 ; *Lalmani v. State,* AIR 1957 Pat 689 .

88 *Bholanath v. Commr. of Police,* (1957) 61 CWN 330 .

1 *Thakamani v. Nepal,* AIR 1938 Cal 704 .

2 *Lalmani v. State,* AIR 1957 Pat 689 .

3 *Lalmani v. State,* AIR 1957 Pat 689 .

4 *Lalmani v. State,* AIR 1957 Pat 689 .

5 *Khuda Bux v. State,* AIR 1951 All 637 [*LNIND 1951 ALL 50*].

6 *Bholanath v. Commr. of Police,* (1957) 61 CWN 330 .

7 *Chagan v. Heera,* (1919) 24 CWN 104 (105).

8 *Emp. v. Piru,* (1909) 10 Crlj 219 220Sind.

9 *Bholanath v. Commr. of Police,* (1957) 61 CWN 330 .

10 *Banarasi Lal v. Neelam,* AIR 1969 Del 304 [*LNIND 1969 DEL 88*]: 1969 Crlj 1370 .

11 *Anjali v. Anil,* (1997) 10 SCC 342 : 1997 SCC (Cri) 827 .

12 *Yudhisthir v. Dallimba,* 1990 Crlj 1085 Ori .

13 *Ramesh v. Laxmi Bai,* (1998) 9 SCC 266 : 1998 SCC (Cri) 999 : 1999 Crlj 5023 .

14 *T. Ramachandra v. V.K. Kuttan,* 1975 Crlj 1531 Ker DB .

15 *Giani Devi v. Superintendent Nari Niketan,* (1976) 3 SCC 234 : 1976 SCC (Cr) 387.

16 *Emp. v. Gaman,* (1913) 14 Crlj 142 (143).

17 *Khuda Bux v. State,* AIR 1951 All 637 [*LNIND 1951 ALL 50*].

18 *Khuda Bux v. State,* AIR 1951 All 637 [*LNIND 1951 ALL 50*].

19 *Khaliqan v. Emp.,* AIR 1945 Oudh 170 .

20 *Khaliqan v. Emp.,* AIR 1945 Oudh 170 .

21 *Saheb Begum v. Ahmed,* (1963) 1 Andh WR 376.

22 *Chepa v. Emp.,* AIR 1928 Pat 550 .

23 *Emp. v. Piru,* (1909) 10 Crlj 219 220Sind.

24 *Ali Khan v. Emp.,* AIR 1926 All 428 .

25 *Khaliqan v. Emp.,* AIR 1945 Oudh 170 .

26 *Bholanath v. Commr. of Police,* (1957) 61 CWN 330 .

27 *Emp. v. Gaman,* (1913) 14 Crlj 142 (143).

28 *Supdt. v. Mozzam,* AIR 1918 Cal 74 .

29 *Supdt.* *v.* *Mozzam,*
AIR 1918 Cal 74 .

30 *Khuda* *Bux* *v.* *State,*
AIR 1951 All 637 639 .

31 *Harakh* *v.* *Lalmani,*
(1977) Crlj 723 (paras 9-13) Pat.

32 *Ashok* *v.* *Ramesh,*
(1982) Crlj 1446 (paras 14, 25-26) AP.

33 *Ikram* *v.* *State* *of* *U.P.,*
AIR 1964 SC 1625 1630 : (1964) 5 SCR 86 :
(1964) 2 Crimes 590 .

34 *Ikram* *v.* *State* *of* *U.P.,*
AIR 1964 SC 1625 1630 : (1964) 5 SCR 86 :
(1964) 2 Crimes 590 .

35 *Ikram* *v.* *State* *of* *U.P.,*
AIR 1964 SC 1625 1630 : (1964) 5 SCR 86 :
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

B.—Search-warrants

S. 98
Power to compel restoration of abducted females.

Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

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1. Scope of s. 98.—

1. This section corresponds to *old* s. 552, which has been transposed, according to the recommendation of the Commission, [36] with the following change:

While under *old* s. 552, only the District Magistrate and a Presidency Magistrate had the power, under the present section the Magistrates empowered are—

(i) The District Magistrate;

(ii) A Sub-Divisional Magistrate;

(iii) A Magistrate of the First Class.

2. This section is confined only to females, and a twofold provision is made for (a) adult woman; and (b) female child, according to the nature of the orders to be made in the two cases.

3. The proceeding is not in the nature of a criminal prosecution against the person abducted [37] or the opposite party, [38] but a summary proceeding to give immediate relief to a person who is in unlawful detention for an unlawful purpose. [39] Hence, the opposite party can be examined as a witness. [40]

2. Sections 97 and 98.—

1. While s. 98 is confined only to the case of a female, under s. 97, the person confined may either be a male or female.

2. The provisions of s. 97 are applicable where the confinement itself amounts to an offence; s. 98 can be applied only where the confinement is not only unlawful but has been made *for an unlawful purpose* .

3. Under s. 97, the Magistrate can act on *prima facie materials* ; under s. 98, he can act only upon a complaint made on oath. [41]

4. The powers under both sections are, however, available to the same class of Magistrates, *viz* ., District Magistrate, Sub-Divisional Magistrate and Magistrate of the first class.

3. Conditions for application of s. 98.—

1. The following conditions must be fulfilled in order to make an order valid under this section:—

(a) There must be a complaint made on oath to a Magistrate of the specified class.

Non-examination of the complainant would vitiate the proceeding under this section, [42] but would not bar a prosecution of the complainant under s. 182, I.P.C.. [43]

(b) The complaint must be that a woman or female child has been abducted or *unlawfully* detained *for an* unlawful *purpose* .

Both conditions must be satisfied, [44] that is to say, the detention as well as its purpose must be unlawful; [45]

(c) ‘ *Abduction or unlawful detention* ’. 1. ‘Abduction’ is defined in s. 362, I.P.C. According to this definition, a female may be held to have been abducted if (i) she is made to go from any place, (ii) by using forceful compulsion, inducement or deceitful means.

2. Apart from a case of abduction, s. 98 may be resorted to where the detention of a female is 'unlawful'. 'Unlawful', in this context, means a detention which is unlawful by itself whether committed in respect of an adult woman or a child, and not a detention which becomes unlawful only when it is of a female child in opposition to the wishes of her guardian. [46]

(b) ' *For any unlawful purpose* '. The second condition for the application of this section is that the *purpose* of the detention, in the case of a female, must also be unlawful, no such condition being required for the application of s. 97 (see *ante*). The 'unlawful purpose' under the present section primarily means some special purpose which has reference to the sex of the person detained; [47] *e.g.* , adultery, prostitution, deflowering, sexual intercourse, bigamy. [48] But it may also include other unlawful purposes which may not necessarily be immoral [49] or connected with a sexual offence. [50]

But unlawful detention which does not constitute an offence, but gives rise only to a civil cause of act ion, is excluded from the purview of the present section. [51]

In the case of a female child who is unable to exercise her free will, a detention may be unlawful in the sense of being against her will, as in the case of an adult woman, and yet, it may attract s. 98, if she has been abducted, [52] and it is for an unlawful purpose, [53] *e.g.* , prostitution, sexual intercourse and the like. Section 98 cannot be used merely because the person detained is a female child, where there is no allegation that such detention would amount to an offence or was being made for some immoral purpose. [54]

(c) In the case of a female child, she must be under the age of 18 years.

4. Order for restoration.—

1. While s. 97 speaks of a search-warrant to recover the person confined, s. 98 does not expressly mention a search-warrant but authorises the Magistrate to 'make an order for restoration of such person to her liberty or to the person lawfully entitled to her custody'.

2. The initial order, therefore, should be on the opposite party that the woman (adult) be restored to her liberty or the female child be restored to her lawful guardian. [55] To order her to be produced before the Magistrate would not be an order under this section. [56] For the same reason, he cannot issue a notice to the person accused of unlawful detention for production of the woman. [57] Nor can the Magistrate direct a preliminary inquiry under s. 200 or 203. [58]

3. The order for restoration, as above, is capable of execution. [59] As the concluding part of the section says, the Magistrate may issue an appropriate direction on the person in whose custody the woman is, for enforcement of the order, and to use force to that end, if necessary. In other words, once an order for restoration is passed, it is open to the Magistrate to use all lawful means to effectuate such restoration. [60]

But any direction which goes beyond such restoration would be without jurisdiction, *e.g.* ,—

A direction upon the mother to whom the girl is to be restored that she should furnish a guarantee that the best interests of the girl would be looked after by her. [61]

4. If an order for restoration is made and enforced as above, a warrant for the arrest of the abducted female will not be necessary, nor can it be issued under the present section. [62]

5. But if a search-warrant becomes necessary, for the production of the female, *e.g.* , to ascertain her wishes, [63] or where it is necessary to ascertain which particular person has abducted or detained her,— the fact of abduction having been established but not the identity of the person who has abducted, [64] —the Magistrate shall be competent to issue a search-warrant under the general provision in s. 97,[65] and then examine the female when she is brought before him. But it should not be issued *ex parte* , and not unless an order for restoration cannot otherwise be enforced. [66] , [67]

5. Procedure.—

1. Though there is no provision in the section for issue of notice on the opposite party, it has been held that the usual procedure, after the examination of the complainant on oath, is to issue a notice to the opposite party to show cause against the complaint, [68] if it is not dismissed *ex parte* .

2. The order for restoration is then passed, upon hearing the opposite party if he appears, if the Magistrate is satisfied that the female has been unlawfully detained for an unlawful purpose.

3. In case the abducted person is brought before the Court, the Magistrate should record her statement, and if she is *sui juris* , set her at liberty according to her wishes. [69] The Magistrate has no jurisdiction to decide the respective rights of the claimants to her custody, *e.g.* , father or husband, once she has expressed her option. [70] He should pass an order immediately in accordance with the statement of the abducted woman. [71]

4. The Magistrate has no jurisdiction to bind her down or to obtain security from the person to whose custody she goes over, unless she is a witness or an accused in a proceeding before the Magistrate. [72]

5. If the husband is wrongfully confining his wife without her consent, search warrant under s. 98 of the Code may be issued. Before issuing such search warrant the husband has no right to be heard prior to the issuing of such search warrant. [73]

6. When a major girl was recovered from the custody of the accused charged with offences under ss. 363 and 366 I.P.C. it would be proper to give her in the custody to father and mother where she would have a healthy, fair and moral atmosphere instead of sending her to a Nari Nikatan. [74]

6. Illegality.—

1. The object of this section being to protect females from detention involving an offence, [75] where there is no allegation of an offence being involved, the Magistrate cannot make an order for the proper guardianship of girl, which is competent only to a Civil Court [76] or to a District Judge under the *Guardians and Wards Act* .[77] , [78]

   For the same reason, an order of restoration of a girl to her mother cannot be made under this section as against a Society for the protection of children to whose care the mother had herself entrusted the girl. [79]

2. Where there is no allegation of any offence, it is for the Civil Court and not the Criminal Court to decide whether there has been a marriage between the complainant and the daughter of the opposite party [80] or whether the husband is entitled to her custody from the father-in-law with whom she is living of her own accord. [81] , [82]

3. As a Muslim girl on attaining majority can marry without the consent of her parents and when such girl has given consent to the marriage, the prayer of the parents to be restored to her to their custody cannot be allowed. [83]

When a Muslim girl aged about fifteen years entered into marriage with a Muslim boy who was able to maintain her, the custody of the girl was given to the husband instead to care home when the husband was able to look after her and maintain her. [84]

7. Revision.—

An order under the present section may be quashed in revision on the grounds, *inter alia* ,—

(i) That the alleged detention involved no offence but raised a civil dispute which can be determined only by the Civil Court. [85]

(ii) Where the order made by the Court as to the restoration of the abducted female is not in terms of the section. [86]

8. High Court's inherent power to interfere under s. 482.—

Apart from revision, the High Court may, under extraordinary circumstances, interfere with proceedings under this section, under its inherent power under s. 482 [*old* s. 561A], *e.g.* ,—

Where the proceedings before the Magistrate were so unduly protracted as to defeat the very object of the present section as a summary and immediate relief, and to constitute an abuse of the process of Court. [87]

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36 41st Rep. of the Commission, Vol. I, para 7.9.

37 *Dhapu* *v.* *Puri,* AIR 1959 MP 356 358 [*LNIND 1959 MP 169*].

38 *Abdul* *Jalil* ,
AIR 1936 All 354 .

39 *Dhapu* *v.* *Puri,*
AIR 1959 MP 356 358 [
LNIND 1959 MP 169].

40 *Abdul* *Jalil* ,
AIR 1936 All 354 .

41 *Rajendra* *v.* *Anukul,*
AIR 1957 Cal 139 [
LNIND 1956 CAL 156](para 6).

42 *Dalpat* *v.* *Emp.,*
AIR 1936 All 469 .

43 *Dalpat* *v.* *Emp.,*
AIR 1936 All 469 .

44 *Moti* *v.* *Beni,*
AIR 1936 All 852 .

45 *Secy.* *v.* *Archana,*
(1939) 43 CWN 362 (363); *Basanti v. Mohanlal,*
AIR 1958 Raj 266 (para 12).

46 *Secy.* *v.* *Archana,*
(1939) 43 CWN 362 (363); *Basanti v. Mohanlal,*
AIR 1958 Raj 266 (para 12); *Mahtab* ,
(1889) 16 Cal 487 (502).

47 *Mahtab* ,
(1889) 16 Cal 487 (502).

48 *Tulsidas* *v.* *Chetan,*
AIR 1933 Nag 374 377 .

49 *Om* *Radhe* ,
AIR 1939 Sind 152 .

50 *Mahtab* ,
(1889) 16 Cal 487 (502).

51 *Om* *Radhe* ,
AIR 1939 Sind 152 .

52 *Rajendra* *v.* *Anukul,* AIR 1957 Cal 139 [*LNIND 1956 CAL 156*](para 6).

53 *Godai* , (1904) 9 CWN 1030 .

54 *Godai* , (1904) 9 CWN 1030 .

55 *Abdul* *Jalil* , AIR 1936 All 354 .

56 *Abdul* *Jalil* , AIR 1936 All 354 .

57 *Newandram* *v.* *Emp.,* (1948) 49 Crlj 327 (330); [The Nagpur High Court held otherwise in *Tulsidas v. Chetan,* AIR 1933 Nag 374].

58 *Tulsidas* *v.* *Chetan,* AIR 1933 Nag 374 377 .

59 *Godai* , (1904) 9 CWN 1030 .

60 *Godai* , (1904) 9 CWN 1030 .

61 *Secy.* *v.* *Archana,* (1939) 43 CWN 362 (363); *Basanti v. Mohanlal,* AIR 1958 Raj 266 (para 12).

62 *Khuda* *Bux* , AIR 1951 All 637 [*LNIND 1951 ALL 50*].

63 Cf. *Basanti* *v.* *Mohanlal,* AIR 1958 Raj 267 [*LNIND 1957 RAJ 238*](para 15).

64 *Mahtab,* (1889) 16 Cal 487 (502).

65 *Gora* *Mian* , (1911) 39 Cal 403 .

66 *Khuda* *Bux* ,
AIR 1951 All 637 [
LNIND 1951 ALL 50].

67 *Umbaji* *v.* *Limbaji,*
AIR 1955 Hyd 153 .

68 *Tulsidas* *v.* *Chetan,*
AIR 1933 Nag 374 377 .

69 *Dhapu* *v.* *Puri,*
AIR 1959 MP 356 358 [
LNIND 1959 MP 169].

70 *Dhapu* *v.* *Puri,*
AIR 1959 MP 356 358 [
LNIND 1959 MP 169].

71 *Dhapu* *v.* *Puri,*
AIR 1959 MP 356 358 [
LNIND 1959 MP 169].

72 *Dhapu* *v.* *Puri,*
AIR 1959 MP 356 358 [
LNIND 1959 MP 169].

73 *Pravin Singh v. Bihari Lal Singh,*
1989 Crlj 1386 Bom .

74 *Niki Gupta v. State of U.P.,* 2008 Crlj (NOC) 1045 :
(2008) 4 ALJ 420 (All) ; *Quitbai Nisha v. State of U.P.,*
2008 Crlj 3233 :
(2008) 4 ALJ 424 .

75 *Om* *Radhe* ,
AIR 1939 Sind 152 .

76 *Gadai* ,
(1904) 9 CWN 1030 .

77 *Om* *Radhe* ,
AIR 1939 Sind 152 .

78 Cf. *Basanti* *v.* *Mohanlal,*
AIR 1958 Raj 267 [
LNIND 1957 RAJ 238](para 15).

79 *Secy.* *v.* *Archana,* (1939) 43 CWN 362 (363); *Basanti v. Mohanlal,* AIR 1958 Raj 266 (para 12).

80 *Parambath* *v.* *Vasudevan,* AIR 1941 Mad 625 626 .

81 Cf. *Basanti* *v.* *Mohanlal,* AIR 1958 Raj 267 [*LNIND 1957 RAJ 238*](para 15).

82 *Nathu* *v.* *Nari,* AIR 1915 Cal 686 687 .

83 *Md. Idris* *v.* *State of Bihar,* 1980 Crlj 764 Pat DB .

84 *Nahida Praveen* *v.* *State of Bihar,* (2008) 4 Pat LJR 147 148DB.

85 *Parambath* *v.* *Vasudevan,* AIR 1941 Mad 625 626 ; *Nathu v. Nari,* AIR 1915 Cal 686 687 ; Cf. *Bhuri v. Chothia,* (1949) Jaipur LR 19; *Basanti v. Mohanlal,* AIR 1958 Raj 267 269 [*LNIND 1957 RAJ 238*].

86 *Dhapu* *v.* *Puri,* AIR 1959 MP 356 358 [*LNIND 1959 MP 169*].

87 *Dhapu* *v.* *Puri,* AIR 1959 MP 356 358 [*LNIND 1959 MP 169*].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

C.—General Provisions relating to Searches

S. 99
Direction, etc., of search-warrants.

The provisions of Sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search-warrants issued under Section 93, Section 94, Section 95 or Section 97.

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1. Scope of s. 99.—

This section reproduces *old* s. 101, with drafting changes.

2. Effects of s. 99.—

As a result of this section, the power to issue a search-warrant, under s s. 93-95 or 97, have to be read along with the provisions specified in the present section. The following consequences, *inter alia* , will follow:—

(a) Any person may aid a person other than a Police officer executing a search-warrant issued under any of the specified sections [s. 38; *old* s. 43].

(b) If it is a warrant of arrest, it must comply with s. 70 [*old* s. 75].

(c) The search-warrant shall ordinarily be directed to a Police Officer, but may also be directed to some other person in case of emergency [s. 72; *old* s. 77].

(d) The police officer to whom such search-warrant is directed by the Court may endorse it for execution to some other Police officer, by name [s. 74; *old* s. 79].

(e) Such search-warrant may be executed at any place in India [s. 77; *old* s. 82].

(f) Such search-warrant, when to be executed outside the local jurisdiction of the Court issuing it, may be forwarded by post in the manner laid down in s. 78 [*old* s. 83].

(g) Where such search-warrant is directed to a police officer outside the jurisdiction of the issuing Court, he must follow the procedure under s. 79 [*old* s. 84].

3. Execution of search-warrant beyond jurisdiction of the Court.—

By reason of s s. 77-78, which are made applicable to a search-warrant, a Court is not powerless to issue a search-warrant to be executed beyond its local jurisdiction; but, in such a case, the procedure prescribed in s s. 77-78 has to be followed. [88]

4. Special Act s.—

1. The reference to the sections of the Code, in the latter part of this section, makes it clear that the section is applicable only to the search-warrants issued under the four provisions of this Code, *viz* . ss. 93, 94, 95, 97.
2. In the absence of a specific provision in any special Act, invoking the present section, it would follow that this section would *not* be applicable to a special Act, *e.g.* ,—

   A search made under the Bengal *Excise Act* . [89]

3. But in view of the specific provision in s. 22(2) of the Forward Contract (Regulation) Act, 1952, this section and s. 100 of the Code would be applicable to a search-warrant issued under that Act . [90]

Similar is the position under the *Public Gambling Act* ;[91] but s. 100 of the Code [*old* ss. 102-103] would not apply. [92]

88 *Gyaso* *v.* *State,* AIR 1957 MP 7 [*LNIND 1956 MP 43*] ; *Debendra v. State,* (1969) Crlj 879 (para 6).

89 *Harbhajan* *v.* *Emp.,* AIR 1927 Cal 527 .

90 *Bullion Exchange* *v.* *F.M. Commn.,* AIR 1968 All 338 341 [*LNIND 1967 ALL 68*] .

91 *Kashi Nath* , (1907) 30 All 60 .

92 *Rure Mal* *v.* *Emp.,* AIR 1929 All 937 939 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

C.—General Provisions relating to Searches

S. 100
Persons in charge of closed place to allow search.

(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of Section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under *Section 187 of the Indian Penal Code (45 of 1860)* .

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1. Scope of s. 100 : Procedure for search.—

This section combines *old* ss. 102-103, with the following changes:—

(i) Sub-sections (1)-(2) correspond to sub-sections (1)-(2) of *old* s. 102, with verbal changes.

(ii) Sub-section (3) reproduces sub-section (3) of *old* s. 102, with the contents of *old* s. 52 stated instead of referring to that section relating to the search of the person of a woman.

(iii) Sub-section (4) corresponds to sub-section (1) of *old* s. 103, with the insertion of the words "or of ... search", to obviate the practical difficulty experienced where respectable and independent witnesses of the locality of the search are not available or are not willing to be witnesses to the search; and the insertion of the word ‘independent’ after the word ‘responsible’, in order to ensure that the witnesses to the search must be "disinterested" persons, as recommended by the Joint Committee. [93]

(iv) Sub-sections (5), (6) and (8) correspond to sub-sections (2), (3) and (5) of *old* s. 103.

(v) Sub-section (7) corresponds to sub-section (4) of *old* s. 103, with verbal changes.

2. Object of s. 100 : Safeguards relating to search.—

1. Combining *old* ss. 102 and 103, the instant section provides certain safeguards against arbitrary seizure and search, [1] and invasion of privacy. [2] One of the main objects is to ensure that anything incriminating which may be said to have been found in the premises searched, was really found there and was not planted by any member of the search party; [3] to ensure fairness, [4] to exclude malpractice, [5] and to obtain reliable evidence as to the search. [6]
2. These safeguards are—

(i) The search should be made in the presence of two or more independent and respectable witnesses [sub-sections (4)-(5)].

(ii) A list of the things seized in course of the search should be prepared and the signatures of the witnesses obtained thereon [sub-section (5)].

(iii) The occupant of the place searched or his representative should be permitted to attend the search and a copy of the search list should be delivered to him [sub-sections (6)-(7)].

3. Section 100 is, however, applicable only when a search is to be made of a *place* and not of *person* . [7]

3. Search of members of search party.—

1. There is no provision in the Code itself requiring that the bodies of the police officer conducting the search and of the witnesses should be searched in the presence of each other, before the commencement of the search, in the presence of the owner of the house before entering it.

2. But there are Police Regulations requiring such search, which have entered into judicial decisions [8] — as a rule of practice [9] unless, of course, the Regulations have the effect of law. [10]

So, the Supreme Court has made it clear that the searching officer should allow his person to be searched to avoid any possibility of implementing any object by the searching party. [11]

Orissa High Court has held that search without any offer to search the searching officer is illegal. [12]

4. Sub-section (1) : Duty of Police officer when a place liable to be searched is closed.—

1. Under this sub-section, a Police officer executing a search-warrant has the following duties—

(a) If the place to be searched is closed, he must demand from the person occupying it to open it for his access. His entry would be illegal if he breaks open the backdoor before making any demand for his ingress. [13]

(b) He must carry the search-warrant with him. His entry without the warrant in his possession would be illegal. [14]

(c) He must produce the warrant with his demand for ingress where the place is closed. [15]

2. The provision in sub-section (1) of the present section being analogous to s. 47(1), the comments on that provision (see *ante*) should be referred to for interpretation.

5. Sub-section (3) : Search of person during search of place.—

1. While s. 51 (pp. 233-235) is analogous to s. 47(2) and refers to that provision the result is that if the Police officer, while executing a search-warrant, is unable to obtain ingress after making a demand, in accordance with the requirements of sub-section (1), he can make a forcible entry by breaking open any door or window of the house, in the manner laid down in s. 47(2), as to which see *ante* .

2. If any unlawful obstruction is offered by the occupant of the house, the Police officer shall have the common law power to use reasonable means to remove the obstruction or overcome the resistance. [16]

3. While s. 51 authorises a Police officer to search a person *while* arresting him under a warrant, the present sub-section authorises him to search a person while executing a search-warrant under s. 93 (see *ante*) or s. 94 (see *ante*).

4. Under the present sub-section, the power of search extends only to a person near-about the place of search who is 'reasonably suspected' of concealing about his person any article for which search should be made under the warrant.

5. While no witness is required to be present at a search of person under s. 51,[17] the Author is of the opinion that sub-section (4) is attracted to a search under sub-section (3) inasmuch as that sub-section applies to 'a search under *this Chapter* ' [*see below*].

6. Search of a woman must be with strict regard to decency.—

This provision being analogous to that in s. 51(2),*ante* , the comments on that provision (see *ante*) should be referred to for interpreting the instant provision.

7. Sub-sections (4)-(6) applicable only to search of place.—

1. Though the opening words of sub-section (4) refer to 'a search made under this Chapter', the words 'place to be searched' in sub-section (4) as well as sub-sections (5)-(6) make it clear that the requirements of these sub-sections relate to a search of a place, and not to the search of an object, such as a motor vehicle, [18] or of a person. [19] , [20] Hence witnesses are not required for seizing shoes from the person of the accused; [21] nor can an order be made upon a person to attend the search of a person. [22]

Comment.— The foregoing view that s. 100(4) would not apply in the case of the search of a person of the seizure of any article found on his person [23] is, however, too wide inasmuch as sub-section (3) provides that the search of a person may be made during the search of a place if such person is suspected of concealing about his person any article for which search should be made, and sub-section (7) provides for the seizure of such article, if found. Obviously to such a search and seizure, the requirements of sub-sections (4)-(5) and (7) should be applicable. Of course, if may be argued that shoes are not articles to be 'concealed', so that sub-section (3) would not be attracted to its seizure. It is to be noticed that the Supreme Court, in the cited case, [24] relied on the alternative argument that absence of witnesses, in such a case, was an 'irregularity' which would not affect the legality of the proceedings.

The situation under s. 100(3) should not be confused with the search of a person under s. 51(1), which does

not require the presence of any search witness (see *ante*).

Sub-section (4) does not apply to a person when searched on a public road. [25]

Where the allegations were that the accused was in possession of charas and the police did not intend to search any place and the accused was also not present at or about the place intended to be searched, s. 100(4) does not apply. [26]

8. Sub-section (4) : 'Independent and respectable inhabitants'.—

1. As pointed out earlier, the changes made in this sub-section have made clear the following points:—

(a) The witnesses must be not only 'respectable' but also 'independent', *i.e.* , disinterested, having no connection with the Police. [27] Hence, witnesses who are taken by the Police raiding party for the purpose of entrapping the accused cannot serve the purposes of this section, nor secure a conviction without corroboration. [28] In other words, mere status or wealth of the witnesses is not enough, [29] , [30] either way. A person who frequently act s as a ' *panch* ' (search witness) can hardly be regarded as free from the influence of the Police [31] but the mere fact that a witness to the search also acted as witness on a previous occasion, need not render him unreliable. [32]

(b) The witnesses must not only be independent but must not be disreputable in any way. [33] The mere fact that a witness had been a prosecution witness before may not deprive him of his respectability. [34] , [35]

On the other hand, a witness *cannot* be said to be 'independent' or 'respectable' in the following cases, *inter alia* —

(i) previously convicted for criminal offences. [36] , [37]

(ii) Having civil litigation with the accused. [38]

(iii) A dismissed constable. [39]

(iv) Belonging to a rival party of the accused. [40]

(v) Challaned in a criminal case under s. 107 of the Code. [41]

(vi) Policemen or people likely to be used as 'Police agent'; [42] or otherwise connected with the Police. [43]

(vii) Grossly immoral. [44]

(c) If no independent and respectable witnesses are available in the locality of the place to be searched or they are unwilling, it is immaterial that the witnesses come from some distance, provided they are independent and respectable. [45]

The difficulty in getting independent and respectable witnesses from the *locality*

[46] of search has now been sought to be overcome by the words inserted in s. 100(4) of the *new Code* 'or of *any other* locality ... to the search'.

But the words 'if no such ... is willing' suggest that evidence should be given by the searching officer, in order to make the prosecution evidence as to the search acceptable, that independent and respectable witnesses were *not* available in the locality. [47] It is for the prosecution to explain the circumstances under which it was not possible to comply with the requirements of this section. [48]

9. 'To attend and witness the search'.—

1. In order to comply with sub-section (4), the search witnesses must be present before the search began [49] and witness the search. [50]

2. It would not do if they are kept outside the building where the search is being made, and then called in to see what has been found. [51]

10. Punishment for refusal to act as search witness.—

1. Though, as sub-section (5) provides, it shall not be obligatory for a search witness to *attend* Court as witness unless 'specially summoned' by it, the refusal to *act* as a search witness, when called upon by the searching officer by an order in writing, would be punishable under s. 187, I.P.C. [sub-section (8)]. But there will be no such liability in the absence of a *written* [52] order delivered or tendered to him. [*See* , further, under sub-section (8), *post.*]

2. The only person who can issue such order is the officer or other person who is 'about to make' the search. [53]

11. Sub-section (5) : 'In their presence'.—

It is no compliance with this sub-section if the search witnesses who attend, on call, are kept outside the building within which the search is held. [54]

12. Effects of non-compliance.—

1. The absence of witnesses (*panchas*) to the search in conformity with this sub-section, will weaken the evidence as to the finding of the articles, and may sometimes destroy the acceptance of the evidence on that point. [55] Such evidence is to be viewed with more than ordinary caution. [56]

2. But non-attendance of witnesses may *not* debar other evidence to be given as to the search, [57] or make the evidence of the search-officers inadmissible; [58] or exclude from the evidence the articles seized at such search; [59] or render the conviction illegal. [60]

3. If the other evidence as to the search is believed, the non-attendance of witnesses, as required by sub-sections (4)-(5), shall have no other legal effect. [61] It does not vitiate the search or seizure in course of such search, [62] if that can be proved by other evidence. [63]

4. Hence, it would not affect the legality of the trial [64] so as to render invalid a conviction based on the evidence relating to such irregular search, [65] though a question of credibility of the witnesses may arise where they are not inhabitants of the locality, [66] or where no list of the things (*panchanama*) is made, as required by sub-section (5), [67] and no explanation is offered why this could not be done. [68]

5. In short, if the Court is satisfied as to the finding of the articles, irregularity of search would be no bar to conviction [s. 465(1),*post*]. [69] [*See* 'instances of irregularity', see *post*].

13. Effect of non-compliance when affects search and seizure, when not.—

1. If for any reason, the search is held to be not in accordance with the provisions of s. 100(4) + (5) of the Code, the seizure of articles, if supported by evidence, cannot be held to be illegal. [70]

2. When the public witness is reluctant to join the search, the search may be illegal, if a police witness figures as a search witness because there is apathy of urban people in assisting the police in search and investigation. [71]

3. However, if it is found that no attempt was made by the searching officer to join the search some people of the locality who were admittedly available to witness the recovery, it would affect the weight of evidence to be given to the police officer, though not it admissibility. [72]

4. But when 197 witnesses were looking from a distance when the search of the place was being made, but none of them came to the spot to witness the search and seizure, not joining those witnesses in search does not affect the creditworthiness of prosecution case. [73]

5. Every omission to call respectable witness of the locality to witness the search does not render the search illegal, if there is sufficient explanation for such omission. [74]

   It only affects the weight to be given to such evidence of search. [75]

6. Where no attempt was made to call reliable witness of the locality, it would not be proper to rely only on the evidence of police witness. [76]

7. However, a witness of search other than one from the locality even if he has been brought by the investigating agency along with them cannot be disbelieved only on the ground that he was not of the locality where the search took place but brought by search party along with them for the purposes of the search. [77]

8. However, when no suggestion was given to the search witness that they were not witnesses of the dacoity or were the stock witnesses of the police, then the evidence of such search witnesses cannot be disbelieved. [78]

9. If the evidence of the police officers is found to be acceptable, their evidence cannot be disbelieved. It would be an erroneous proposition that the Court must reject the prosecution version only on the ground that no independent witness of the search was examined [79] .

10. At the time of search residents of the houses in the immediate proximity of the house of the accused persons were available and large number of persons were present at the time of recovery. The prosecution should have come forward with some explanation why PW-4, who is not resident of the locality and who belonged to the *birdari* of the complainant had been selectively chosen to witness the search [80].

11. When the recovery of bloodstained knickery of the deceased have been recovered on the basis of the statement of the accused admissible under s. 27 of the Evidenec Act, seizure memo, prepared by the Police need not be attested by any independent witness. Mere absence of independent witness would not affect the recovery and the evidence of the police officer regarding the recovery at the instance of the accused should be believed. [81]

14. Evidentiary value of the testimony of the searching officer.—

1. In some earlier cases, it was supposed that if any of the search witnesses was not examined in Court [82] or there were no witnesses to the search, the evidence of the searching officer was of no value, and that the accused was entitled to a benefit of doubt, [83] at least where there is no explanation as to why no corroboration of the sole testimony of the searching officer was available. [84]

2. But the later trend of decisions, appear to have been approved by the Supreme Court in *Nabakumar v. State of W.B.* [85] There is no presumption that police officials are liars. [86] Hence, in the absence of circumstances to throw a doubt on their veracity, there is no reason why their testimony should not be treated in the same manner as that of any other witness. [87]

The Supreme Court has gone to the extent of holding that even where the witnesses to a search do not support the prosecution case of seizure of an article during the search, there is nothing to bar the Court from act ing upon the sole testimony of the searching officer; [88] But this the Court would not do where there is a material discrepancy in the officer's description of the article seized by him. [89] [*See also* under 'Effect of non-examination of search-witnesses', see *post*].

15. The seizure (or search) list.—

1. The words 'shall be prepared' indicate that it is imperative to make a list of all things seized during a search. [90]

2. The list must also specify the places in which the seized articles were respectively found [sub-section (5)].

3. Though the section does not require any further particulars to be mentioned in the list, the evidentiary weight of the list may be affected if it is not precise where several articles [1] are recovered from several persons. [2] When several persons are searched, a separate search list should, therefore, be made with respect to things recovered from each person. [3]

16. 'Shall be prepared by such officer or other person'.—

1. The search list must be prepared by or under the supervision of the officer conducting the search; but it need not be in his handwriting. [4]

2. Where firearms are seized, they should be properly sealed, [5] apart from their entry in the search list.

17. 'Signed by such witnesses'.—

1. These words indicate that the search list should be made in the presence of the witnesses to the search and the Police officer should not add anything to it at the police station. [6] At the same time, it has been held that a search list would not be worthless if it is *not* signed by the witnesses, because, by reason of the latter part of sub-section (5), they cannot be punished (under s. 187, I.P.C.) for refusal to sign; [7] or if it is prepared and signed by the witnesses at some other place, when the search took place at an uninhabited place. [8]

2. Refusal to act as a witness is punishable under sub-section (8), *below* , but no penalty is provided for refusal to sign, which is a separate duty under sub-section (5). [9] The duty to sign is not included in the duty to 'assist' [10] the Police officer, within the purview of s. 187, I.P.C.

3. The practice of the Police to get the signature or thumb-impression of the accused on the search list is unauthorised. [11] Nor should the Police officer obtain any *statement* of the accused or of any witness on the search list, by reason of s. 162. [12]

18. Evidentiary value of the search-list.—

1. The list prepared under this sub-section is evidence of the things found and the place from which they were found in course of the search. It should be duly proved by calling at least one of the witnesses to the list. [13] Though, by reason of sub-section (5), the calling of a witness to the list is not obligatory, if the list is sought to be proved without calling even one witness to the search, the fact that no such witness has been produced for cross-examination might render vulnerable the evidence of the police officer; [14] but the Court can still act upon his evidence if otherwise reliable [15] [*see post*].

2. In the absence of the witnesses to the search, the search list cannot itself be used to corroborate the evidence of the searching officer. [16] A search witness can refresh his memory with reference to the search list, but it is not admissible in evidence as a statement of the witnesses or the Police officer. [17] It cannot be proved and admitted on the evidence of the Police officer, without examining a witness to it. [18]

3. But *s. 91 of the Evidence Act* is not attracted to the factum of a search [19] hence, *other* evidence is admissible to prove recovery of the incriminating articles and the place from where they were recovered. [20] For the same reason, the mere non-mention of a particular article in the search-list as having been recovered from the accused need not necessarily render the prosecution evidence on the point unreliable. [21]

4. Where there are several search lists, each containing several items, the prosecution ought to prove their case with reference to such items severally. [22]

19. Search witness not bound to attend without being specially summoned.—

1. The latter part of this sub-section makes it clear that it is only the Court which can call upon a search witness to give evidence at the trial. The search officer has no power, without summons, to call upon a witness to attend Court for the purpose, [23] though he can call upon a person, under sub-section (4), to act as a witness to the search. [24]

2. Whether or not to call a search witness at the trial is left to the discretion of the Court, [25] and even where the prosecution desires to call any of them, the prosecution must explain the reasons therefor to the Court. [26] Thus, where the search officer wants to corroborate or fortify his own evidence, he must call a witness to the search; he cannot rely on the search list (*panchanama*), even though it is signed by the search witnesses. [27] He must offer the accused an opportunity to cross-examine such witnesses if he wants to rely on their evidence. [28]

3. But it should be a duty of the prosecution to mention the names of search-witnesses so that the Court may summon any of them if it so desires; [29] and to ask the Court to call them or any of them if the Police officer's evidence is disputed by the accused. [30]

4. Whether to believe a search witness or not rests with the Court as in the case of any other evidence; his evidence cannot be accepted as true merely because he has been summoned under this sub-section. [31]

20. Effect of non-examination of search witnesses.—

1. Though, as have been stated earlier, there is no bar to the acceptance by the Court of the uncorroborated testimony of a Police officer, particularly of the higher rank, as to the factum of a search; [32] the *ordinary* [33] rule is that the Court would not rely on the testimony of a Police officer as to search in the absence of corroboration from at least one of the witnesses to the search. [34]

2. Such corroboration cannot be offered by the search list because it is nothing but a note made by the witnesses of what they had seen at the time of the search. [35] A witness to the search can, therefore, refresh his memory with reference to the search list. [36]

3. Nor can such corroboration be ordinarily available where there are no witnesses to the search or the witnesses who are examined do not support the police officer. [37]

4. Conversely, if the witnesses to the search-list give evidence to contradict the search-list on material particulars, [38] the value of their evidence may be undermined. [39]

5. But even the absence of witnesses at a search cannot bar the Court from convicting an accused on other evidence relating to the search and recovery of the incriminating articles from him. [40]

The reason is that sub-section (5) does not cast any duty on the prosecution to examine the search witnesses but expressly provides that "no person witnessing a search ... shall be required to attend the Court as witness of the search unless specially summoned by it.". It is, therefore, left to the discretion of the Court whether to call such witness at the trial or not. [41] Hence, any other evidence relating to the search cannot be disbelieved merely on the ground that the prosecution did not examine the search witnesses; [42] , [43] or the witness who is called, does not support the prosecution. [44]

21. Value of the evidence of the search-officer.—

1. As has been stated earlier, the sole testimony of the search-officer is not inadmissible [45] , [46] nor necessarily insufficient for a conviction [47] but where he is contradicted by the search-list in the matter of description of the articles seized, in material particulars, a conviction based on such testimony of the Police-officer cannot stand. [48]

2. It should be clearly remembered that when the legality of a search is challenged in an appeal from conviction, the question before the Court is whether the illegality goes to the root of the jurisdiction of the Court, in which case, of course, the conviction must be set aside. If not, the question is whether, notwithstanding any irregularity in the mode of search, the prosecution evidence as to the recovery of the incriminating articles from the accused should be believed. [49] , [50]

3. In relying on the sole testimony of the searching officer, the Court should have regard to circumstances, *e.g.* , that it was not possible to make a search in the presence of witnesses [51] or that the property [52] was found without a search [53] (*e.g.* , a bottle of liquor in the hands of the accused); [54] the status of the searching officer [55] or that no attempt at all was made to find witnesses. [56]

22. Sub-section (6) : Right of occupant to attend search.—

1. The occupant or some person on his behalf, residing in or being in charge of the place to be searched [vide sub-section (1)] [57] has a right to attend the search, and, he is, therefore, to be given the opportunity to attend, [58] if he so desires. [59]

2. If this right is denied, the Court would be justified in scrutinising the evidence relating to the search with caution. [60]

3. The word ‘occupant’ in sub-section (5) obviously refers to ‘any person’ residing in, or being in charge [61] of the place and would include the accused where he is so occupying the house at the time of the search. [62] He cannot, therefore, be sent out during the search. [63]

   But to hold that even where the accused is already in police custody, he should be brought by the searching officer to the search of his house and that a search held in the presence of his wife in such a case would be a contravention of the law or an irregularity causing denial of justice to the accused, as held by the Saurashtra High Court, [64] seems to be going too far. It is also debatable whether the meaning of the words ‘shall be permitted’ can be str *etc* hed so far. [65]

4. If the occupant, being present, is kept out by the search-officer, he has a right to, enter forcibly, without being liable under s. 332, I.P.C.. [66]

23. Sub-sections (6)-(7) : Right to copies under s. 100.—

1. Sub-sections (6)-(7) [corresponding to sub-sections (3)-(4) of *old* s. 103] confer a right to obtain copies of the papers prepared during a search of premises, as follows:

(a) Where the occupant of the place searched or anybody on his behalf attends the search, he shall be entitled to a free copy of the search list to be delivered to such person [sub-section (6)].

(b) When anybody is personally searched under sub-section (3) he shall be entitled to a free copy of the list of things taken possession of from him on such search [sub-section (7)].

2. Ordinarily, the copy of the search list should be delivered to the person whose premises or person has been searched immediately after the search; but it would not be illegal to give it some time later (*e.g.* , at the search officer's camp), so long as there is no opportunity to raise any suspicion or doubt as to the authenticity of the seizure of articles. [67]

24. Right to copies under other provisions of the Code.—

1. This right to obtain a copy of any part of the proceedings is a statutory right, which cannot be claimed in the absence of a provision conferring such right. [68]
2. It would, therefore, be useful to refer to the various provisions of the Code which confer such right:

(i) S. 100(6)- (7), discussed above.

(ii) S. 165(4)- (5) confer similar right to a free copy of the search list to the owner or occupier of the place searched, in course of a police investigation.

(iii) S. 166(5) confers upon the owner or occupier of the searched place a free copy of the record sent by the Police officer conducting a search to the nearest Magistrate, under sub-section (4) of that section.

(iv) Under s. 173(7), the investigating Police officer has the discretionary power to grant to the accused free copies of the documents referred to in sub-section (5) of that section, *i.e.* , copies of all documents or statements sought to be relied on by the prosecution at the trial.

(v) S. 207 confers a duty upon the Magistrate to grant free copies of the documents just referred to, creating a corresponding right in favour of the accused.

(vi) The accused is entitled to a copy of the judgment in the following cases—

(a) Where the accused is sentenced to imprisonment [s. 363(1),— *old* s. 371(4)],—a free copy.

(b) Free copy where the judgment is appealable [s. 363(2),— *old* s. 372], including an appealable order s. 117 [s. 363(3)].

(c) A certified copy, on his application, in other cases [s. 363(2),— *old* s. 371(1)].

(d) Free certified copy, where a sentence of death is passed or confirmed by High Court [s. 363(2), Proviso].

(vii) Any other person, who is effected by a judgment or order, is entitled to a certified copy of such judgment, on payment of cost [s. 363(5)- (6)].

(viii) A free copy of the order of maintenance passed under s. 125 to be given to the person in whose favour it is made or to his guardian or to the person to whom the allowance is to be paid [s. 128,— *old* s. 490].

(ix) A free copy of order under s. 111 to be delivered to the person summoned or arrested under s. 113 [s. 114].

(x) Free copy of the memorandum of local inspection to be given to the complainant, accused or any other party to the case [s. 310(2),— *old* s. 539-B(2)].

25. Sub-section (8): Refusal to attend as witness after written order.—

This sub-section makes a person liable to be punished under s. 187, I.P.C., for refusal or neglect to attend *and* witness a search under this section, under the following circumstances:

(a) There must be a written [69] order calling upon him to do so. Persons who are voluntarily present or at the verbal request of the officer cannot be convicted if they refuse to witness the search. [70]

(b) The liability will arise only if such person refuses to attend and witness the search. It will not include a refusal to sign the search list. [71]

(c) Such person shall not be liable where he has a reasonable cause for such refusal or neglect, *e.g.* , where the person is asked to wait at a place on the road until the suspected person arrives there, and then to witness the search. [72]

26. Appeal: Effects of irregularity on the trial.—

1. By reason of s. 465(1) [*old* s. 537], any irregularity in the search-warrant or the execution thereof would not vitiate the trial or the order or judgment passed therein, in the absence of a failure of justice having been occasioned thereby.

A. The following, *inter alia* , are irregularities in the matter of compliance with the present section :

(i) That there were no independent witnesses of the locality, as required by s. 100(4), if those witnesses on whose evidence the Court acts are reliable. [73]

(ii) That the witnesses were not 'respectable' [74] *e.g.* , rickshawallas. [75]

(iii) That the Police Rules or Regulations [76] relating to search were not complied with. [77]

(iv) That there was no witness to the search. In some earlier cases, it was held that a search held without any witnesses was absolutely illegal. [78]

But since the Privy Council decision in *Malak Khan's* case, [79] it is settled law that this also

would amount to an 'irregularity', which would be fatal only if there is no other reliable evidence as to the search.

(v) That a copy of the search list was not delivered to the occupant, as required by sub-section (7) of this section. [80]

B. On the other hand, even where the contravention of the section constitutes only an 'irregularity', a conviction would be set aside on appeal or revision where the conviction rests on the evidence as to recovery of an incriminating article on search, and the irregularity in question has resulted in a failure of justice, [81] *e.g.* , in the following cases—

(i) The search witnesses, whose evidence was act ed upon by the Court were not disinterested and respectable persons, but lived near the Police station and were interested in the election of a candidate belonging to a party other than that of the accused, and the witnesses were involved in some criminal proceedings. [82]

(ii) Where the evidence of the search-witnesses did not support the searching officer who made a material discrepancy in the description of the articles seized. [83]

(iii) Where owing to the irregularities at the search, *e.g.* , the witnesses were not present throughout the search, the Court is left with a reasonable doubt as to whether the incriminating article was really recovered from the custody of the accused. [84]

(iv) Where, owing to the fact that an outsider, without having his person searched, entered a room during a search wherefrom some incriminating article was found, the Court entertained a doubt whether such article was recovered from the possession of the accused. [85]

2. Even where a search is *illegal* , the articles recovered on search would *not* cease to be admissible in evidence. [86]

27. Revision.—

It follows from the above discussion that though non-compliance with sub-section (4) as to search witnesses would not *per se* render the conviction *illegal* , [87] the prosecution evidence relating to search should, in such a case, be reviewed in revision. [88]

28. Remedy under Art. 226 of the Constitution.—

But though a breach of the requirements of sub-sections (4)-(7) may be treated as an irregularity for the purpose of setting aside the judgment or order eventually passed in the proceeding in course of which such search took place, there is nothing to debar the person affected to have the defective search quashed and the seized articles returned, by a proceeding for mandamus, [89] on the ground of violation of statutory conditions, [90] *e.g.* ,—

(a) That the search was made without a warrant. [91]

(b) That the seizure was made without compliance with the requirements of s. 100(4)- (7). [92]

29. Suit for damages.—

An illegal search would constitute an actionable trespass, so that the search officers would be liable in a suit for damages, even though the person whose house had been searched was convicted for an offence in respect of which the search had been made [93] (see *ante*).

30. Illegality as defence in criminal prosecution.—

1. If a search be conducted in contravention of the requirements of the present section, resistance or obstruction offered to such search will not be an offence under the I.P.C., [94] say, s. 186; [95] s. 332,[96] *e.g.* ,—

   (i) Where the occupant of the house is forcibly kept out by the search-officers, in contravention of his right to be present under sub-section (6) of this section. [97]

   (ii) Where the search officers made a burglarious entry by scaling the outer wall, without complying with the requirements of sub-sections (1)-(2). [98]

   (iii) Where the search officer attempts to search witnesses. [99]

2. Persons subjected to an illegal search are also entitled to exercise their right of private defence, under s. 99, I.P.C., which would exonerate even the commission of an offence in course of resistance to such illegal search, provided the act ion of the searching party was wholly without jurisdiction and not in good faith. [1] Conversely, the right of private defence would not be available against a charge under s. 353, I.P.C., where the action of the search officer was merely ‘irregular’ and he act ed in good faith. [2]

3. On the other hand, if the person whose premises has been illegally searched goes beyond resisting the search and *forces* the searching officer or person to do some act contrary to his volition, after the search is over, he cannot escape liability under s. 342 or 353 of the I.P.C. [3]

31. S s. 100 and 165.—

1. Sub-section (4) of s. 165 provides that "the general provisions as to searched in s. 100 shall, so far as may be, apply to a search under this section". [4] Consequently, when a search is made by an investigating Police officer under s. 165(1),*post* , he must comply with the requirements of sub-section (1) relating to forcible entry; [5] sub-section (4) regarding search-witnesses [6] , [7] and sub-section (5) relating to search-list; [8] and also deliver a copy of such list to the occupant, irrespective of his asking for it. [9]

2. On the other hand, the words 'so far as may be' suggest that there may be circumstances in which it may not be possible for the investigating officer to comply with all the requirements of this section. [10] Thus, in an emergency, he may have to enter the house into which an accused has run and bolted himself in, without complying with the requirements of a demand for ingress, as required by sub-section (1). [11] But in the absence of emergent circumstances, a burglarious entry into a house shall be illegal, and if the occupants offer violent resistance; they shall not be liable under s. 332, I.P.C. [12]

3. Similarly, absence of witnesses may not necessarily render a search illegal [13] where s. 165 itself is not applicable.

4. The recording of reasons for the necessity of a search is obligatory under the express requirement of s. 165; [14] it is not so under s. 100 (see *ante*).

32. S. 100,Cr.P.C. and s. 27, Evidence Act .—

The formalities prescribed by s. 100 are not to apply to the discovery under *s. 27 of the Evidence Act* . [15]

33. Applicability of s. 100 in searches under Special Act .—

In searches under TADA Act s. 100 of the code are attracted. However, when recovery of country made pistol and three live cartridges were recovered from the accused and he is charged under s. 8 of TADA, the evidence of the police personnel cannot be discarded only because no independent witness of the locality did not join in the search when none of the locality was willing to join the said in the house of the accused. [16]

When an empowered officer or an authorised officer under s. 41(2) of the Narcotic Drugs and Psychotropic Substance Act is conducting the search, he is conducting the search under ss. 100 and 165 of the Code. However, if there is no strict compliance of the Code, the search would not be illegal. [17]

The evidence collected in a search in violation of *s. 50 of the NDPS Act* does not become inadmissible in evidence. So, for violation of *s. 50 of the NDPS Act* , the accused cannot be discharged by the Sessions Judge.[18]

Right conferred by *s. 50 of the N.D.P.S. Act* is extension of the right conferred by s. 100(3) *Cr.P.C.* [19]

The provisions of s *s. 100* and *165* *Cr.P.C.* are not inconsistent with the provisions of *N.D.P.S. Act* .[20]

When the accused was apprehended from outside the airport and taken to the security room and 490 grams of charas were recovered, but independent and respectable people of the locality though available were not associated with the record, the accused was prejudiced and was acquitted. [21]

When under West Bengal Public Distribution System (Maintenance and Control) Order, 2003, the show cause notice for suspension of licence of the Fair-Price shop of the petitioner has been issued and search and seizure of the shops of the petitioner was made without complying with the provisions of sub-sections (4) and (5) of s. 100 of the Code, the search and seizure may not be in order and seizure list may not acquire a status of dependable evidence, yet it would not affect the proceedings initiated by the Authority to suspend the licence of the petitioner. [22]

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93 Rep. of the Joint Committee on the Bill of 1970 [p. (xi), on Cl 100].

1 *Emp.* *v.* *Balai,* 1930 Cal 141 .

2 *Rajabather* , in re., AIR 1959 Mad 450 452 .

3 *Abdullah* *v.* *Emp.,* (1926) 27 Crlj 73 .

4 *Ram Prasad* *v.* *Emp.,* AIR 1938 Pat 403 .

5 *Emp.* *v.* *Balai,* 1930 Cal 141 .

6 *Emp.* *v.* *Balai,* 1930 Cal 141 .

7 *Sunder Singh* *v.* *State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *State v. Ram,* (1978) Crlj 601 (P&H) .

8 *State of Bihar* *v.* *Kapil Singh,* AIR 1969 SC 53 [*LNIND 1968 SC 415*]: (1968) 3 SCR 810 [*LNIND 1968 SC 415*] : 1969 Crlj 279 ; *State v. Mohan,* (1961) I Crlj 828 (829) Cut.

9 Not obligatory in an emergency, *Chinna* , in re., AIR 1945 Mad 523 525 .

10 *State of Bihar v. Kapil Singh,* AIR 1969 SC 53 [LNIND 1968 SC 415] ([LNIND 1968 SC 415]) (1968) 3 SCR 810 1969 Crlj 279 ; *State v. Mohan,* (1961) I Crlj 828 (829) Cut.

11 *Rabindra Nath v. State of Orissa,* 1984 Crlj 1392 Ori .

12 *Rabindra Nath v. State of Orissa,* 1984 Crlj 1392 Ori .

13 *Pagla Baba v. State,* AIR 1957 Orissa 130 .

14 *State v. Durlabhji,* AIR 1952 Sau 81 .

15 *State v. Durlabhji,* AIR 1952 Sau 81 .

16 *Matajog v. Bhari,* AIR 1956 SC 44 50 : (1955) 2 SCR 925.

17 *Dhanpat* , AIR 1960 Pat 582 587 .

18 *Bhagwanbhai v. State of Maharashtra,* (1963) 3 SCR 386 [LNIND 1962 SC 240]] (392) : (1963) 2 Crlj 694 : (1964) 2 SCJ 263 .

19 *Sunder Singh v. State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *State v. Ram,* (1978) Crlj 601 (P&H) .

20 *Parmeshwar v. State,* (1963) 1 Crlj 342 (All) .

21 *Sunder Singh v. State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *State v. Ram,* (1978) Crlj 601 (P&H) .

22 *Local Govt. v. Nainsukh,* AIR 1933 Nag 99 .

23 *Sunder Singh v. State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *State v. Ram,* (1978) Crlj 601 (P&H) .

24 *Sunder Singh v. State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *State v. Ram,* (1978) Crlj 601 (P&H) .

25 *Ramadhan Singh v. State of U.P.,* (1995) 3 Crimes 41 (42)(All) .

26 *Sohan Lal v. State of H.P.,* 2008 Crlj NOC 499HP DB .

27 *Ashfaq v. Emp.,* AIR 1936 All 707 .

28 *Shiv Bahadur v. State of U.P.,* AIR 1954 SC 322 328 : 1954 SCR 1098 : 1954 Crlj 910 ; *Kamalabai v. State of Maharashtra,* AIR 1962 SC 1189 [*LNIND 1962 SC 15*](para 4) : 1962 Supp (2) SCC 632 : (1962) 2 Crimes 273 .

29 *Rajabather* , in re., AIR 1959 Mad 450 452 .

30 *Ashfaq v. Emp.,* AIR 1936 All 707 .

31 *Fernandez v. State,* AIR 1951 Bom 468 [*LNIND 1951 BOM 97*]; *Govindan* , in re., AIR 1959 Mad 545 .

32 *Local Govt. v. Nainsukh,* AIR 1933 Nag 99 ; *Ashfaq v. Emp.,* AIR 1936 All 707 .

33 Contra *Mohd. v. State of Maharashtra,* (1994) Crlj 1020 (para 8) Bom (DB), where the Investigating officer *knowingly* used a pliable witness.

34 *Ashfaq v. Emp.,* AIR 1936 All 707 .

35 *Kaur* *v.* *State* *of* *Punjab,* AIR 1974 SC 329 [LNIND 1973 SC 356](para 9) : (1974) 2 SCR 393 [LNIND 1973 SC 356] : (1974) 3 SCC 649 [LNIND 1973 SC 356] : 1974 Crlj 358 .

36 *Ashfaq* *v.* *Emp.,* AIR 1936 All 707 .

37 *Haradhon* *v.* *Emp.,* AIR 1938 Cal 701 .

38 *Haradhon* *v.* *Emp.,* AIR 1938 Cal 701 .

39 *Indar* *v.* *Emp.,* AIR 1931 Lah 408 415 .

40 *Penda* *v.* *Emp.,* AIR 1947 All 165 167 .

41 *Penda* *v.* *Emp.,* AIR 1947 All 165 167 .

42 *Fernandez* *v.* *State,* AIR 1951 Bom 468 [LNIND 1951 BOM 97]; *Govindan* , in re., AIR 1959 Mad 545 .

43 *Harinarayan* *v.* *Emp.,* AIR 1928 Cal 27 35 .

44 *Ashfaq* *v.* *Emp.,* AIR 1936 All 707 .

45 Cf. *Simon* *v.* *State,* AIR 1951 Bom 468 [LNIND 1951 BOM 97].

46 Cf. *Tej* *Bahadur* *v.* *State* *of* *U.P.,* (1970) SCD 688 ; *State of Maharashtra v. Pathak,* AIR 1980 SC 1224 (paras 8-9).

47 Cf. *Bai* *Radha* *v.* *State* *of* *Gujrat,* AIR 1970 SC 1396 [LNIND 1968 SC 348]: (1969) 1 SCC 43 [LNIND 1968 SC 348] :

1970 Crlj 1279 ; *Govindan* , in re., AIR 1959 Mad 544 [*LNIND 1958 MAD 141*].

48 *Biswanath* *v.* *Emp.,* AIR 1950 All 147 [*LNIND 1949 ALL 65*](148-149).

49 *Ram* *Prasad* *v.* *Emp.,* AIR 1938 Pat 403 .

50 *Appa* *v.* *Emp.,* AIR 1934 Bom 16 .

51 *Ram* *Prasad* *v.* *Emp.,* AIR 1938 Pat 403 .

52 *Ram* *Prasad* *v.* *Emp.,* AIR 1938 Pat 403 .

53 *Raman,* (1898) 21 Mad 83 (89).

54 *Rustom* *v.* *Emp.,* (1931) Bom LR 267 .

55 *Malak* *Khan* *v.* *Emp.,* AIR 1946 PC 16 19 .

56 *Legal* *Remembrancer* *v.* *Mamtazuddin,* (1947) 1 Cal 439 ; *Lal Bahadur v. State,* AIR 1957 Assam 74 75 .

57 *Malak* *Khan* *v.* *Emp.,* AIR 1946 PC 16 19 .

58 *Banamali* *v.* *Emp.,* (1939) 1 Cal 210 ; *Velayudhan v. State,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](FB) .

59 *Parmeshwar* *v.* *State,* (1963) 1 Crlj 342 (All) .

60 *Govindan* , in re., AIR 1959 Mad 544 548 [*LNIND 1958 MAD 141*].

61 *Sundar Singh v. State of U.P.,* AIR 1956 SC 411 415 ; *Ramrao v. Crown,* AIR 1951 Nag 237 .

62 *Banamali v. Emp.,* (1939) 1 Cal 210 ; *Velayudhan v. State,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](FB) .

63 *Malak Khan v. Emp.,* AIR 1946 PC 16 19 .

64 *Kaur v. State of Punjab,* AIR 1974 SC 329 [*LNIND 1973 SC 356*](para 9) : (1974) 2 SCR 393 [*LNIND 1973 SC 356*] : (1974) 3 SCC 649 [*LNIND 1973 SC 356*] : 1974 Crlj 358 .

65 *Sundar Singh v. State of U.P.,* AIR 1956 SC 411 415 ; *Ramrao v. Crown,* AIR 1951 Nag 237 .

66 *Parmeshwar v. State,* (1963) 1 Crlj 342 (All) .

67 *State v. Murgesh,* AIR 1967 Bom 199 [*LNIND 1963 BOM 42*].

68 *State v. Murgesh,* AIR 1967 Bom 199 [*LNIND 1963 BOM 42*].

69 *Govindan* , in re., AIR 1959 Mad 544 548 [*LNIND 1958 MAD 141*].

70 *State of Maharahtra v. Natwarlal,* AIR 1980 SC 593 [*LNIND 1979 SC 482*]: 1980 Crlj 429 : (1980) 4 SCC 669 [*LNIND 1979 SC 482*].

71 *Appabhai* v *State of Gujarat,* AIR, 1988 SC 696 : 1988 Crlj 484 : 1988 Supp. SCC 241.

72 S *ahib Singh v. State of Punjab,*
(1996) 11 SCC 685 [
LNIND 1996 SC 1464] :
AIR 1997 SC 2417 [
LNIND 1996 SC 1464]:
(1996) 3 Crimes 284 .

73 *Balbir Singh v. State,*
(1996) 11 SCC 685 [
LNIND 1996 SC 1464] :
1997 SCC (Cri) 315 [
LNIND 1996 SC 1464] :
AIR 1997 SC 2417 [
LNIND 1996 SC 1464]:
(1996) 3 Crimes 284 .

74 *Abdul Sattar v. State,*
1989 Crlj 430 Bom DB .

75 *State of Punjab v. Wasson Singh,*
AIR 1981 SC 697 [
LNIND 1981 SC 33]:
(1981) 2 SCC 1 [
LNIND 1981 SC 33] :
1981 Crlj 410 .

76 *Atma Singh v. State,*
(1984) 2 Crimes 764 (P&H) .

77 *Ronny v. State of Maharashtra,*
AIR 1998 SC 1251 [
LNIND 1998 SC 302]:
(1998) 3 SCC 625 [
LNIND 1998 SC 302] :
1998 Crlj 1638 .

78 *Ghasita Sahu v. State of M.P.,*
AIR 2008 SC 1425 [
LNIND 2008 SC 186]:
(2008) 1 SCC 605 (Cri) : 2008 AIRSCW 1435 (1436).

79 *Kalpanath Rai v. State,*
(1997) 8 SCC 733 :
1998 Crlj 319 :
AIR 1998 SC 201 : (1997) 4 Crimes 227.

80 *State of U.P. v. Arun Kumar Gupta,*
AIR 2003 SC 801 [
LNIND 2003 SC 9]:
(2003) 2 SCC 202 [
LNIND 2003 SC 9] :
2003 SCC (Cri) 481 [
LNIND 2003 SC 9] :
2003 Crlj 894 .

81 *State, Government of NCT Delhi v. Sunil,* [
(2001) 1 SCC 652
LNIND 2000 SC 1687] :
2001 SCC (Cri) 248 [
LNIND 2000 SC 1687] :
2001 Crlj 504 .

82 *Abdulla v. State,*
(1951) 52 Crlj 1058 (Mad) .

83 *Abdulla v. State,*
(1951) 52 Crlj 1058 (Mad) .

84 *State v. Raijibhai,* [
AIR 1960 Guj 24
LNIND 1960 GUJ 18](para 5).

85 *Nabakumar v. State of W,B.,*
1974 Crlj 512 (para 6) :
AIR 1974 SC 777 : (1974) 3 SCC 582.

86 *State v. Raijibhai,* [
AIR 1960 Guj 24
LNIND 1960 GUJ 18](para 5).

87 *State v. Raijibhai,* [
AIR 1960 Guj 24
LNIND 1960 GUJ 18](para 5).

88 *Nabakumar v. State of W,B.,*
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AIR 1974 SC 777 : (1974) 3 SCC 582.

89 *Nabakumar v. State of W,B.,*
1974 Crlj 512 (para 6) :
AIR 1974 SC 777 : (1974) 3 SCC 582.

90 *Rafiquddin* ,
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1 *Rafiquddin* ,
AIR 1935 Cal 184 187 .

2 *Ahmed v. State,*
AIR 1971 Gau 7 (para 16).

3 *Chandrama v. State,*
ILR (1951) 1 Cal 539 .

4 *State v. Sujan,* AIR 1954 J&K 28 (29).

5 *State* *v.* *Banwari,*
(1959) 9 Raj 107 .

6 *Htaung* ,
(1914) 15 Crlj 523 (Rang) .

7 *Ram* *Prasad* *v.* *Emp.,*
AIR 1938 Pat 403 (405-07)FB .

8 *Habu* *v.* *State,*
AIR 1956 Sau 25 .

9 *Ram* *Prasad* *v.* *Emp.,*
AIR 1938 Pat 403 (405-07)FB .

10 *Ippili* *v.* *Emp.,*
AIR 1920 Mad 286 .

11 *Narayana* *v.* *State* *of* *A.P.,*
AIR 1957 SC 737 739 : 1958 SCR 283 :
1957 Crlj 1320 .

12 *Eradu* *v.* *State* *of* *Hyderabad,*
(1956) Crlj 559 (560) SC.

13 *Abdulla* *v.* *State,*
(1951) 52 Crlj 1058 (Mad) ; *State v. Raijibhai,*
AIR 1960 Guj 24 [
LNIND 1960 GUJ 18](para 5).

14 *Mohan* *v.* *Emp.,*
AIR 1941 Bom 149 151 .

15 *Malak* *Khan* *v.* *Emp.,*
AIR 1946 PC 16 19 .

16 *State* *v.* *Raijibhai,*
AIR 1960 Guj 24 [
LNIND 1960 GUJ 18](para 5).

17 *State* *v.* *Raijibhai,*
AIR 1960 Guj 24 [
LNIND 1960 GUJ 18](para 5).

18 *Mohan* *v.* *Emp.,*
AIR 1941 Bom 149 151 .

19 *State* *v.* *Babu* *Singh,* (1963) Crlj 348 (Punj) .

20 *Bashir* *v.* *Emp.,* AIR 1932 All 185 .

21 *Banwari* *v.* *State,* (1957) Crlj 688 (Raj) .

22 *Rafiquddin* , AIR 1935 Cal 184 187 .

23 *Ippili* *v.* *Emp.,* AIR 1920 Mad 286 .

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25 *Bir* *v.* *State* *of* *U.P.,* AIR 1955 ALJ 492 .

26 *Mosaddi* *v.* *Emp.,* AIR 1933 Pat 100 .

27 *Mohan* *v.* *Emp.,* AIR 1941 Bom 149 151 .

28 *Rustom* *v.* *Emp.,* AIR 1932 Bom 181 .

29 *Mukh* *Ram* *v.* *State,* ILR (1952) Raj 887 .

30 *Abdullah* *v.* *State,* [AIR 1951 Mad 883 *LNIND 1950 MAD 327*].

31 *Fernandez* *v.* *State,* [AIR 1951 Bom 468 *LNIND 1951 BOM 97*].

32 *State* *v.* *Raijibhai,* [AIR 1960 Guj 24 *LNIND 1960 GUJ 18*](para 5).

33 *State* *v.* *Raijibhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5).

34 *State* *v.* *Raijibhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5); *Emp. v. Shanwar,* AIR 1950 Bom 267 [*LNIND 1949 BOM 127*].

35 *State* *v.* *Raijibhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5).

36 *State* *v.* *Raijibhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5).

37 *State* *v.* *Raijibhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5).

38 *Banwari* *v.* *State,* (1957) Crlj 688 (Raj) .

39 Cf. *Ahmed* *v.* *State* *of* *Assam,* AIR 1972 Gau 7 (para 16).

40 Cf. *Malak* *Khan* *v.* *Emp.,* AIR 1946 PC 16 19 .

41 *Hari* *Narayan* , AIR 1928 Cal 27 35 .

42 Cf. *Malak* *Khan* *v.* *Emp.,* AIR 1946 PC 16 19 .

43 *Badruddin* , (1951) 52 Crlj 1152 (All) .

44 *Velayudhan* *v.* *State* *of* *Kerala,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](paras 9, 32). The position would be different where the search witness has been summoned and yet he is not examined [*Bhand v. State of Assam,* (1984) Crlj 217 (220) Gau].

45 *State* *v.* *Raijbhai,* AIR 1960 Guj 24 [*LNIND 1960 GUJ 18*](para 5).

46 *Velayudhan v. State of Kerala,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](paras 9, 32). The position would be different where the search witness has been summoned and yet he is not examined [*Bhand v. State of Assam,* (1984) Crlj 217 (220) Gau].

47 *Emp. v. Kisan,* AIR 1951 Bom 186 [*LNIND 1949 BOM 167*]; *Naba Kumar v. State of W.B.,* (1974) Crlj 512 (SC) : AIR 1974 SC 777 : (1974) 3 SCC 582.

48 *Naba Kumar v. State of W.B.,* (1974) Crlj 512 (SC) : AIR 1974 SC 777 : (1974) 3 SCC 582; *Haradhon v. Emp.,* AIR 1938 Cal 701 .

49 *Velayudhan v. State of Kerala,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](paras 9, 32). The position would be different where the search witness has been summoned and yet he is not examined [*Bhand v. State of Assam,* (1984) Crlj 217 (220) Gau].

50 Cf. *Kamalabai v. State of Maharashtra,* AIR 1962 SC 1189 [*LNIND 1962 SC 15*](para 5) : 1962 Supp (2) SCR 632 : (1962) 2 Crimes 273 .

51 *Jainand v. Emp.,* AIR 1949 All 291 [*LNIND 1948 ALL 55*].

52 *Velayudhan v. State of Kerala,* AIR 1961 Ker 8 [*LNIND 1960 KER 217*](paras 9, 32). The position would be different where the search witness has been summoned and yet he is not examined [*Bhand v. State of Assam,* (1984) Crlj 217 (220) Gau].

53 *Emp. v. Kisan,* AIR 1951 Bom 186 [*LNIND 1949 BOM 167*].

54 *Emp. v. Kisan,* AIR 1951 Bom 186 [*LNIND 1949 BOM 167*].

55 *Jainand v. Emp.,* AIR 1949 All 291 [*LNIND 1948 ALL 55*].

56 *Jainand v. Emp.,* AIR 1949 All 291 [*LNIND 1948 ALL 55*].

57 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377).

58 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377).

59 *Hari* *Narayan* , AIR 1928 Cal 27 35 .

60 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377); *State v. Anil,* AIR 1952 Cal 1154 1156 .

61 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377).

62 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377).

63 *Ramesh* *v.* *Emp.,* (1913) 41 Cal 350 (377).

64 *Bhagu* *v.* *State,* (1955) Crlj 31 (Sau) .

65 *Hari* *Narayan* , AIR 1928 Cal 27 35 .

66 *Bhikugir* , AIR 1932 All 449 450 .

67 *Shyam Lal v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100](para 8).

68 *Indradatt* , in re., (1974) 80 Crlj 994 (AP) .

69 *Ram Prasad* *v.* *Emp.,* AIR 1938 Pat 403 (407, 412)(FB) .

70 *Ram Prasad* *v.* *Emp.,* AIR 1938 Pat 403 (407, 412)(FB) .

71 *Ram Prasad* *v.* *Emp.,* AIR 1938 Pat 403 (407, 412)(FB) .

72 *Local Govt. v. Nainsukh,*
AIR 1933 Nag 99 .

73 *Radha Krishan v. State of U.P.,*
AIR 1963 SC 822 [
LNIND 1962 SC 315]:
(1963) 1 Crlj 809 .

74 *Malak Khan v. Emp.,*
AIR 1946 PC 16 19 .

75 *Sunder Singh v. State of U.P.,*
AIR 1956 SC 411 415 : 1956 Crlj 801.

76 *Niranjan v. State of U.P.,*
AIR 1957 SC 142 [
LNIND 1956 SC 73](paras 14-16) :
1957 Crlj 734 :
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77 *Ramesh v. Emp.,*
(1913) 41 Cal 350 (377).

78 *Nirmal v. Emp.,*
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79 *Malak Khan v. Emp.,*
AIR 1946 PC 16 19 ; *Sunder Singh v. State of U.P.,*
AIR 1956 SC 411 415 : 1956 Crlj 801.

80 *State v. Radha Kishan,*
(1961) 1 Crlj 595 (599) [reversed, on other points, by
AIR 1963 SC 822 [
LNIND 1962 SC 315]:
(1963) 1 Crlj 809].

81 *Sunder Singh v. State of U.P.,*
AIR 1956 SC 411 415 : 1956 Crlj 801.

82 *Kaur Sain v. State of Punjab,*
AIR 1974 SC 329 [
LNIND 1973 SC 356](para 9) :
(1974) 3 SCC 649 [
LNIND 1973 SC 356] :
1974 Crlj 358 .

83 *Naba Kumar v. State of W.B.,*
(1974) Crlj 512 (para 6) :
AIR 1974 SC 777 : (1974) 3 SCC 582.

84 *Dinkar* ,
AIR 1930 Bom 169 .

85 *Sultan* *v.* *State,*
(1954) 59 CWN 391 .

86 *State* *of* *Maharashtra* *v.* *Natwarlal,*
AIR 1980 SC 593 [
LNIND 1979 SC 482]:
(1980) 4 SCC 669 [
LNIND 1979 SC 482] :
1980 Crlj 429 .

87 *Khalil* *v.* *State,*
(1976) Crlj 465 (All) .

88 *Tittar* *v.* *State,*
AIR 1953 All 506 [
LNIND 1952 ALL 240]; Cf. *Lalbahadur v. State,*
AIR 1957 Assam 74 .

89 *Bd.* *of* *Revenue* *v.* *Jhaver,*
AIR 1968 SC 59 [
LNIND 1967 SC 224](para 9) :
(1968) 1 SCR 148 [
LNIND 1967 SC 224]; *Sundaram v. State of T.N.,*
AIR 1972 Mad 313 [
LNIND 1971 MAD 449].

90 *Dinkar* ,
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91 *Sundaram* *v.* *State* *of* *T.N.,*
AIR 1972 Mad 313 [
LNIND 1971 MAD 449].

92 *Sundaram* *v.* *State* *of* *T.N.,*
AIR 1972 Mad 313 [
LNIND 1971 MAD 449].

93 *Rure* *Mal* ,
AIR 1929 All 937 939 .

94 *State* *of* *Rajasthan* *v.* *Rehman,*
AIR 1960 SC 210 [
LNIND 1959 SC 183]:
(1960) 1 SCR 991 [
LNIND 1959 SC 183] :
1960 Crlj 286 ; *Bai Radha v. State of Gujarat,*
AIR 1970 SC 1396 [
LNIND 1968 SC 348].

95 *Barada* ,
(1896) 1 CWN 74 .

96 *Nirmal* *v.* *Emp.,*
AIR 1919 All 41 .

97 *Bhikugir* ,
AIR 1932 All 449 ; *Lachman v. Emp.,*
AIR 1942 Pat 281 282 .

98 *Emp.* *v.* *Mukhtar,*
(1915) 37 All 353 .

99 *Lachman* *v.* *Emp.,*
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1 *Pagla Baba* *v.* *State,*
AIR 1957 Orissa 130 (paras 40-44); *Bisu v. Emp.,*
(1970) 11 CWN 836 ; *.Iograj v. State of Bihar,*
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2 *Emp. v. Pukot,* (1896) 19 Mad 349.

3 *Shyam Lal* *v.* *State of* *M.P.,*
AIR 1972 SC 886 [
LNIND 1972 SC 100](para 8) :
(1972) 1 SCC 764 [
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1972 Crlj 638 .

4 *Shyam Lal* *v.* *State of* *M.P.,*
AIR 1972 SC 886 [
LNIND 1972 SC 100](para 8) :
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6 *Pagla Baba* *v.* *State,*
AIR 1957 Orissa 130 (paras 40-44); *Bisu v. Emp.,*
(1970) 11 CWN 836 ; *.Iograj v. State of Bihar,*
AIR 1953 Pat 313 .

7 *Emp.* *v.* *Param,*
AIR 1926 All 147 . [The pre-1923 decision in *Sadagopala* , 23 MLJ 445, no longer good law since the amendment of Section 165(4) in 1923.]

8 *Shyam Lal v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100](para 8) : (1972) 1 SCC 764 [LNIND 1972 SC 100] : 1972 Crlj 638 .

9 *Shyam Lal v. State of M.P.,* AIR 1972 SC 886 [LNIND 1972 SC 100](para 8) : (1972) 1 SCC 764 [LNIND 1972 SC 100] : 1972 Crlj 638 .

10 *Indu Bhusan* , AIR 1955 Cal 129 [LNIND 1954 CAL 169].

11 *Chinna* , in re., AIR 1945 Mad 523 [LNIND 1945 MAD 134].

12 *Nirmal v. Emp.,* AIR 1919 All 41 .

13 *Shiam* , AIR 1927 All 516 .

14 *State of Rajasthan v. Rehman,* AIR 1960 SC 210 [LNIND 1959 SC 183]: (1960) 1 SCR 991 [LNIND 1959 SC 183] : 1960 Crlj 286 ; *Bai Radha v. State of Gujarat,* AIR 1970 SC 1396 [LNIND 1968 SC 348].

15 *Manheri v. State,* (1987) Crlj 563 (para 17) Ker.

16 *Brij Pal v. State,* (1996) 2 SCC 676 [LNIND 1996 SC 246] : 1996 Crlj 1677 : 1996 SCC (Cri) 392 [LNIND 1996 SC 246] : AIR 1996 SC 2915 [LNIND 1996 SC 246]; *Anil v. State of Maharashtra,* (1996) 2 SCC 589 [LNIND 1996 SC 423] : 1996 SCC (Cri) 356 [LNIND 1996 SC 423] : 1996 Crlj 1695 .

17 *State of Punjab v. Balbir Singh,* AIR 1994 SC 1872 : (1994) 4 SCC 365 : 1994 SCC (Cri) 634 [*LNIND 2004 SC 1094*] : 1994 Crlj 3702 .

18 *State of H.P. v. Prithi Chand,* [AIR 1996 SC 977 *LNIND 1995 SC 1212*]: (1996) 2 SCC 37 [*LNIND 1995 SC 1212*] : 1996 SCC (Cri) 210 [*LNIND 1995 SC 1212*].

19 *Gurbux Singh v. State of Haryana,* [AIR 2001 SC 1002 *LNIND 2001 SC 329*]: 2001 Crlj 1166 : (2001) 3 SCC 28 [*LNIND 2001 SC 329*] : (2001) 1 Crimes 235 [*LNIND 2001 SC 329*].

20 *State of Punjab v. Baldev Singh,* [AIR 1999 SC 2378 *LNIND 1999 SC 596*]: (1999) 6 SCC 172 [*LNIND 1999 SC 596*] : AIR 1999 AIRSCW 2494 .

21 *Mohd. Rafique v. State,* 2000 Crlj 2401 Del .

22 *Lakshmi Kanta Roy v. State of West Bengal,* AIR 2007 NOC 1198 (Cal) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

C.—General Provisions relating to Searches

S. 101
Disposal of things found in search beyond jurisdiction.

When, in the execution of a search-warrant at any place beyond the local jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

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1. Scope of s. 101: Disposal re. search beyond jurisdiction.—

1. This section reproduces *old* s. 99 with a verbal change.

2. It has no application where there is no search-warrant issued by a Court of another jurisdiction. [23]

2. Object of s. 101.—

This section is a sequel to ss. 78-79 (*ante*) which provide for execution of a warrant outside the jurisdiction of the Magistrate who issued the warrant of arrest; and which provisions extend to a search-warrant by reason of s. 99 [see *ante*]. In such a case, the Magistrate *etc* ., to whom the warrant is forwarded for execution or presented by a police officer, shall endorse his name on the warrant and execute it or order its execution. The

present section provides for the removal of the things seized, if any, in execution of the search-warrant to the Court issuing the warrant or the Court within whose jurisdiction the search is made, whichever is nearer.

3. Discretion of the executing Magistrate or officer, if any.—

Though the Magistrate who receive a warrant for execution from another jurisdiction has no discretion to refuse to execute such warrant if it is *prima facie executable* , he has a discretion to refuse to remove the seized articles when they are produced before him on execution of the search, if he is not satisfied as to the identity of the goods seized with those described in the search-warrant. [24]

4. 'Unless there be good cause to the contrary'.—

These words would authorise the Magistrate, before whom the seized articles are produced, to refuse to make an order for their removal to the Court issuing the warrant where the articles seized do not conform to the description in the search-warrant; but would not authorise such Magistrate to question the legality of the warrant itself.

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23 *Permanand* , (1897) Rat 880.

24 *Debendra* *v.* *State,* [AIR 1969 Cal 340 *LNIND 1967 CAL 37*](para 10).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

S. 102
Power of police officer to seize certain property.

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

[(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, [26] [or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation] he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]

[*Provided* that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sale.]

1. Legislative changes.—

Sub-section (3) has been inserted in the Code is an important amendment which removes a licence in the original section, there was no specific provision as in old s. 523(1) requiring the police officer to report to the Magistrate having jurisdiction of the search and seizure under s. 102. To remove these defects sub-section (3) of s. 102 has been inserted by Act 45 of 1978 (w.e.f. 18.12.1978).

Sub-section (3) has further been amended by the *Code of Criminal Procedure* (Amendment) Act, 2005 (25 of 2005) with effect from 23.06.2006 by which the police officer has power to give the seized property to the custody of any person executing the bond undertaking a produce it before the Court as and when required. Originally the police officer after seizure could give the property seized to a supardar only when it cannot be conveniently transported to the Court. By virtue of the Amendment Act, 2005 over and above, the police officer may give custody of the seized property to a supardar,—

(a) When there is difficulty in securing proper accommodation for the custody of such property, or

(b) When the continued retention of the property in police custody may not be considered necessary for the purpose of investigation.

Proviso has been added to sub-section (3) of s. 102 by which power has been conferred upon the police officer to sell by auction the seized property under order of Superintendent of Police and for doing so it can take recourse to ss. 457 and 458 of the Code as far as practicable for net proceeds of such sale. But it is only when the property is subject to speedy and natural decay and if the person entitled to possess is unknown or absent and the value of such property is less than five hundred rupees the power of sale can be exercised.

Notes on Clause 13 of the Amendment Bill, 2005 making amendment to s. 102, which is incorporated as s. 13 of the Amendment Act, 2005 (25 of 2005), read as follows:

> ‘The proposed amendment of sub-section (3) of s. 102 is intended to give creative discretion to the police for releasing seized property, when there is difficulty in securing accommodation for the custody of the property, or where the continued retention of the property in the police custody is not considered necessary for the purposes of investigation.
>
> It is also proposed that if the seized property is of perishable nature and the value of such property is less than five hundred rupees and if the person entitled to the possession of such property is unknown or absent, the police be empowered to sell such property by auction under the orders of the Superintendent of Police. For this purpose, a

provision is being inserted to sub-section (3) of s. 102 of the Code.'

2. Scope of s. 102 : Police officer's power to seize on suspicion.—

1. This section corresponds to *old* s. 550, after splitting up the two sentences of that section into two sub-section (1)-(2).
2. The section has been transposed to the present Chapter in accordance with the recommendations of the Commission. [28]

3. Conditions for the application of sub-section (1).—

A seizure of property under this sub-section shall be valid only under the following conditions:

(i) The seizure may be made only by a 'Police officer', but he may be of any rank.

(ii) The property must be—

(a) alleged or suspected to have been stolen; or

(b) found under circumstances which create a suspicion of the commission of an offence. [29]

A seizure was, therefore, held to be illegal where there were no materials on the record to show that there was any information to the Police officer about the commission of any offence or that he was investigating the charge of an offence, [30] nor any report of such seizure made under sub-section (2). [31] Where the property is neither alleged to be stolen nor is there any suspicion of its being involved in the commission of any offence, the Police has no power to seize it under the present section merely because a proceeding under s. 107 of the Code was pending over the property, namely, harvested paddy. [32] The power of police officer to seize property during investigation is limited to property suspected of commission of offence. In the case involving Italian Marines in the murder of two Indian fishermen, an Italian ship on voyage was carrying on board Naval Military Protection Squad and during the course of voyage two Marines of the squad caused death of two Indian fisherman. In course of investigation of the crime the police restrained the Italian ship from continuing its voyage. Investigation revealed that the vessel was neither object of crime nor was suspected of commission of offence. Refusing permission to the ship to continue its voyage on the ground that it could be seized by police under *s.102, Cr PC* was held by the Supreme Court to be improper. The court allowed the ship to sail out after safeguarding presence of ship, crew members and Marines as and when required by the court.[33]

4. Freezing of bank accounts.—

The freezing of all bank accounts of a Mutt and its connected bodies merely on the ground that the head of the said Mutt was involved in a murder case is not proper. [34]

In case of disproportionate asset the police have no power for attachment of bank accounts without coming to the conclusion that the amount in the bank account was out of disproportionate income of the accused. Though attachment orders were issued five years back, such an order without complying with the provisions of *s. 102 Cr.P.C.* are liable to be set aside.[35]

The amplitude of s. 102 of the Code is very wide. It empowers the police officers to seize properties not only of the accused but of any of his relatives or any other person who could be concerned with the said property. The only requirement is that it must be found under the circumstances which create suspicion about the commission of an offence. Thus, the seizure of the Bank account was held permissible even though the Society was not cited as an accused. [36]

5. Procedural mandatory requirement under s. 102 required.—

When the police did not follow the mandatory requirements of s. 102 of the code and had not given any notice and even prohibitory order was not served on the petitioner, the prohibitory order preventing the petitioner from operating the bank account is liable to be quashed. [37]

When the bank account was a sequel to the discovery of the commission of the offence, it was not sufficient to attract s. 102 of the Code as it cannot be since the bank account had been traced or discovered in the circumstances which have made the police aware of the commission of an offence. [38]

But there is no such inflexible rule that in the absence of independent witnesses being associated with search and seizure, the seizure cannot be relied upon. [39]

6. 'Police officer'.—

1. *See* p. 186, *ante* .
2. The power being expressly given to a Police officer, cannot be delegated by him. [40]
3. The expression would not include officers of other Departments on whom powers of a Police officer have been conferred for specific purposes, *e.g.* , a Customs officer, under *s. 115, Customs Act* s, 1962; [41] or an Excise Officer under the Central Excises and Salt Act . [42]
4. In some cases it has been suggested that a Police officer can exercise this power only when he is engaged in the investigation of an offence, [43] or where he is empowered to investigate an offence under the Code or any other law. [44] But there is no such limitation in the section. A Police officer's exercise of this power while passing along the road, [45] has been upheld.
5. The power under the present section may also be used to seize stolen or incriminating article when a person is arrested without warrant by a Police officer, under s. 41(1)(d) [*old*

s. 54(1)(iv)], *ante* , and then his person is searched under s. 51(1),[46] *ante* [47] and the article is found on such search.

7. 'Seize'.—

This word implies the power to take physical possession of the property. [48] It would not, therefore, include an order like the following—

A prohibitory order upon a Bank [49] or Postal [50] authority or Railway [51] not to pay certain money or deliver any property [52] to the Petitioner.

8. 'Stolen property'.—

1. If any other property has been mixed up with stolen property, such other property cannot be seized under this section. [53]
2. As to 'stolen property', *see* s. 410, I.P.C.

9. 'Property'.—

It would include currency. [54]

The bank account of the accused or any of his relatives is "property." [55]

10. 'Any offence'.—

These words include a non-cognizable offence, [56] or an offence under the Defence of India Rules, [57] provided the suspicion exists.

11. Sealing of seized property.—

1. Police Rules require that the seized articles should be sealed and kept in safe custody. [58]
2. Tampering of the seal while in custody and non-examination of the officer in whose custody it was kept may lead to acquittal. [59]
3. But there is no statutory requirement that the seal used by the Investigating Officer must be immediately handed over to a private person, or that where it is so done, the prosecution must fail if such private person is not examined and the prosecution relies upon the evidence of the Investigating Police officer. [60]

12. Analogous provisions.—

1. Under the present section, no warrant is required by any Police officer to seize anything suspected to have been stolen or involved in the commission of any offence. The seizure may be made at *any* time and irrespective of any investigation into any offence, or the arrest of any suspect.
2. When a Police officer arrests, without warrant, a person in whose possession any property is found which may be suspected to be stolen or with respect to which an offence is suspected to have been committed [s. 41(1)(d),*ante*], his person may be searched by such Police officer and such offending articles may be seized from him [s. 51(1),*ante*]. [61]

   Though the present section may be utilised in seizing stolen property when a person is searched under s. 51(1), the power conferred by the present section is a general power which may be used by the Police even where there is no arrest under s. 41 or a search under s. 51. [62]

3. The power to make an investigation under s. 165 has been held to include the power to make a seizure, without warrant. [63] But such seizure can be made only when a Police officer is authorised to investigate an offence and the search and seizure is necessary for the purposes of such investigation. [64]

   There is no such limitation under the present section.

4. Under s. 94(1)(c), a Police officer may have a power to seize stolen property or property involved in the commission of any of the offences specified in sub-section (2) of the section provided—

   (a) a search-warrant to that effect has been issued by any of the Magistrates specified in s. 94(1);

   (b) the Police officer is an officer above the rank of a constable;

   (c) apart from stolen property, a property may be seized only if it relates to any of the offences specified in s. 94(2) [see *ante*].

If a Police officer has to execute a warrant outside the jurisdiction of the Court issuing it, he has to follow the procedure laid down in s. 79 (see *ante*). The power of seizure under the present section is not subject to any such limitation; he can seize the offensive property wherever he finds it within India. [65]

The power under the present section, therefore, is much wider than under any of the foregoing provisions. [66]

5. Where none of the foregoing provisions is applicable, a seizure of movable property would be illegal. [67]

13. Search and seizure under Armed Forces (Special Provisions) Act, 1958.—

The provisions of s. 93 and s. 102 of the Code governing the search and seizure have to be followed during the course of search and seizure conducted under s. 4(d) of the Armed Forces (Special Provisions) Act, 1958. [68]

14. Seizure of animals under Prevention of Cruelty to Animals Act, 1960.—

The Police officer has the power to seize animals on suspicion of commission of an offence under the *Prevention of Cruelty to Animals Act, 1960* or under ancillary provisions irrespective of the fact that most of the offences under the above Act are non-cognizable offences and the police have power to seize animals under s. 102 of the Code. [69]

15. Sub-section (2) : Report to officer-in-charge of Police station.—

1. This sub-section requires that when the seizure under sub-section (1) is made by a subordinate Police officer he must, forthwith, report this fact to the officer in charge of his Police station.

2. In some cases, it has been held that a Police officer, making a seizure under the present section, should make a seizure list, [70] as if it were a seizure or a search under s. 100(5). But that provision applies only where there has been a *search* ; in s. 102, there may not be any search and there is no other condition excepting the duty to report. The obligation to give a receipt will, of course, arise when the recovery is made under s. 51(1) [see *ante*]; and a search-list has to be prepared when the power of seizure under the present section is exercised in course of investigation under s. 165(4).

16. Sub-section (3) : Duty to report to a Magistrate.—

1. A duty to report to a Magistrate, [71] in such cases, was expressly laid down in *old* s. 523(1); but that provision was omitted in *new* s. 457, to which *old* s. 523 corresponds on the assumption that such a requirement otherwise existed in the Code. [72] A *lacuna was thus created* . [73]
2. That lacuna [74] has been removed by inserting sub-section (3) by Act 45 of 1978. It is now clear from sub-section (3) that—

   (a) A Police officer making a seizure under s. 102(1) must forthwith report it to a Magistrate.

   (b) Even where the Police officer does not so report, it would be for the Magistrate to call for such report on receipt of information from the application of the claimant and to dispose of the claim made in the application. [75]

   (c) Such Magistrate must make an order as to the disposal of such property without delay, [76] and it is he alone who can make such order regarding its disposal under s. 457 and not any officer of the Police. [77]

(d) There is nothing in s. 457 [*old* s. 523] to prevent the Police from returning a property to the person from whom it had been seized under s. 165, if they find, after investigation, that the seizure was unjustified; [78] but after the Magistrate is moved, the Police must hold the property subject to the orders of the Magistrate, [79] who has jurisdiction to pass an order under that section so long as the property remains with the Police. [80]

(e) When the property seized is such that it cannot be conveniently transported to the Court, or where there is difficulty in securing proper accommodation for the custody of such property or when the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, the police officer seizing the property may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to further orders of the Court as to the disposal of the same.

(f) The supurdar of such property has two obligations namely:—

(1) to produce the property before the Court as and when required;

(2) to give effect to any further orders of the Court as to the disposal.

This means if the Court directs the *supurdar* to deliver the property to any person, the supurdar has to give effect to such order by delivering the property to him on obtaining proper receipt and to report compliance to the Court.

17. Power of police officer to sell the seized property.—

The proviso added to the *Code of Criminal Procedure* (Amendment) Act, 2005 (25 of 2005) with effect from 23.06.2006 has given power to hold auction sale of the seized property by police after obtaining orders from the Superintendent of Police concerned when such seized property—

(a) is subject to speedy and natural decay; and

(b) if the person entitled to possession of such property is unknown or absent; and

(c) the value of such property is less than rupees five hundred.

3. Under s. 457(1),*post* , the Magistrate is to return it to ‘the person entitled to the possession’ of the property, where he can be ascertained.

These words are not identical with the words ‘the person from whose possession the property was taken’. Hence, the person from whose possession it was taken is not entitled to a return of the seized property in all cases. It is within the competence and discretion of the Magistrate, having regard to the circumstances in which it had been seized, to make an inquiry as to the person entitled to its possession, even where the person from whose possession it was taken is ascertainable. [81]

4. Of course, *ordinarily* , the property should be returned to the accused from whose possession it had been recovered, if he is acquitted of the offence [82] regarding the property or his possession is not found to have been otherwise unlawful. [83] But it cannot be returned to him where it is proved that he had acquired it dishonestly [84] or his possession was unlawful though he was not liable for the offence for which the investigation or seizure had been made; [85] or where he says that the property does not belong to him [86] or he was only in temporary custody; [1] or where the property is liable to be seized under some other law. [2]

   In such exceptional cases, the Magistrate should conduct an inquiry as to who is entitled to possession (not ownership) [3] of the property though it had been seized from the possession of a known person.

5. The jurisdiction of the Magistrate is to make a summary inquiry as to the right to possess and not to determine [4] or confer any title. [5] The right of the party aggrieved by such order is to move against such order in revision, [6] to the High Court [7] or approach the Civil Court whose jurisdiction remains unaffected by s. 457. [8]

6. No order for return of the property can be made under s. 457 where the property has been lost while in Police custody. [9] In such a case, the party must be left to his civil remedy. If any. [10]

7. Where the person entitled to possession of an article is *not* known, the Magistrate should issue a Proclamation under sub-section (2) of s. 457.

18. Where Magistrate can order delivery of seized property pending investigation.—

Under s. 523(1) of the *old* Code, it was open to the Magistrate to make an order for disposal of the property as soon as the seizure was reported by the Police, and even during pendency of the investigation. [11] , [12]

But as a result of redrafting of s. 523(1) in the *new* s. 457(1), it may suggest that the power of the Magistrate to make an order for delivery of the property would be available only after conclusion of the inquiry or trial and in respect of such property as is not produced before the Court during such inquiry or trial. A single Judge of the Allahabad High Court [13] has, thus, held that under s. 457(1), the Magistrate has no power to order delivery of the property during investigation. This would mean that when property is seized by the Police under s. 51 or s. 102(1), the property must, in any case, remain in the custody of the Police till the conclusion of the inquiry or trial, because the other provisions in this behalf, *viz* ., ss. 451-452 of the *new* Code also refer to the pendency or conclusion of a trial. [14] This is an obvious lacuna in the *new* Code. [15]

19. Return of seized Car.—

Once a car has been seized in connection with a case, it can be returned to the person entitled to the said car only under the order of a competent Court. [16]

20. Revision.—

Revision lies from an order made under s. 457. [17] , [18]

21. Suit for recovery of property to whom it may have been delivered under s. 457.—

1. Section 457(1) authorises the Magistrate to return the property to the person 'entitled to the possession thereof'. If the person to whom it is delivered under his order is not entitled to it, the real owner may bring a suit against him for recovery of the property on declaration of his title. [19]

2. The State or the Police officer concerned cannot be held liable in such suit for the consequences of the wrong order made by the Magistrate. [20]

22. Suit for loss of property in police custody.—

1. Where stolen property is seized by the Police and kept in the *Malkhana* , and from there it is lost, it has been held that no suit for damage lies against the Government [21] or the Police officer [22] for wrongful loss of property, even where negligence of the officers is proved, because the seizure, in exercise of powers conferred by the Code, was a sovereign act, for which the State cannot be held liable, [23] so long as such sovereign immunity is not abrogated by statute. [24]
2. But the Supreme Court [25] has upheld a decree for return of a seized property or its value where it had been sold as unclaimed property, in the following circumstances:

   (i) the State, in its written statement, did not take the plea of sovereign immunity for the negligence of its servants;

   (ii) the property, having been seized under the *Customs Act* on the ground of suspicion of some offence having been committed under the Act, which order was liable to be set aside on appeal; hence, there was an implied statutory obligation to return the property seized;

   (iii) if the property was lost while in the custody of the State pending such appeal, the owner could recover the value of the property from the State, under his statutory right to return, after his appeal had been allowed, and the Appellate Tribunal had ordered its return. [26] [*See* , further, under s. 457,*post* .]

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25 Sub-s. (3), inserted by Act No. 45 of 1978, S. 10 (w.e.f.18-12-1978).

26 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 13 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

27 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 13 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

28 41st Rep. of the Commission, paras 7, 10.

29 *State of Maharashtra v. Tapas D. Neogy,* (1999) 7 SCC 685 [*LNIND 1999 SC 826*] : 1999 SCC (Cri) 1352 : 1999 Crlj 4305 .

30 *Sashi Bhusan v. State,* AIR 1957 Cal 148 [*LNIND 1956 CAL 153*](para 8).

31 *Sashi Bhusan v. State,* AIR 1957 Cal 148 [*LNIND 1956 CAL 153*](para 8).

32 *Dolansana v. Narjitsana,* AIR 1971 Manipur 39 (para 4).

33 *M.T. Enrica Lexie v. Dorramma,* AIR 2012 SC 2134 [*LNIND 2012 SC 290*]: (2012) 6 SCC 760 [*LNIND 2012 SC 290*] : (2012)3 SCC (Cri) 309 [*LNIND 2012 SC 290*].

34 *Jayendra Saraswathy v. State of T.N.,* (2005) 8 SCC 771 [*LNIND 2005 SC 815*] : AIR 2006 SC 6 [*LNIND 2005 SC 815*]: (2005) 4 Crimes 332 .

35 *Sashi Kant v. State,* 2008 Crlj 148 Bom (DB) .

36 *Adarsh Co-operative Housing Society Ltd. v. Union of India,* 2012 Crlj 520 Bom (DB) .

37 *R. Chandrasekhar v. Inspector of Police,* 2003 Crlj 294 Mad .

38 *R. Chandrasekhar v. Inspector of Police,* 2003 Crlj 294 Mad .

39 *State* *v.* *Navjot* *Sandhu,*
(2005) 11 SCC 600
[LNIND 2005 SC 580]
2005 SCC (Cri) 1715
2005 Crlj 3950
AIR 2005 SC 3820
[LNIND 2005 SC 580].

40 *Emp.* *v.* *Bithal,*
AIR 1914 Oudh 230.

41 *Asstt. Collector* *v.* *Tilak,*
AIR 1969 Delhi 301.

42 *Badaku* *v.* *State of Mysore,*
AIR 1966 SC 1746
[LNIND 1966 SC 68]:
(1966) 3 SCR 698
[LNIND 1966 SC 68]:
1966 Crlj 1353.

43 *Sashi Bhusan* *v.* *State,*
AIR 1957 Cal 148
[LNIND 1956 CAL 153](para 8).

44 *Namichand* *v.* *Supdt.,*
AIR 1963 Manipur 35 (para 18).

45 Cf. *Krishnan* *v.* *Enforcement Officer,*
AIR 1968 Ker 208
[LNIND 1967 KER 225](para 8); *State v. Laik Singh,*
AIR 1968 All 170 172
[LNIND 1967 CAL 95]; *Enforcement Officer v. S.I.,*
(1971) 77 Crlj 1019.

46 Cf. *Kasturi* *v.* *State of U.P.,*
AIR 1965 SC 1039
[LNIND 1964 SC 245](para 8):
(1965) 2 Crlj 144; *Premchand v. State of W.B.,*
(1961) 66 CWN 470 (474).

47 *Textile Traders* *v.* *State of U.P.* (II),
AIR 1960 All 405 407; *Malnad Construction v. State,*
(1994) Crlj 645.

48 *Textile Traders* *v.* *State of U.P.* (II),
AIR 1960 All 405 407; *Malnad Construction v. State,*
(1994) Crlj 645.

49 *Textile Traders* *v.* *State of U.P.* (II),
AIR 1960 All 405 407; *Malnad Construction v. State,*
(1994) Crlj 645.

50 *Textile Traders v. State of U.P.* (II), AIR 1960 All 405 407 ; *Malnad Construction v. State,* (1994) Crlj 645 .

51 *Emp. v. Bithal,* AIR 1914 Oudh 230 .

52 *Emp. v. Bithal,* AIR 1914 Oudh 230 .

53 *Sada* , (1910) 11 Crlj 19 (Lah) .

54 Cf. *Krishnan v. Enforcement Officer,* AIR 1968 Ker 208 [LNIND 1967 KER 225](para 8); *State v. Laik Singh,* AIR 1968 All 170 172 [LNIND 1967 CAL 95]; *Enforcement Officer v. S.I.,* (1971) 77 Crlj 1019 .

55 *State of Maharashtra v. Tapas D. Neogy,* (1999) 7 SCC 685 [LNIND 1999 SC 826] : 1999 SCC (Cri) 1352 : 1999 Crlj 4305 .

56 *Babulal v. Prov. Of Orissa,* AIR 1954 Orissa 225 .

57 *Bhimji v. Emp.,* AIR 1944 Nag 366 368 .

58 *Piara Singh v. State of Punjab,* (1982) Crlj 1176 (P & H) (para 26) FB.

59 *State of Rajasthan v. Daulat Ram,* AIR 1980 SC 1314 : (1980) 3 SCC 303 : 1980 Crlj 929 .

60 *Piara Singh v. State of Punjab,* (1982) Crlj 1176 (P & H) (para 26) FB.

61 Cf. *Emp. v. Benimadhab,* AIR 1936 Nag 143 .

62 Cf. *Kasturi v. State of U.P.,* AIR 1965 SC 1039 [LNIND 1964 SC 245](para 8) : (1965) 2 Crlj 144 .

63 *Ajay* *v.* *Raj* *Bahadur,* AIR 1967 Cal 421 [LNIND 1965 CAL 67]; *Ramankutty v. State,* AIR 1970 Ker 191 [LNIND 1969 KER 149].

64 *Ramankutty* *v.* *State,* AIR 1970 Ker 191 [LNIND 1969 KER 149].

65 *Emp.* *v.* *Bithal,* AIR 1914 Oudh 230.

66 *Sada* , (1910) 11 Crlj 19 (Lah).

67 *Dolansana* *v.* *Narjitsana,* AIR 1971 Manipur 39 (para 4).

68 *Naga People's Movement of Human Rights v. Union of India,* AIR 1998 SC 431 [LNIND 1997 SC 1511]: (1998) 2 SCC 109 [LNIND 1997 SC 1511] : 1998 SCC (Cri) 514 [LNIND 1997 SC 1511].

69 *Pinjrapole, Deodar* *v.* *Chakaram,* 1998 Crlj 1337 Guj.

70 *Namichand* *v.* *Supdt.,* AIR 1963 Manipur 35 (para 16).

71 *Suraj* *v.* *State,* AIR 1967 Guj 126 [LNIND 1966 GUJ 101](para 4); *Jaggi v. Mohapatra,* (1977) Crlj 1902 (para 5) Or.

72 41st Rep. of the Commission, Vol. I, para 43.27.

73 Cf. *Anwar* *v.* *State* *of* *U.P.,* AIR 1976 SC 680 [LNIND 1975 SC 336](para 4).

74 Cf. *Anwar* *v.* *State* *of* *U.P.,* AIR 1976 SC 680 [LNIND 1975 SC 336](para 4).

75 41st Rep. of the Commission, paras 7, 10.

76 *Shroff,* in re., AIR 1942 Mad 319 .

77 *Kasturi Lal v. State of U.P.,* AIR 1965 SC 1039 1043 : (1965) 2 Crlj 144.

78 *Ramankutty v. State,* AIR 1970 Ker 191 [*LNIND 1969 KER 149*].

79 *Ramankutty v. State,* AIR 1970 Ker 191 [*LNIND 1969 KER 149*].

80 *Ramlal v. Hiralal* , AIR 1953 MB 241 .

81 *Ahmed v. Commr.,* AIR 1970 Mad 220 [*LNIND 1968 MAD 208*]; *Mohan Singh v. State,* (1966) Crlj 233 .

82 *Chinnavadu* , AIR 1942 Mad 726 [*LNIND 1942 MAD 231*].

83 *Arjun* , AIR 1965 Orissa 198 .

84 *Chinnavadu* , AIR 1942 Mad 726 [*LNIND 1942 MAD 231*].

85 *Arjun* , AIR 1965 Orissa 198 .

86 Cf. *Chandmal v. State of Rajasthan,* (1971) 77 Crlj 137 (Raj) .

1 *Muneswar v. State,* AIR 1956 All 199 [*LNIND 1955 ALL 193*].

2 *Fakkir v. State,* AIR 1967 Ker 282 [*LNIND 1966 KER 204*]; *Ganeshilal v. Satyanarain,* AIR 1958 MP 39 [*LNIND 1957 MP 22*].

3 *Ganeshilal* *v.* *Satyanarain,* AIR 1958 MP 39 [*LNIND 1957 MP 22*].

4 *Enforcement Officer* *v.* *S.I.,* (1971) 77 Crlj 1019 (Ker) .

5 *Premchand* *v.* *State of W.B.,* (1961) 66 CWN 470 (472-73).

6 *Premchand* *v.* *State of W.B.,* (1961) 66 CWN 470 (472-73).

7 *Suraj* *v.* *State,* AIR 1967 Guj 126 [*LNIND 1966 GUJ 101*](para 4); *Jaggi v. Mohapatra,* (1977) Crlj 1902 (para 5) Or.

8 *Premchand* *v.* *State of W.B.,* (1961) 66 CWN 470 (472-73).

9 Cf. *Basavva* *v.* *State of Mysore,* (1971) 77 Crlj 566 (Mys) .

10 Cf. *Basavva* *v.* *State of Mysore,* (1971) 77 Crlj 566 (Mys) .

11 *Ganeshilal* *v.* *Satyanarain,* AIR 1958 MP 39 [*LNIND 1957 MP 22*].

12 *Ramankutty* , AIR 1970 Ker 191 [*LNIND 1969 KER 149*].

13 *Nanno* *v.* *Sher Md.,* (1976) Crlj 1783 (All) .

14 It is to be noted, however, that the object of the Law Commission behind the redrafting of the provision was not to curtail the power of the Magistrate under the existing provision in Section 523(1), but to make it more comprehensive so as to include property seized under other provisions of the Code, *e.g.* , *old* Sections 165- 166 [41st Rep., Vol. I, p. 342]. Whether such an interpretation of Section 457(1) is possible was not considered by the Single Judge.

15 It is to be noted, however, that the object of the Law Commission behind the redrafting of the provision was not to curtail the power of the Magistrate under the existing provision in Section 523(1), but to make it more comprehensive so as to include property seized under other provisions of the Code, *e.g.* , *old* Sections 165- 166 [41st Rep., Vol. I, p. 342]. Whether such an interpretation of Section 457(1) is possible was not considered by the Single Judge.

16 *George v. State of Kerala,* AIR 1998 SC 1376 [LNIND 1998 SC 325]: (1998) 4 SCC 605 [LNIND 1998 SC 325] : 1998 Crlj 2034 .

17 *Enforcement Officer v. S.I.,* (1971) 77 Crlj 1019 (Ker) .

18 *Tribani v. Ellen,* (1971) 77 Crlj 1775 (UP) .

19 *Premchand v. State of W.B.,* (1961) 66 CWN 470 (472-73).

20 *Premchand v. State of W.B.,* (1961) 66 CWN 470 (472-73).

21 *Kasturi Lal v. State of U.P.,* AIR 1965 SC 1039 1048 : (1969) 2 Crlj 144.

22 *Premchand v. State of W.B.,* (1961) 66 CWN 470 (472-73).

23 *Kasturi Lal v. State of U.P.,* AIR 1965 SC 1039 1048 : (1969) 2 Crlj 144.

24 *Premchand v. State of W.B.,* (1961) 66 CWN 470 (472-73).

25 *State of Gujarat v. Menon,* AIR 1967 SC 1885 [LNIND 1967 SC 193]: (1967) 3 SCR 938 [LNIND 1967 SC 193] [This decision can be reconciled with the decision in *Kasturi Lal's* case (*supra*) only on the ground that there was, in the instant case (an implied), statutory liability to return, on which, however, the Court's finding was not so clear.]

26 *State of Gujarat v. Menon,* AIR 1967 SC 1885 [LNIND 1967 SC 193]: (1967) 3 SCR 938 [LNIND 1967 SC 193] [This decision can be reconciled with the decision in *Kasturi Lal's* case (*supra*) only on the ground that there was, in the instant case (an implied), statutory liability to return, on which, however, the Court's finding was not so clear.]

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

S. 103
Magistrate may direct search in his presence.

Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

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1. Scope of s. 103 : Search by Magistrate made in his presence.—

1. This section reproduces *old* s. 105 without change.

2. It enables a Magistrate to direct a search to be made in his presence, instead of issuing a search warrant, [27] under s. 93 or 94. But the power is to be exercised judicially [28] and, though the power may be used during a police investigation, [29] if the Magistrate is present, a Magistrate should not allow himself to be a part of or to witness a 'police trap'. [30] But there is nothing wrong if the Magistrate himself lays a trap and the Police appear on the scene at the time of the search in the presence of witnesses. [31]

3. Though the power under this section is available to any Magistrate, it is limited by the words at the end of the section—'of which he is competent to issue a search-warrant'. Hence, a Magistrate would be competent to make the search under this section only if he would have been competent to issue a search-warrant under s. 93 or 94, as may be applicable to the circumstances of the case. [32]

4. It extends to the search of *any* place where the Magistrate may be present, [33] and to make a 'general search' under s. 93(1)(c) [see *ante*] but not to search a man's *person* . [34]

5. But the search must be made in his presence. If he sits outside the room to be searched and sends a Police officer to enter it and search, it would not be a search authorised by the present section. [35]

2. Immunity of Magistrate.—

Since a Magistrate Acts under this section judicially, the protection under the Judicial Officers' Protection Act, 1850 [Author's *Commentary on the Constitution of India*, Latest Edition] would be available to him, so that no action for damages would lie against him, even if he act s without jurisdiction, but in good faith.

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27 *Clarke v. Brojendra,* (1912) 39 Cal 953 (PC) .

28 *Clarke v. Brojendra,* (1912) 39 Cal 953 (PC) .

29 *Clarke v. Brojendra,* (1912) 39 Cal 953 (PC) .

30 *Shiv Bahadur v. State of U.P.,* AIR 1954 SC 322 355 : 1954 SCR 1098 : 1954 Crlj 910 .

31 *Moolraj v. State of H.P.,* AIR 1955 HP 51 53 : 1956 Crlj 801.

32 *Clarke v. Brojendra,* (1912) 39 Cal 953 (PC) .

33 *Clarke v. Brojendra,* (1912) 39 Cal 953 (PC) .

34 *Sunder v. State of U.P.,* AIR 1956 SC 411 .

35 *Emp. v. Kaitan,* (1907) 31 Bom 438.

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CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

S. 104
Power to impound document, etc., produced.

Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

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1. Scope of s. 104 : Power of Court to impound document.—

This section reproduces *old* s. 104, without any change.

2. 'Impounding' : Meaning of.—

1. To impound means to keep a document in the custody of its officer, by an order of a Court.
2. The usual mode of impounding is to endorse the word 'impounded' on the document, affixing the signature of the presiding officer thereto. [36] Such endorsement may be made also on a document which already forms a part of the record. [37]
3. The effect of such endorsement is that it shall not be allowed to pass out of the custody of the Court except by its written order.

3. Conditions for exercise of the power to impound.—

The power under the present section may be exercised on the following conditions:

(a) It may be exercised by 'any' Court.

But it cannot be done after a Magistrate or Judge has become *functus officio* , after having delivered judgment in the case in which the document was produced. [38]

(b) A Court may impound only a document which has been produced before itself. Thus, a Magistrate cannot impound a document before another Magistrate, even though the latter may be subordinate to him. [39] But is would include any proceeding, *e.g.* , a document filed in appeal or revision.

(c) The document must have been produced under the provisions of the Code, [40] *e.g.* , (i) in response to a summons to produce, under s. 91(1) [see *ante*]; or (ii) voluntarily tendered in evidence.

Where there is no such intention, mere physical production of a document through mistake or the like would not justify its impounding. [41]

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36 *Puran* *Chand* *v.* *Emp.,* AIR 1942 Lah 257 .

37 *Puran* *Chand* *v.* *Emp.,* AIR 1942 Lah 257 .

38 *Chunduri* *v.* *Kumaraswami,* AIR 1937 Mad 763 764 .

39 *Byas* *v.* *Emp.,* (1904) 1 Crlj 1960 (All) .

40 *Byas* *v.* *Emp.,* (1904) 1 Crlj 1960 (All) .

41 *Narayan* , in re., AIR 1943 Nag 97 98 .

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CHAPTER VII
PROCESSES TO COMPEL THE PRODUCTION OF THINGS

D.—Miscellaneous

S. 105
Reciprocal arrange ments regarding processes.

(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or

(d) a search-warrant,

[issued by it shall be served or executed at any place—

(i) within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in Clause (a) or Clause (c) has been so served, the provisions of Section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii) in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf.]

(2) Where a Court in the said territories has received for service or execution—

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing or to produce it, or

(d) a search-warrant,

[43]

[issued by—

(i) a Court in any State or area in India outside the said territories;

(ii) a Court, Judge or Magistrate in a contracting State,

it shall cause the same to be served or executed] as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where—

(i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by Sections 80 and 81;

(ii) a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by Section 101;

[44]

[*Provided* that in a case where a summons or search warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search warrant through such authority as the Central Government may, by notification, specify in this behalf.]

1. History of s. 105.—

I. In 1940, it was held [45] that there was no provision in the Code of 1898 for enforcing the attendance in the Courts of British India of persons from outside British India and *vice versa* , without recourse to extradition proceedings. In view of this decision, s s. 93A-93C were inserted in the Code by Act 14 of 1941. While s s. 93A-B provided for service of summons and warrants issued by Courts in the Indian States within British India, s. 93C provided for service by an Indian Court of summons and warrants issued by Courts in the Indian States.

II. The foregoing sections were consolidated and substituted by s. 93A, after Independence, by Act 1 of 1951, substituting the word 'States' by the 'State of Jammu & Kashmir and the State of Manipur'. Later, Manipur was omitted by Act 68 of 1956. s. 93A, as substituted, in 1951, used the expressions 'internal Court' and 'external Court' to refer to a Court to which the Code extended and to a Court outside such territory, respectively.

III. The foregoing sections were replaced by s. 105A by Act 26 of 1958, to amplify the scope of s. 93A in the following respects:

Sections 93A- 93C related only to service of summons and warrants. There was no provision for service in the rest of India of search warrants or summons to produce a document or thing issued by a Court in Jammu & Kashmir, and *vice versa* . These processes also were, therefore, included in s. 105A. [46]

The constitutionality of s. 105A was upheld by the Delhi High Court. [47]

IV. *New Code.*— The present section substitutes *old* s. 105A with the following changes:

(a) Section 105A(1) extended not only to Courts of Jammu & Kashmir but also to 'Courts established or continued under the authority of the Central Government in any area outside the said territories', thereby referring to the courts established under the *Foreign Jurisdiction Act, 1947* . The Commission[48] observed that since there was no such Court under the *Foreign Jurisdiction Act* existing at the time of the Report, "there is no need to refer to them". Hence, the words 'Courts established .... said territories' have been omitted.

(b) Instead, the wording has been changed to refer to courts within the 'territories to which the Code extends' and courts 'outside the said territories'. The latter expression will now refer to Courts in the State of Jammu & Kashmir, and in the State of Nagaland and the tribal areas in Assam [*vide* s. 1(2),*ante*].

(c) To clarify the scope of the section, the marginal note 'Special rules regarding processes in certain cases' has been changed to 'Reciprocal arrangements regarding processes'.

V. The *new* section has been amended by Act 32 of 1988. [49]

2. Scope and object of s. 105.—

1. It provides for reciprocal arrangements for service of processes under the Code between the Courts to which the Code applies and the Courts in India to which the Code does not apply [s. 1(2),*ante*].

2. These processes are—(a) Summons to an accused person; (b) Warrant for the arrest of an accused person; (c) Summons for production of a document or thing; (d) Search warrant.

3. Sections 67- 68 [*old* ss. 73-74] make provisions for processes issued by a Court of India to be served outside its territorial jurisdiction. But the operation of these sections being confined to the territory of India, [50] such processes may be sent for service only to another Court within India, within whose jurisdiction the person to be served resides (see *ante*).

4. Hence, some other provision is required for service of processes between a Court in a territory to which the Code extends and a Court in territory of India to which the Code does *not* extend. A territory of the latter category, such as Jammu & Kashmir, is not a 'foreign' State to which extradition proceedings relate, [51] because Jammu & Kashmir or Nagaland are parts Art. 1[(]1[)] of the *Constitution of India* . That need is provided for by the present section.

3. Sub-section (1) : Process to be served in a territory of India to which the Code does not extend.—

1. This sub-section relates to the case where a process of any of the four kinds specified in Clauses (a)-(d), issued by an Indian Court, is to be served in a territory to which the Code does not extend, *e.g.* , Jammu & Kashmir or Nagaland or the tribal areas in Assam.

2. It says that in such a case, the Indian Court should send in duplicate the summons or warrant to the presiding officer of the Court of such outside territory, *e.g.* , Jammu & Kashmir, for service or execution.

3. In the case of a summons, when it is received back after service, the endorsement of service by such outside Court shall be admissible in proof of due service, with a presumption of correctness, under s. 68(1) [see *ante*].

4. Since the Code does not extend to the Court to which such process is sent for execution, s. 105 cannot possible made any provision in that behalf. That Court will, in the matter of service, be governed by its own laws.

4. Sub-section (2) : Process issued by a Court outside the territories to which the Code applies.—

1. This sub-section deals with the converse case where a process issued by a Court in a territory, say, Jammu & Kashmir, is to be served in India.

2. In such a case, if a Court governed by the Code receives it for service or execution, it has to serve it in the same manner as if it were a process received from another Court within the territories to which this Code applies. In other words, the provisions of s s. 78, 80-81, 101 shall apply to the service of such process even though it were issued by a Court of a territory to which the Code does not apply.

3. But in order to apply this sub-section, the authority issuing it must be a 'Court'. Hence, this sub-section cannot apply where the Commissioner of Police of a State in India receives a warrant for service from the Inspector-General of Police of Jammu & Kashmir. [52]

4. The Court receiving such process has jurisdiction to serve it within its own jurisdiction; it cannot get it executed outside its jurisdiction, according to s. 78, which power belongs only to a Court issuing the process. [53] It follows that, while issuing the process, the Court outside the territories governed by the Code must direct it to the particular Court within whose jurisdiction the process is to be served.

5. Processes issued by a Court of Jammu & Kashmir for service in India.—

1. Before 1941, a process issued by a Court in Jammu & Kashmir could not be executed in India. [54]

2. After the introduction of s. 93A- 93C in 1941, a process issued by a Court in Jammu & Kashmir could be executed by a Court in India, [55] excepting a search-warrant or a summons to produce.

3. Under s. 105A, as introduced in 1958, all processes, including search-warrant, could be executed by a Court in India, as if they were issued by a Court in India to which the Code extends. [56]

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42 Subs. by *Cr.P.C.* (Amendment) Act, 1988 (32 of 1988), S. 2 (w.e.f.25-5-1988).

43 Subs. by *Cr.P.C.* (Amendment) Act, 1988 (32 of 1988), S. 2 (w.e.f.25-5-1988).

44 Ins. by *Cr.P.C.* (Amendment) Act, 1988 (32 of 1988), S. 2 (w.e.f.25-5-1988).

45 *Emp.* *v.* *Karimbux,* AIR 1940 Sind 154 .

46 41st Rep. of the Commission, Vol. I, para 7.11.

47 *Durlab* *v.* *Dt.* *Magistrate,* (1974) 80 Crlj 1182 (Del) .

48 41st Rep. of the Commission, Vol. I, para 7.11.

49 Changes made by the Code of Crp (Amendment) Act 32 of 1988.

50 *Nga Ba v. Emp.,*
AIR 1927 Rang 248 .

51 Cf. *State of W.B. v. Jugal,*
AIR 1969 SC 1171 [
LNIND 1969 SC 8]:
(1969) 1 SCC 440 [
LNIND 1969 SC 8] :
1969 Crlj 1559 .

52 Cf. *Ramnath* , in re.,
AIR 1953 Mad 953 .

53 Cf. *P.K. Roy v. State,*
(1954) 59 CWN 300 .

54 Cf. *Ramnath* , in re.,
AIR 1953 Mad 953 .

55 Cf. *Ramnath* , in re.,
AIR 1953 Mad 953 .

56 *Durlab v. Dt.*
(1974) 80 Crlj 1182 (Del) .

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-A. Definitions.

In this Chapter, unless the context otherwise requires—

(a) "contracting State" means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;

(b) "identifying" includes establishment of a proof that the property was derived from, or used in the commission of an offence;

(c) "proceeds of crime" means any property derived or obtained directly or indirectly, by any person as a result of criminal activity (including crime involving currency transfers) or the value of any such property;

(d) "property" means property and assets of every description whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets derived or used in the commission of an offence and includes property obtained through proceeds of crime;

(e) "tracing" means determining the nature, source, disposition, movement, title or ownership of property.

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1 Chapter VII-A containing Sections 105 -A to 105-L ins. by the *Code of Criminal Procedure* (Amendment) Act, 1993 (Act 40 of 1993), Section 2 (w.e.f. 20.7.1994).

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-B.
Assistance in securing transfer of persons.

(1) Where a Court in India, in relation to a criminal matter, desires that a warrant for arrest of any person to attend or produce a document or other thing issued by it shall be executed in any place in a contracting State, it shall send such warrant in duplicate in such form to such Court, Judge or Magistrate through such authority, as the Central Government may, by notification, specify in this behalf and that Court, Judge or Magistrate, as the case may be, shall cause the same to be executed.

(2) Notwithstanding anything contained in this Code, if, in the course of an investigation or any inquiry into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that the attendance of a person who is in any place in a contracting State is required in connection with such investigation or inquiry and the Court is satisfied that such attendance is so required, it shall issue a summons or warrant, in duplicate, against the said person to such Court, Judge or Magistrate, in such form as the Central Government may, by notification, specify in this behalf, to cause the same to be served or executed.

(3) Where a Court in India, in relation to a criminal matter, has received a warrant for arrest of any person requiring him to attend or attend and produce a document or other thing in that Court or before any other investigating agency, issued by a Court, Judge or Magistrate in a contracting State, the same shall be executed as if it is the warrrant received by it from another Court in India for execution within its local limits.

(4) Where a person transferred to a contracting State pursuant to sub-section (3) is a prisoner in India, the Court in India or the Central Government may impose such conditions as that Court or Government deems fit.

(5) Where the person transferred to India pursuant to sub-section (1) or sub-section (2) is a prisoner in a contracting State, the Court in India shall ensure that the conditions subject to which the prisoner is transferred to India are complied with and such prisoner shall be kept in such custody subject to such conditions as the Central Government may direct in writing.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-C.
Assistance in relation to orders of attachment or forfeiture of property.

(1) Where a Court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of Sections 105-D to 105-J (both inclusive).

(2) Where the Court has made an order for attachment or forfeiture of any property under sub-section (1), and such property is suspected to be in a contracting State, the Court may issue a letter of request to a Court or an authority in the contracting State for execution of such order.

(3) Where a letter of request is received by the Central Government from a Court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Court, as it thinks fit, for execution in accordance with the provisions of Section 105-D to 105-J (both inclusive) or, as the case may be, any other law for the time being in force.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-D.
Identifying unlawfully acquired property.

(1) The Court shall, under sub section (1), or on receipt of a letter of request under Sub-section (3) of Section 105-C, direct any police officer not below the rank of Sub-Inspector of Police to take all steps necessary for tracing and identifying such property.

(2) The steps referred to in sub-section (1) may include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.

(3) Any inquiry, investigation or survey referred to in sub-section (2) shall be carried out by an officer mentioned in sub-section (1) in accordance with such directions issued by the said Court in this behalf.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-E.
Seizure or attachment of property.

(1) Where any officer conducting an inquiry or investigation under Section 105-D has a reason to believe that any property in relation to which such inquiry or investigation is being conducted is likely to be concealed, transferred or dealt with in any manner which will result in disposal of such property, he may make an order for seizing such property and where it is not practicable to seize such property, he may make an order of attachment directing that such property shall not be transferred or otherwise dealt with, except with the prior permission of the officer making such order, and a copy of such order shall be served on the person concerned.

(2) Any order made under sub-section (1) shall have no effect unless the said order is confirmed by an order of the said Court, within a period of thirty days of its being made.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-F.
Management of properties seized or forfeited under this Chapter.

(1) The Court may appoint the District Magistrate of the area where the property is situated, or any other officer that may be nominated by the District Magistrate, to perform the functions of an Administrator of such property.

(2) The Administrator appointed under sub-section (1) shall receive and manage the property in relation to which the order has been made under sub-section (1) of Section 105-E or under Section 105-H in such manner and subject to such conditions as may be specified by the Central Government.

(3) The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is forfeited to the Central Government.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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S. 105-G.
Notice of forfeiture of property.

(1) If as a result of the inquiry, investigation or survey under Section 105-D, the Court has reason to believe that all or any of such properties are proceeds of crime, it may serve a notice upon such person (hereinafter referred to as the person affected) calling upon him within a period of thirty days specified in the notice to indicate the source of income, earnings or assets, out of which or by means of which he has acquired such property, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties, as the case may be, should not be declared to be proceeds of crime and forfeited to the Central Government.

(2) Where a notice under sub-section (1) to any person specifies any property as being held on behalf of such person by any other person, a copy of the notice shall also be served upon such other person.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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S. 105-H.
Forfeiture of property in certain cases.

(1) The Court may, after considering the explanation, if any, to the show-cause noticeissued under Section 105-G and the material available before it and after giving to the person affected (and in a case where the person affected holds any property specified in the notice through any other person, to such other person also) a reasonable opportunity of being heard, by order, record a finding whether all or any of the properties in question are proceeds of crime:

Provided **that if the person affected (and in a case where the person affected holds any property specified in the notice through any other person such other person also) does not appear before the Court or represent his case before it within a period of thirty days specified in the show-cause notice, the Court may proceed to record a finding under this sub-section *ex-parse* on the basis of evidence available before it.**

(2) Where the Court is satisfied that some of the properties referred to in the show-cause notice are proceeds of crime but it is not possible to identify specifically such properties, then, it shall be lawful for the Court to specify the properties which, to the best of its judgment, are proceeds of crime and record a finding accordingly under sub-section (1).

(3) Where the Court records a finding under this section to the effect that any property is proceeds of crime, such property shall stand forfeited to the Central Government free from all encumbrances.

(4) Where any shares in a company stand forfeited to the Central Government under this section, then, the company shall, notwithstanding anything contained in the *Companies Act, 1956* (1 of 1956) or the articles of association of the company, forthwith register the Central Government as the transferee of such shares.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-I.

Fine in lieu of forfeiture.

(1) Where the Court makes a decla ration that any property stands forfeited to the Central Government under Section 105-H and it is a case where the source of only a part of such property has not been proved to the satisfaction of the Court, it shall make an order giving an option to the person affected to pay, *in lieu* of forfeiture, a fine equal to the market value of such part.

(2) Before making an order imposing a fine under sub-section (1), the person affected shall be given a reasonable opportunity of being heard.

(3) Where the person affected pays the fine due under sub-section (1), within such time as may be allowed in that behalf, the Court may, by order, revoke the declaration of forfeiture under Section 105-H and thereupon such property shall stand released.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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S. 105-J.
Certain transfers to be null and void.

Where after the making of an order under sub-section (1) of Section 105-E or the issue of a notice under Section 105-G, any property referred to in the said order or notice is transferred by any mode whatsoever such transfers shall, for the purposes of the proceedings under this Chapter, be ignored and if such property is subsequently forfeited to the Central Government under Section 105-H, then, the transfer of such property shall be deemed to be null and void.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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S. 105-K.
Procedure in respect of letter of request.

Every letter of request, summons or warrant, received by the Central Government from, and every letter of request, summons or warrant, to be transmitted to a contracting State under this Chapter shall be transmitted to a contracting State or, as the case may be, sent to the concerned Court in India in such form and in such manner as the Central Government may, by notification, specify in this behalf.

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

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[CHAPTER VII-A RECIPROCAL ARRANGEMENTS FOR ASSISTANCE IN CERTAIN MATTERS AND PROCEDURE FOR ATTACHMENT AND FORFEITURE OF PROPERTY

S. 105-L.
Application of this Chapter.

The Central Government may, by notification in the Official Gazette, direct that the application of this Chapter in relation to a contracting State with which reciprocal arrangements have been made, shall be subject to such conditions, exceptions or qualifications as are specified in the said notification.]

Chapter VII-A, containing ss. 105A-105L was inserted by the *Cr PC* (Amendment) Act, 1993, in order to achieve the following objects:

(1) the transfer of persons between the contracting States including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings;

(2) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been committed in the other country; and

(3) enforcement of attachment and forfeiture orders issued by a Court in the other country.

In the Statements of Objects and Reasons to the

Amending Act 40 of 1993 there is a clear reference that:

"The Government of India had signed an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfers) and terrorist funds, with a view to check the terrorist act ivities in India and the United Kingdom."

In a case where the offences alleged were local offences like gambling and offences under the *IPC* . The police filed an application for proceeding under Chapter VII-A of the Code and for attachment and forfeiture of property. The trial court allowed the application. Against the order of forfeiture the accused moved the High Court where the order passed invoking the provisions of Chapter VII-A of the Code was quashed. The State of Madhya Pradesh moved the Supreme Court against the order of the High Court. Confirming the order of the High Court the Supreme Court held that the said provisions are not ordinary law of the land, and are applicable only to offences which have international ramifications. The provisions impose stringent measures for attachment and forfeiture of properties earned by offences, by way of reciprocal arrangement in contracting countries. The provisions there under are supplemental to special provisions contained in SS.166-A and 166-B, and have nothing to do with investigation into offences in general. It was further held that the alleged offences were local, and even the properties were not shown to be connected with crimes mentioned in the Object and Reasons of the *Amending Act* . In the result it was held that the orders of the High Court quashing the forfeiture proceedings did not call for any interference. [2]

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1 41st Rep. of the Commission, Vol. I, paras. 17.3-4; 47.2.

2 *State of M.P. v. Balram Mihani,* (2010) 2 SCC 602 [*LNIND 2010 SC 130*] : (2010) 2 SCC 1070 (cri) . See also *J. Jayalalitha v. State,* 2002 Crlj 3026 Mad ; *Union of India v. W.N. Chadha* , 1993 Supp (4) SCC 260 : 1993 SCC (cri) 1171 ; *Bhinka v. Charan Singh,* AIR 1959 SC 960 [*LNIND 1959 SC 77*]: 1959 Crlj 1223 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

An analysis of Chapter VIII.—

1. The object of the provisions in Chapter VIII is the prevention of offence as distinguished from the punishment of accused persons for offences that have been committed. [1] With this end in view, various powers have been conferred on Courts and Magistrates.

2. The provisions in this Chapter [2] which empower Courts and Magistrates to obtain security from a person to prevent him from committing offences in the future are of two kinds:

A. Security for keeping the peace [s s. 106-107]; and B. Security for good behaviour [s s. 108-110]. The rest of the Chapter contains procedural provisions [3] [s s. 111-124].

A. *Security for keeping the peace* : A Security of this category may be demanded in two classes of cases—(a) From an accused, on conviction [s. 106]; (b) in other cases [s. 107].

(a) Under s. 106, security for keeping the peace on conviction can be demanded only by the following Courts:

A Court of Sessions or the Court of a Judicial Magistrate of the first class.

The security may be demanded when—

(i) such Court has convicted a person accused of an offence of rioting, affray, offences committed by a member of an unlawful assembly, assault, criminal force, mischief, offence causing a breach of the peace, or criminal intimidation; and

(ii) such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace.

The Court may, in its discretion, in such a case at the time of passing the sentence, order such person to execute a bond, with or without sureties, for keeping the peace, for such period, not exceeding three years, as it thinks fit to fix.

(b) The procedure for demanding security for keeping the peace *otherwise* than on conviction is laid down in s. 107.

Only Executive Magistrates are competent to exercise this power.

Such Magistrate may proceed under s. 107 when he is *informed* that any person is likely to commit a breach of the peace or to do any wrongful act that may probably occasion a breach of the peace and the Magistrate is of opinion that there is sufficient ground for proceeding under this section. If he is so satisfied he may require such person to *show cause* why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period not exceeding *one year* as the Magistrate thinks fit to fix.

In his order requiring such person to show cause, the Magistrate shall set forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be enforced and the number, character and the class of sureties, if any, required [s. 111].

If such person is not present in Court, the Magistrate shall issue summons requiring him to appear before the Court. If, however, it appears to the Magistrate on a report of the police or other information that a breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may, instead of issuing summons, issue a warrant for his arrest [s. 113].

When such person is brought before the Court, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken and to take such further evidence as may appear necessary [s. 116].

If, upon such inquiry, it is proved that it is necessary for keeping the peace that the person in respect of whom the enquiry is made should execute a bond with or without sureties, the Magistrate shall make an order accordingly. On the contrary, if it is proved that it is not necessary to require a bond for keeping the peace from such person, the Magistrate shall discharge such person, or release him if he is in custody [s s. 117-118].

B. *Security for good behaviour* : The provisions relating to security for good behaviour are contained in s s. 108 to 110.

(i) Section 108 provides for a security for good behaviour to be demanded in the case of the following classes of offences—

(a) dissemination of any seditious matter;

(b) dissemination of any matter causing enmity between classes or outraging religious feelings of any class;

(c) dissemination of any matter concerning a Judge which amounts to criminal intimidation, or defamation under the *Indian Penal Code* ;

(d) making, publishing *etc* ., of obscene matter.

If a Judicial Magistrate of the first class has information that there is within his local jurisdiction, any person who either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate or abets dissemination of any matter which involves any of the offences specified above, and the Magistrate is of opinion that there is sufficient ground for proceeding, such Magistrate may require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period not exceeding one year as the Magistrate thinks fit to fix [s. 108].

(ii) Under s. 109, similar order for showing cause may be made by a Judicial Magistrate of the first class when he receives information that—

Any person is taking precautions to conceal his presence within such Magistrate's local jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any *cognizable* offence.

(iii) Under s. 110, a similar order to show cause may be made by a Judicial Magistrate of the first class when he receives information that any person within the local limits of his jurisdiction—

(a) is by habit a robber, house-breaker, thief, or forger; or

(b) is by habit a receiver of stolen property knowing the same to have been stolen; or

(c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property; or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief or any offence under ss. 489A-489D, I.P.C.; or

(e) habitually commits, or attempts to commit, or abets the commission of offences involving a breach of the peace; or

(f) habitually commits an anti-social offence under any of the specified Act s; or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community.

In short, s. 110 is aimed at 'habitual offenders'.

In each of the three classes of cases [s s. 108-110], the order to show cause will be followed by inquiry and a *final order* requiring the bond or discharging the person as in the case under s. 107, stated above.

Nature of the proceedings under s s. 106-110.—

1. Though the incidents of the various proceedings under this chapter [s s. 106-110] differ in material respects, there is one aspect in common, namely, that all these proceedings have for their object the prevention, and not the punishment of a crime.

2. The other common aspect of all these proceedings is that they are not obligatory but confer a discretionary power on the specified Court or Magistrate to exercise such power in the specified circumstances. [4] Being an interference with the liberty of the individual, such power must be exercised judicially, and strictly in accordance with the procedure laid down in the relevant sections. [5]

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1 *Jaffar* *v.* *Emp.*, AIR 1936 All 859 ; *Madhu Limaye* , AIR 1971 SC 2486 [*LNIND 1970 SC 501*]: (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

2 *See* summary of Chapter VIII in *Dwarka v. State of Maharashtra,* (1977) Crlj 120 (121-23) Bom.

3 The division of the Chapter into three heads—A, B, C, has been omitted.

4 *Emp.* *v.* *Vijai,* AIR 1948 Nag 28 .

5 *Ram Charan v. State,* AIR 1953 All 375 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 106
Security for keeping the peace on conviction.

(1) When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.

(2) The offences referred to in sub-section (1) are—

(a) any offence punishable under Chapter VIII of the *Indian Penal Code (45 of 1860)* , other than an offence punishable under Section 153A or Section 153B or Section 154 thereof;

(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation;

(d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.

(3) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(4) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.

1. Scope of s. 106.—

This section corresponds to *old* s. 106, with a number of important changes, as recommended by the Commission:

(i) Instead of mentioning the offences with respect to which the power under this section may be exercised in sub-section (1), they have been placed together in sub-section (2), with the addition of Clauses (b)-(d).

(ii) The newly added offences in Clauses (b)-(c) are assault, criminal force, mischief and criminal intimidation, to remove the controversy under the *old* section as to which offences involved breach of the peace. [6] In Clause (a), s. 143 has been added in the Bill as presented after the Rep. of the Joint Committee, [7] s. 149 has been added on the recommendation of the Commission, [8] so that security may now be demanded from a person convicted under s. 149, "whatever may be the nature of the offence committed by the other members or members of the unlawful assembly".

(iii) Clause (d), newly added, brings within the purview of the section any offence, other than those specified in Clauses (a)-(c), if it has either caused or was intended or was likely to cause a breach of the peace. This clause has been added on the recommendation of the Commission [9] in order to clarify what was meant by the expression 'offence involving breach of the peace' in *old* sub-section (1). Since everything is specifically enumerated in the *new* sub-section (2), the expression 'involving a breach of the peace' has been omitted from sub-section (1).

(iv) Under the *old* section, abetment of the offence of criminal intimidation was excluded; [10] but abetment of all the offences specified in the *new* sub-section (2) would now come under sub-section (1), as redrafted.

(v) The offence which is newly *excluded* from the operation of the section is : s. 153B, I.P.C. as recommended by the Joint Committee, [11] so that the exceptions now would be s s. 153A, 153B and 154, I.P.C. Other offences specified in Chapter VIII will come under the present section including s s. 143[12] and 149, [13] which were excepted from the *old* s. 106(1).

(vi) As to the Courts empowered by the section, the High Court, the District Magistrate and a Sub-divisional Magistrate have been omitted, as these will not try cases under the *new* Code.

(vii) The words 'proportionate to his means' have been omitted from sub-section (1).

2. Object of s. 106.—

The provisions of this section are aimed at persons who are a danger to the public by reason of the commission by them of certain offences [14] and are intended to prevent them from committing such offences in future. [15]

3. Sections 106 and 107- 110.—

1. Under s. 106, the order for executing a bond to keep the peace can be made only by a Court while convicting a person of any of the offences specified in sub-section (2) of the section.

Proceedings under s s. 107-110, on the other hand, are independent proceedings initiated whether

by the Police or by private individuals on the ground of likelihood of breach of the peace and partake of *some* characteristics of a regular trial, [16] though not constituting a 'trial', [17] which results in either conviction or acquittal.

2. While an order under s. 106(1) can be passed only by a Court of Session or a Judicial Magistrate of the 1st Class, while trying a case, an order under s. 107(1) can be made only by an Executive Magistrate (*see,* further, under s. 107,*post*).

4. Sub-section (1) : Conditions for the making of an order under.—

An order demanding a bond under s. 106(1) shall be valid only if the following conditions are satisfied:

(i) The Courts which may exercise this power are—

(a) A Court of Session.

(b) A Court of a Magistrate of the first class [sub-section (1)]. (As to the procedure to be followed by a second class Magistrate, *see* p. 463, *below*).

(c) Any superior Court exercising appellate or revisional power from the cases involving the offences enumerated in sub-section (2) [sub-section (4)].

(ii) The order may be made only by that one of the aforesaid Courts which passes the sentence of conviction, [18] as the trial, appellate or revisional Court. If such order is passed by any other Court or Magistrate, the order shall be void [s. 461(c): *old* s. 530(c)].

(iii) Such order may be passed only where a person has been *convicted* of any of the offences specified in sub-section (2) [19] or abetment thereof; and (2) the Court is *also* [20] of the opinion that the circumstances are such that security must be taken from the accused for keeping the peace.

Hence, an order under this section cannot be made where the accused is acquitted of the offence mentioned in sub-section (2), or where, though there may be a finding, no sentence of conviction of such offence has been passed. [21] For the same reason, no order under s. 106 can be passed against the complainant or a witness, though the Court can proceed against such persons under other sections of this Chapter. [22] Where there is no conviction but there are strong grounds for apprehension of a future breach of the peace, the Magistrate should proceed under s. 107.

A conviction at a summary trial by first class Magistrate, having jurisdiction, shall attract the present section. [23]

(iv) The order under this section may be passed only at the time of passing sentence on such person. [24]

Of course, if that stage is passed, the Court may proceed under s. 107[25] complying with the requirements of that section.

As sub-section (4) provides, an appellate or revisional Court may also make an order under s. 106, while confirming the sentence of conviction or passing such sentence itself [*see* sub-section (4), *post*].

(v) The bond that may be required under s. 106 is one for keeping the peace, and not for good behaviour. [26] An order for furnishing security for good behaviour under s. 106 would be illegal. [27]

(vi) The period mentioned in the bond for keeping the peace shall not exceed three years. In fixing the period, the Court should have regard to the gravity of the offence. [28]

(vii) As Form no. 12 of the 2nd Schedule shows, the order under s. 106(1) must specify the amount for which the bond is to be executed; otherwise it cannot be complied with.

(viii) It is only an enabling provision and confers a discretionary power on the Court to make such order, in its discretion, having regard to the circumstances of the case.

(ix) Since under the *new* Code, Executive Magistrates have ceased to have the power under this section, there cannot be any doubt that power conferred by this section is not administrative but judicial; and that the Magistrate must apply his mind judicially as to the necessity for an order under this section. [29]

(x) The words 'at the time of passing the sentence' show that the order under s. 106(1) should form part of the decision of the trying Court in the case where the accused is convicted, and must be based on the evidence recorded in that case, and not on the statement of the prosecution. [30] But the facts put in the evidence would not justify an order under s. 106(1) unless the offence of which the accused is convicted falls under sub-section (2). [31] On the other hand, mere conviction of such offence would not be enough unless from the facts disclosed in the evidence, the Court is satisfied that a security for keeping the peace should be taken from the accused. [32] Previous conviction may be a consideration, provided it is proved according to s. 298 [*old* s. 511] [33] or is admitted. [34]

5. Procedure for Magistrate of the second class.—

1. A Magistrate of the second class, not being mentioned in sub-section (1), has no power to make an order under this section, and if he makes any order demanding security for keeping the peace, his order shall be void [s. 461(c), *old* s. 530(c)].
2. If, in any case before him after hearing evidence, he forms the opinion that the accused ought to be required to execute a bond under s. 106, he should follow the procedure laid down in s. 325,*post* [*old* s. 349], namely, that—

(a) The second class Magistrate should not convict the accused or pass any sentence for the substantive offence. [35]

(b) He should record his opinion as to the need for an order under s. 106 and then forward his proceedings and the accused to the Chief Judicial Magistrate to whom he is subordinate, and the latter will then try the case and dispose of it under sub-section (3) of s. 349, with or without an order under s. 106. In short, the second class Magistrate must submit the *whole case* to the Chief Judicial Magistrate. [36]

6. Circumstances where the power should not be exercised.—

Since the power conferred by sub-section (1) is discretionary and can be exercised only if the Court is of the opinion that there is likelihood of a further breach of the peace, the Court should not make such order demanding security in the absence of extraordinary circumstances, in the following cases—

(i) Where the offence of which the accused is convicted is a petty offence, [37] , [38] and a failure to comply with the demand for a bond might involve detention in jail for a period longer than the punishment for the substantive offence. [39]

(ii) Where the period for which the accused is convicted is so long that danger of renewal of hostilities following the release of the accused becomes unlikely. [40] , [41]

(iii) Where the accused is guilty of a solitary instance of disorderly conduct, there being no evidence from which a likelihood of its being repeated in future could be inferred. [42]

(iv) Where the result of binding down the accused would be to prevent him from exercising his lawful right [43] *e.g.* , from resisting any attempt by the complainant to interfere with his possession. [44] The proper order, in such cases, would be to bind down both parties under s. 107,*post* . [45]

7. Whether the opinion or the reasons therefor should be recorded.—

1. Though the section itself does not require that the Court making an order under sub-section (1) must record his opinion as to the necessity for such order, the consensus of judicial opinion is that the Court should record such opinion, [46] , [47] as well as the reasons [48] therefor, in order to enable an appellate or revisional Court to find out whether the subordinate Court had applied his mind to the requirements of the section. [49] , [50]

2. There is a group of cases in which it has been held that where the offence is not specifically mentioned in Clauses (a)-(c) of the present sub-section (2), but is considered to come within the present Clause (d), by reason of the intention, probability or actual causing of a breach of the peace, the Magistrate should, in his order, record a finding as to the facts which attract Clause (d). [51]

3. But omission to record reasons would *not* vitiate the order if the records contain ample materials to satisfy the superior Court. [52] , [53]

8. Form of bond to be executed.—

See Form no. 12, 2nd Schedule, *post* . No court-fee is payable on the bond.

9. Measure of security.—

1. In the *old* s. 106(1), the measure of security that could be demanded from an accused was limited by the words 'for a sum proportionate to his means', from which it was held that where excessive security, disproportionate to the means of the accused, was demanded, the order would, instead of acting as a preventive, operate as a punishment, making the accused liable to undergo further imprisonment, which was not intended by the section. [54]

2. Though the aforesaid words have been omitted from s. 106(1), while the words 'shall not be excessive' are retained in Proviso (b) to s. 117, it does not appear that any material change in s. 106(1) is intended because the object of the section (not being punitive) remains as under the *old* Code.

10. 'With or without sureties'.—

1. It is in the discretion of the Magistrate to require the bond to be executed by sureties, apart from the accused. [55] But is has no power to direct that a particular person must be a surety. [56]

2. The sureties, by their bond, guarantee that the person bound over will keep the peace, and in the event of the failure of the latter to do so, the surety must pay the penalty stipulated in the bond, [57] in addition to the amount that may be recovered from the person bound over (usually called the 'principal'). [58]

11. Cash deposit in lieu of bond.—

The Court has the power under s. 445 [*old* s. 513], to permit the accused to make a cash deposit or a deposit of Government promissory notes in lieu of the bond required under s. 106(1).

12. Sub-section (2) : Offences in relation to which the power under sub-section (1) may be exercised.—

In order that an order demanding security to keep the peace may be made under this section, the person must be convicted of any of the following offences:

I. Sections 143- 145, I.P.C. (being member of unlawful assembly). Under the *old* Code, an order for security under s. 106 could *not* be made in case of conviction under s. 143, I.P.C., [59] because that section was excepted by sub-section (1) of s. 106.

> *Change made by the new section.*— That exception has been omitted by the new sub-section (2)(a), and any offence punishable under Chapter VIII of the I.P.C., excepting only s. 153A, 153B and 154, have been brought within the field of the present section [see *ante*]. Hence, mere membership of an unlawful assembly [s. 143] would be an offence coming under Clause (a) of the present sub-section,—together with its aggravated forms under s s. 144-145, I.P.C. [60]

II. Sections 147- 148, I.P.C. (rioting), [61] for the reason just stated.

III. Section 149, I.P.C. (offence committed by a member of an unlawful assembly). *Old* s. 106(1) excepted the offence under s. 149, I.P.C. From this an anomalous conclusion was reached in some cases that even though an order under s. 106(1) could be made in case of a conviction for rioting, no such order could be made where a person was convicted of the offence of rioting, as a member of an unlawful assembly (*i.e.* , under s. 147, read with s. 149, I.P.C.). [62]

Change made by the new Code.— The foregoing situation has been sought to be avoided by omitting s. 149 from the exception clause in sub-section (2)(a) of the present section. The result of this omission is that an order under the present section can now be made against an accused person convicted under s. 149, read with any other section, [63] and irrespective of the nature of the offence of which other members of the unlawful assembly may have been convicted. [64]

IV. Sections 150- 153, I.P.C. (aggravated offences relating to unlawful assembly).

V. Sections 155- 158, I.P.C. (aggravated offences relating to unlawful assembly or rioting).

VI. Section 160, I.P.C. (affray).

VII. Sections 506- 507, I.P.C. (criminal intimidation). [65]

VIII. Any offence which *consists of or includes* assault, criminal force, mischief, *i.e.* , offences under—

(a) Sections 323- 325, I.P.C. (hurt), [66] , [67] which involves assault.

(b) Sections 352- 358, I.P.C. (offences involving assault or criminal force). [68]

(c) Rape (ss. 375-376, I.P.C.) or attempt thereof, as involving assault. [69]

(d) Sections 426- 440, I.P.C. (offences involving mischief). Under the *old* section, the offence of mischief was not specifically mentioned and it was held that it did *not* 'involve a breach of the peace'. Hence, no order under the present section could be made in case of conviction for mischief. [70]

Change made by the new section.— By mentioning 'mischief' specifically in sub-section (2)(b), the *new* section is extended to conviction of any of the offences relating to mischief.

13. Clause (d) : 'Any other offence which caused ....breach of the peace'.—

1. There was no such clause under the *old* section. Any offence, other than those specifically mentioned in sub-section (2), could come under the present section only if it could be brought under the expression 'other offence *involving* a breach of the peace'. Hence, a serious controversy arose as to the interpretation of the word 'involves':

I. In a number of cases, it was held that this word referred only to those offences in the I.P.C. of which breach of the peace was an ingredient. [71] This view led to the anomalous result that though the seduction of a married woman might provoke or lead to a breach of the peace, it would not 'involve' a breach of the peace within the ambit of the present section. [72]

II. A wider view was taken in other cases, holding that it comprised not only offences in which breach of the peace was an essential ingredient, but also offences where there was an *intention* to commit a breach of the peace, *e.g.* , criminal trespass; [73] and also offences which as a matter of experience, were known to lead to a breach of the peace, *e.g.* , removal of a landmark (s. 434, I.P.C.]; [74] as well as offences which have act ually led to a breach of the peace, *e.g.* , wrongful confinement committed in an open space, but attended with violence.

III. *Change made.*— The Commission accepted this latter interpretation and the *new* section which has been drafted, in accordance with their recommendation, [75] includes within the purview of s. 106—

(a) Any offence which actually caused a breach of the peace; [76]

(b) Any offence which was intended [77] to cause a breach of the peace;

(c) Any offence which was known to be likely to cause a breach of the peace. [78]

The under-mentioned cases [79] , [80] would, therefore, offer interpretation to the foregoing text of *new* Clause (d). Thus,—

(a) Though breach of the peace is not an essential ingredient of the following offences, they would come under s. 106 when committed with the *intention* to commit a breach of the peace:

Theft [s. 379, I.P.C.]; [81] Criminal trespass [s. 441, I.P.C.]; [82] , [83] intentional insult [s. 504, I.P.C.]. [84]

Where there is an intention to commit a breach of the peace, *e.g.* , by an armed assembly, s. 106 would be attracted even though no such breach actually occurred, *e.g.* , because the other party fled away. [85]

(b) As instances of offences which are *known to be likely* to cause a breach of the peace may be mentioned—

(i) Assault [86] or use of abusive language [87] at a public place.

(ii) Removal of landmark [s. 434, I.P.C.]. [88]

(iii) Criminal trespass with the object of having illicit intercourse with the complainant's wife. [89]

(iv) Intentional insult [s. 504, I.P.C.]. [90]

(c) Again, even though an offence may not *per se* involve any breach of the peace, it may come under Clause (d) of the present sub-section, if it *actually causes* breach of the peace, involving violence or threat thereof, [91] *e.g.* ,—

Defamation; [92] seduction of a married woman. [93]

The words 'breach of the peace', not being qualified by any other words, would comprehend such breach in a private as in a public place [94] and may be caused by angry words as by deeds. [95]

14. Sub-section (3) : Termination of the Bond.—

1. The bond executed under order made under sub-section (1) shall become void and inoperative under the following circumstances:

(i) If the conviction of the offence referred to in sub-sections (1)-(2), on which the order is founded, is set aside on appeal [sub-section (3)].

(ii) The Appellate Court may cancel the order under sub-section (1), even where it affirms the conviction for the substantive offence [s. 386(e), *post* ,— *old* s. 523(1)(d)]. [96]

(iii) If the order under s. 106(1) is quashed on revision. [97]

2. Where the order is set aside or the bond terminates, the accused must be released from custody forthwith, if he had been detained for not executing the bond. [98]

15. Sub-section (4) : Power of a Court of appeal or revision.—

1. The power conferred on the appellate or revisional Court, by the present sub-section, is an independent power over a conviction even though the inferior Court itself had no power to make an order under s. 106(1),*e.g.* , a Magistrate of the second class. [99]
2. The appellate or revisional Court need not issue any notice to show cause before making an order under this section. [1]
3. But this power may be exercised only where—

(a) The offence for which the accused was convicted by the lower Court was one of those specified in sub-section (2), in respect of which the order under sub-section (1) could be made. [2]

(b) The appellate or revisional Court either confirms the sentence of conviction passed by the lower Court or itself passes such sentence. The superior Court need not call upon the accused to show cause why an order under the present section should not be made. [3] It can, in the same manner as the trial Court, make such order while passing a sentence of conviction. [4]

But the superior Court has no jurisdiction to maintain the order under s. 106 passed by the lower Court or to direct that the security should continue, where it sets aside the conviction [*see* sub-section (3), *ante*].

(c) The substantive sentence must be appealable, apart from the order under s. 106, in order to give jurisdiction to the appellate Court [Proviso to s. 376: *old* s. 415].

4. Where the appellate Court passes an order under s. 106 where the trial Court had not, such order of appellate Court does not amount to an 'enhancement of the sentence' for any purpose. [5] Hence, the appellate Court may make an order demanding security under this section even after the substantive punishment awarded by the trial Court has already been undergone. [6]

5. Under s. 386(e) [*old* s. 423(d)], it is competent for the appellate Court to quash the order under s. 106, even while upholding the conviction from the substantive sentence. [7]

6. It has been held by the Bombay High Court that the words 'at the time of passing sentence' in sub-section (1) do not apply to an appellate or revisional Court, so that they can make an order for security even after disposal of the appeal or revision case. [8] This view seems to be doubtful because—(i) so far as the Court of revision is concerned, the words in sub-section (4)—'when exercising its powers of revision' cannot allow it to make such order after the revision proceeding has been over; (ii) as regards a Court of appeal, it is debatable whether it is to be an 'appellate Court', with respect to a particular appeal, after it has been disposed of.

16. Revision.—

Revision lies from an order under s. 106 [s. 397], and the revisional Court may interfere on the ground that the offence for which the accused has been convicted is not one under sub-section (2) of this section; [9] or that the discretion has been exercised improperly; [10] or there has been an illegality, *e.g.* , a previous conviction which has been relied upon, has not been duly proved under s. 298 [*old* s. 511]. [11]

17. Appeal.—

1. By reason of Proviso (i) to s. 376 [*old* s. 415], an order under s. 106 is not, of itself appealable, [12] but it would be appealable where the substantive sentence, in the case where such order has been passed, is appealable. [13] The appeal, in the case of a Magistrate, lies to the Sessions Judge [s. 374(3)(c): *old* s. 408].

2. There is no appeal even from an order of imprisonment for failure to give security, [14] under s. 122(1). But in such a case, a power to reduce the security called for has been given to superior Courts, by s. 123(2) [*old* s. 124(2)].

6 41st Rep. of the Commission, Vol. I, paras 8.1-8.4.

7 The Bill of 1970, as presented after the Rep. of the Joint Committee [Notes on Clauses, p. 242].

8 41st Rep. of the Commission, Vol. I, paras 8.1-8.4.

9 41st Rep. of the Commission, Vol. I, paras 8.1-8.4.

10 37th Rep. of the Commission, para 280.

11 Rep. of the Joint Committee, p. (xi) on Cl. 106.

12 Notes on Clause, p. 242.

13 Rep. of the Joint Committee, p. (xi) on Cl. 106.

14 *Vaman* , (1909) 11 Bom LR 743 .

15 *Jaffar* *v.* *Emp.,* AIR 1936 All 859 .

16 41st Rep. of the Commission, Vol. I, paras 8.1-8.4.

17 *Venkata* *v.* *Emp.,* AIR 1920 Mad 337 (FB) .

18 *Mahmudi* v. Ali, (1894) 21 Cal 622 .

19 *Raj* *Narain* *v.* *Bhagabat,* (1907) 35 Cal 315 .

20 *Arumugha* , in re., [AIR 1943 Mad 169 *LNIND 1942 MAD 289*].

21 *Subal* *v.* *Ramkanai,* (1899) 25 Cal 623 .

22 *Emp. v. Kader,* (1882) 5 Mad 380.

23 *Emp. v. Lachman,* (1886) AWN 181.

24 *Ram* *Adhin* , AIR 1924 All 230 231 .

25 *Ram* *Adhin* , AIR 1924 All 230 231 .

26 *Bakhsish* *Singh* *v.* *State,* AIR 1952 Pepsu 138 .

27 *Mahabir* , AIR 1918 All 95 .

28 *Arumugha* , in re., AIR 1943 Mad 169 [*LNIND 1942 MAD 289*].

29 *Saroja* , in re., AIR 1955 Mad 596 [*LNIND 1954 MAD 212*].

30 *Arumugha* , in re., AIR 1943 Mad 169 [*LNIND 1942 MAD 289*].

31 Cf. *Raj* *Narain* *v.* *Bhagabat,* (1908) 35 Cal 315 .

32 *Bakhsish* *Singh* *v.* *State,* AIR 1952 Pepsu 138 .

33 *Emp.* *v.* *Abdul,* (1916) 43 Cal 1128 .

34 *Wahid* , in re., AIR 1949 Mad 499 .

35 *Mahmudi* v. Ali, (1894) 21 Cal 622 .

36 *Rahimuddi* , (1908) 35 Cal 1093 .

37 *Arumugha* , in re., [AIR 1943 Mad 169 *LNIND 1942 MAD 289*].

38 *Saroja* , in re., [AIR 1955 Mad 596 *LNIND 1954 MAD 212*].

39 *Bharpur* *v.* *State,* AIR 1955 NUC 735 (Punj) .

40 *Bakhsish* *Singh* *v.* *State,* AIR 1952 Pepsu 138 .

41 *Bharpur* *v.* *State,* AIR 1955 NUC 735 (Punj) .

42 *Arumugha* , in re., [AIR 1943 Mad 169 *LNIND 1942 MAD 289*].

43 *Nandakumar* , (1907) 11 CWN 1128 (1132).

44 *Nahar* , (1907) 11 CWN 840 (841).

45 *Bepin* *v.* *Pranakul,* (1907) 11 CWN 176 (177).

46 *Arumugha* , in re., [AIR 1943 Mad 169 *LNIND 1942 MAD 289*].

47 *Saroja* , in re., [AIR 1955 Mad 596 *LNIND 1954 MAD 212*].

48 *Naziruddin* , (1933) 55 All 850 .

49 *Arumugha* , in re., [AIR 1943 Mad 169 *LNIND 1942 MAD 289*].

50 *Saroja* , in re., [AIR 1955 Mad 596 *LNIND 1954 MAD 212*].

51 Cf. *Rajaram* *v.* *Govinda,* (1924) 25 Crlj 1064 ; *Rafatulla v. Rajok,* (1930) 34 CWN 988 .

52 *Naziruddin* , (1933) 55 All 850 .

53 *Haroon* *v.* *Emp.,* AIR 1930 Sind 87 .

54 *Rama* , (1892) 16 Bom 372.

55 *Sardar* , (1935) 17 Lah 523.

56 *Mahabir* , AIR 1918 All 95 .

57 *Narain* , (1946) All 801 FB .

58 *Sardar* , (1935) 17 Lah 523.

59 *Abdul* *Ali* , (1915) 43 Cal 671 .

60 *Srihari* *v.* *Lalkhan,* (1900) 5 CWN 250 .

61 *Ramzan* *v.* *Jamaluddin,* AIR 1944 All 272 .

62 *Ramzan* *v.* *Jamaluddin,* AIR 1944 All 272 .

63 This adopted the view taken in *Mekraj* , [AIR 1939 Mad 787 *LNIND 1938 MAD 98*].

64 41st Rep. of the Commission, Vol I, para 8.2.

65 *Abdulla* *v.* *Emp.,* (1910) 11 Crlj 680 (681).

66 *Naziruddin* ,
(1933) 55 All 850 .

67 *Ramaswami* *v.* *Emp.*,
AIR 1923 Mad 618 ; *Manni v. Emp.*,
AIR 1938 Oudh 75 .

68 Cf. *Dubi* ,
(1920) 22 Crlj 227 (Oudh) .

69 *Gauli* , in re.,
AIR 1938 Mad 615 [
LNIND 1938 MAD 279].

70 *Subba Rao* , in re.,
AIR 1940 Mad 55 [
LNIND 1938 MAD 380].

71 *Anukul* *v.* *Sadhan*,
AIR 1939 Cal 484 ; *Bans Gopal v. Emp.*,
AIR 1939 Oudh 45 .

72 *Arun*,
(1903) 30 Cal 366 (368).

73 *Gafur* *v.* *Mirza*,
(1931) 35 CWN 1150 .

74 *Arun*,
(1903) 30 Cal 366 (368).

75 *Asoke* *v.* *Emp.*,
AIR 1930 Cal 802 ; *Lodha Ram* , 33 Crlj 193, no longer good law.

76 *Emp.* *v.* *Yacoob*,
AIR 1919 Bom 150 .

77 *Gafur* *v.* *Mirza*,
(1931) 35 CWN 1150 .

78 *Manha* ,
AIR 1924 Nag 118 .

79 *Gafur* *v.* *Mirza*,
(1931) 35 CWN 1150 .

80 *Emp.* *v.* *Yacoob,* AIR 1919 Bom 150 .

81 *Kinoo* *v.* *Darastulla,* (1902) 29 Cal 393 , no longer good law.

82 *Gafur* *v.* *Mirza,* (1931) 35 CWN 1150 .

83 *Tarini* *v.* *Gourikant,* (1903) 7 CWN 25 .

84 *Asoke* *v.* *Emp.,* AIR 1930 Cal 802 ; *Lodha Ram* , 33 Crlj 193, no longer good law.

85 *Srihari* *v.* *Lalkhan,* (1900) 5 CWN 250 .

86 *Sheeram* , (1923) 24 Crlj 319 .

87 *Raja* *Ram* *v.* *Govind,* AIR 1936 All 140 .

88 *Emp.* v. *Manik* , (1911) 33 All 771 .

89 *Subal* *v.* *Ram* *Kanai,* (1898) 25 Cal 628 , no longer good law.

90 *Yacoob* , (1939 43 Bom 554.

91 *Emp.* *v.* *Maung* *Kai,* AIR 1940 Rang 50 .

92 *Emp.* *v.* *Maung* *Kai,* AIR 1940 Rang 50 .

93 The following cases are no longer good law on this point : *Yacoob* , (1939) 43 Bom 554 (557); *Arun* , (1903) 30 Cal 366 (368).

94 *Naziruddin* *v.* *Emp.,* AIR 1933 All 609 611 .

95 *Emp.* *v.* *Chunibhai,* (1902) 4 Bom LR 78 .

96 *Abdul* *v.* *Amiran,* (1903) 30 Cal 101 .

97 Cf. *Saroja* , in re., [AIR 1955 Mad 596 *LNIND 1954 MAD 212*].

98 Cf. *Saroja* , in re., [AIR 1955 Mad 596 *LNIND 1954 MAD 212*].

99 Cf. *Solai* , in re., (1913) 37 Mad 153(FB) .

1 *Ram* *Adhin* , (1923) 25 Crlj 965 (All) .

2 *Jai* *Singh* , AIR 1927 Pat 37 .

3 *Yakub* , in re., AIR 1943 Mad 406 .

4 *Yakub* , in re., AIR 1943 Mad 406 .

5 *Abdul* *v.* *Amiran,* (1903) 30 Cal 101 .

6 *Maharaja* , (1917) 20 Crlj 760 (Nag) .

7 *Mian* *Bakhsh* *v.* *Emp.,* (1905) 2 Crlj 190 (Punj) .

8 *Hussein* , AIR 1928 Bom 134 135 .

9 Cf. *Abdul* , (1916) 43 Cal 671 .

10 *Dharam* *Raj* *v.* *Emp.,* (1920) 42 All 345 (346).

11 *Wahid* , in re., (1948) 50 Crlj 729 (Mad) .

12 *Wahid* , in re., (1948) 50 Crlj 729 (Mad) .

13 *Emp.* *v.* *Nga* *Tun,* AIR 1935 Rang 363 .

14 *Wahid* , in re., (1948) 50 Crlj 729 (Mad) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 107
Security for keeping the peace in other cases.

(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond [15] [with or without sureties;] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

1. Scope of s. 107.—

1. This section reproduces sub-sections (1), (2) of *old* s. 107 with the important change, other than verbal, that instead of only the District Magistrate, Sub-divisional or Presidency Magistrate, *all* Executive Magistrates have been vested with the power under this section, as recommended by the Commission, [16] so that immediate act ion may be taken for which the administrative heads may not have time. On the other hand, Judicial Magistrates shall have no such power, having regard to the nature of the function.

2. Sub-sections (3)-(4) have been omitted as unnecessary, in view of the foregoing change. [17]

2. Object of s. 107.—

1. The function of the State embraces not only the punishment of offenders but also, as far as possible, the prevention of offences. [18] This section has the latter object [19] and is aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquility and empowers Magistrates to nip in the bud such conduct, in aid of an orderly society. [20]

2. Proceedings under this section are maintainable though apprehension of the breach of peace arises out of acts for which the person may be prosecuted and punished, and even where such trial is pending. [21]

3. But s. 107 cannot be utilised by the Police to detain a person until they can work out a case for prosecuting him for some offence. [22]

4. The petitioner and the project affected people were squatting on the road shouting slogans and demanding land for land and other rehabilitation necessary and there was nothing in their conduct that they had a design for committing any cognizable offence. There was nothing to give rise to an even apprehension that they would disturb public tranquility, public peace or public order. Magistrate's act ion in directing them to execute personal bonds under *s. 107 Cr.P.C.* and sending them to jail on their failure to execute the bonds was in violation of *Article 21 of the Constitution* and order was set aside.[23]

5. So, it is clear that the object of s. 107 is preventive and not punitive. [24]

6. Initiation of proceedings under s. 107 of the Code is not an accusation of an offence. [25]

3. Nature of the proceedings under s. 107- 110. —

1. The proceedings under these sections are *preventive* in nature. [26]

2. Such proceedings do not constitute a 'trial' and do not end in conviction or acquittal. [27]

3. Hence, neither s. 300 [*old* s. 403] [28] not the principle of 'issue estoppel' applies to such proceedings. [29]

4. A person proceeded against under these sections is not 'accused [30] of an offence nor is he 'prosecuted'. [31] The word 'accused' should not, loosely, be used by Magistrates, in these proceedings. [32]

5. An application under s. 107 is not a 'complaint', [33] as defined in s. 2(d), pp. 10-11.

6. But—

(i) A proceeding under s. 107 is a 'case' within the meaning of s. 411: *old* s. 192 (transfer) [*see post*]; s. 302 (permitting a Police Officer to conduct prosecution); s. 411(b): [*old* s. 528(2)] (withdrawal and recall). [34]

(ii) It is an 'inquiry', as defined in s. 2(g) [p. 21] [35] thus attracting s. 326 [*old* s. 350] where the Magistrate recording evidence is succeeded by another. [36] , [37]

(iii) It is a 'proceeding' so as to attract s. 303 [*old* s. 340]; [38] s. 340 [*old* s. 476]. [39]

(iv) It is a 'criminal proceeding' so as to attract s. 211, I.P.C. [40]

(v) A detention ordered in default of execution of the bond called for, either under s. 116(3) or s. 117, though it has the appearance of an administrative order in so far as it is made before an offence has been committed and in the apprehension of a breach of the peace, cannot be characterised as 'preventive detention' in the nature of the detention under *Art. 22 of the Constitution* inasmuch as a judicial procedure has to be followed and even in making an interim order under s. 116(3), the Magistrate cannot act without at least *prima facie* inquiring into the truth of the information on which the order calling upon the person to show cause is based. [41]

4. S. 106- 107.—

Both these sections are counterparts of the same policy, namely, prevention of disturbance of the peace; while s. 106 applies where the apprehension for the future arises out of the *conviction* to a person for his past conduct, s. 107 applies where the Magistrate forms such opinion from *information* received, [42] which information has to be tested by subsequent inquiry in the presence of the person [*see* under s. 116,*post*].

5. S. 107- 110.—

1. Even though the person to be proceeded against is one who comes under s. 110, if there is an apprehension of such person using violence towards a particular person or persons, the Magistrate should proceed under s. 107 and not under s. 110. [43]

2. The ingredients of the provisions in s s. 107 and 110 being different, it is not competent for the Magistrate, where he has started proceedings under s. 107, to issue orders under s. 110, without issuing a fresh notice to the accused to show cause why act ion under s. 110 should not be taken. [44]

3. But where the conditions of both sections are fulfilled, simultaneous proceedings under both s s. 107 and 110 would not be illegal. [45]

4. Where the allegation is that the opposite party were committing or threatening offences (say, extortion) against *particular* persons as his enemies, the proper proceeding would be one under s. 107 and not under s. 110, which may be applied only if such offences were being committed against persons at random, [46] or they are repeated, [47] rendering the opposite party as dangerous to the community. [48]

6. S s. 107 and 111.—

An order under s. 107 without complying with s. 111 shall be illegal. [49]

7. S s. 107 and 144.—

1. An apprehension of disturbance of the public tranquility is a common ground for action under s s. 107 and 144. But s. 144 cannot be applied unless the danger is so *imminent* that it cannot be averted by resorting to s. 107. [50]

2. Where one party is clearly found to be in possession and the other party is in the wrong, s. 107 should more properly be used against the wrongdoer, than an order under s. 114. [51]

3. The choice is to be determined by the emergency existing when the initial order is made and not by subsequent circumstances. [52] s. 144 should not be resorted to unless there is no time or opportunity for taking any other course. [53]

4. Where the apprehension of breach of the peace relates to immovable property and on the expiry of the injunction under s. 144, there is further apprehension, the appropriate procedure would be to take proceedings under s. 145 but not under s. 107. [54]

5. Repetitive orders cannot be made under s. 144. Where that is necessary resort should be had to s. 107 or 145. [55]

8. S s. 107 and 145.—

1. The object of both sections is the same, *viz* ., to prevent breach of the peace, but while s. 107 (which is discretionary) is general in nature, s. 145 (which is mandatory) [56] refers to disputes relating to land in particular. But the mere fact that the dispute concerns immovable property is no bar to a proceeding under s. 107, and it would not be without jurisdiction. [57] But s. 107 would not be applicable unless the act s of the opposite party are wrongful. [58]
2. When, therefore, there is an apprehension of breach of the peace arising out of a dispute relating to immovable property, the Magistrate has to exercise his discretion, according to the circumstances of each case, whether to proceed under s. 107 or s. 145[59] s. 145(10) makes this clear. As to the exercise of this discretion, the following principles may be formulated, generally,—

(i) Where there is a clear or genuine ‘dispute’ as to possession, the proper proceeding is under s. 145,[60] whereas s. 107 should be resorted to where one party is clearly in the wrong [61] there being no uncertainty as to possession. [62] Thus,—

(a) Where one party is evicted in execution of a civil Court decree, but he threatens to dispossess the decree-holder, the proper remedy should be under s. 107, against the wrongdoer, [63] particularly when the delivery of possession by the Civil Court has been made recently. [64]

(b) Section 107 should be applied against the wrongdoer where the possession of the Petitioner or complainant is obvious, owing to a finding of the Criminal Court in a criminal case or in a previous proceeding between the parties under s. 145 itself, [65] where the proceeding under s. 145 even does not put a stop to apprehension of breach of the peace from violent parties. [66]

In such a case, it would be wrong for the Magistrate to refuse to apply s. 107 against the wrongdoer on the ground that the party aggrieved should prosecute the wrongdoer under s. 188, I.P.C., for interference with the possession of the party in whose favour the finding under s. 145 stands. [67]

(ii) Where there has already been a decision of a Civil Court as to the factum of possession, a Criminal Court should not ordinarily resort to a proceeding under s. 145, which would result in parallel proceedings in the Civil and Criminal Courts regarding possession of the same property. [68]

But if there is a likelihood of the breach of the peace, notwithstanding the Civil Court decision, the proper course for the Criminal Court should be to take under s. 107. [69]

(iii) Even when civil litigation regarding a property is *pending* , a proceeding under s. 145 (though not without jurisdiction) should not be resorted to. But the Magistrate may proceed under s. 107 against the party or parties from whom breach of the peace may be apprehended. [70] The reason is that the whole object of s. 145 is to compel contesting parties to place their case before the Civil Court and even the final order in a proceeding under s. 145 is intended only as a stopgap arrangement. Hence, once the parties have gone to the Civil Court and that Court is seized of the matter, there is no longer any scope for invoking s. 145. [71]

(iv) Where it is *not* evident that one party is clearly in the wrong, *i.e.* , his claim is a mere pretence [72] or, in other words, there is a *bona fide* dispute between the parties out of which a breach of the peace is likely to arise, the Magistrate should proceed under s. 107 against *both* parties, [73] in which case, even an interim order under s. 116(3) against both parties would be justified. [74]

3. There is no bar to a proceeding under s. 145 being converted into a proceeding under s. 107, in the light of circumstances transpiring during pendency of the proceeding under s. 145. [75] , [76]

4. Similarly, in a proper case, a proceeding under s. 107 may be converted into one under s. 145, by issuing an order under s. 145(1),[77] but, in the absence of exceptional circumstances,the Magistrate should not draw up proceedings under s s. 107 and 145. simultaneously, [78] as a matter of routine. [79]

5. Even where a Magistrate feels justified in drawing up proceedings *both* under s s. 107 and 145, to which there is no legal bar, [80] he should draw up *separate* proceedings, [81] , [82] under the two sections, the scopes of which are different, and start with an order under s. 145(1) in the proceeding under that section. [83] Composite proceedings under s s. 107 and 145 would be illegal. [84]

6. Dropping of proceedings under s. 107 could not furnish foundation for dropping the proceedings under s. 145. The proceedings under s. 107 are for public peace and tranquility whereas s. 145 relates to dispute regarding possession between parties concerning any land or water or boundaries thereof.

7. The proceedings under s. 145 could not also be dropped on ground of pendency of a *civil suit* . When there was no dispute about title, the rule that a suit or remedy in civil Court for possession or injunction normally prevents a person from invoking jurisdiction of the criminal Court, would not apply. When claim or title are not in dispute and the parties on their own showing are co-owners and there is no partition one cannot be permitted to act forcibly and unlawfully and ask the other to act in accordance with law. Where the dispute is not on the *right* to possession but on the question of possession, the Magistrate is empowered to take cognizance under *s. 145, Cr. P.C.* [*See* , further, under s. 145].

9. S s. 107 and 146.—

In a proceeding under s. 107, a Magistrate has no jurisdiction to attach any property, as under s. 146(1) [*old* s. 145(4)], without first converting the proceeding into one under s. 145, by issuing an order under s. 145(1),[85] provided the conditions specified in s. 146(1) are present. [86] , [87]

10. S s. 107 and 147.—

1. Where the apprehension of a breach of the peace relates to the *user* of land or water, the proper proceeding is against both parties, under s. 147, and not a proceeding under s. 107, against one of them only, [88] though a proceeding under s. 107 in such a case cannot be said to be without jurisdiction. [89]

   But even when the Magistrate proceeds under s. 107, in such a case, he should proceed against both parties, [90] , [91] except where the claim of one of the parties is a mere pretence. [92] , [93]

2. As in the case of s. 145, the Magistrate cannot proceed under s. 147, unless there is a genuine 'dispute' between the parties. [94]

11. S s. 107 and 151.—

1. A person cannot be arrested under s. 107,*per se* . If an order under s. 107 is made, followed by a warrant of arrest under s. 113; [95] or an interim order for security under s. 116(3), or a final order under s. 117 (after complying with the relevant procedure) is made, and the person fails to furnish the security called for, then he may be imprisoned by order of the Magistrate who made the order under s. 116(3) or s. 122(1), as the case may be.

   Under s. 151, any Police officer may arrest a person, without the order of any Magistrate, if such order comes to know of a design that such person is designing to commit a cognizable offence, which cannot be otherwise prevented than by arresting him immediately. [96]

2. In order to initiate action under s. 107, it is not necessary that the person concerned must be designing the commission of any offence; it is enough if he is likely to commit a breach of the peace or public tranquility. Apprehension of breach of the peace is a condition for act ion under this section.

   Under s. 151, on the other hand, the test is not the breach of the peace, but the commission of a cognizable offence. Secondly, mere *apprehension* or possibility is not enough; the police officer must *know* that he is designing to commit such offence. [97]

3. Hence, the practice usually followed by the Police of arresting a person under 's s. 107-151' of the Code is untenable, [98] but a person may be arrested under s. 151, in order to take him before a Magistrate for initiating a proceeding under s. 107. [99]

12. S s. 107 and 167.—

1. Under s. 107, read with s. 116(3) or s. 117, a Magistrate may order the detention of a person on the *apprehension* of a breach of the peace.

Section 167(2) authorises a Magistrate to remand a person in jail custody (for the period specified therein) when a case relating to the *commission* of an offence is being investigated. [1]

2. When a person has been arrested under s. 107, there cannot be an order for remand under s. 167; the procedure prescribed in Chapter VIII has to be followed. In other words, in a proceeding under s. 107, the Magistrate has no jurisdiction to detain a person without making any inquiry under s. 116(2)- (3). [2]

13. S s. 107, 202.—

When a private person gives information to the Magistrate for proceeding under s. 107, he does not become a 'complainant' of an 'offence' and his petition under s. 107(1) cannot be treated as a 'complaint'. Hence, on receipt of such petition or information, the Magistrate cannot proceed under s. 202[3] or 204. [4] The proceeding before him become judicial only from the state of inquiry under s. 116. [5] Prior thereto, the Magistrate has no power to examine either the complainant or the Opposite Party, in order to determine whether he should make the preliminary order under s. 111 and issue notice to show cause. [6]

14. S s. 107 and 250.—

See post .

15. S s. 107 and 278.—

See under s. 116(2),*post* .

16. S s. 107 and 309.—

[*old* s. 344], *See* under s. 116(2),*post* .

17. S s. 107 and 315.—

[*old* s. 342], *See* under s. 116(2),*post* .

18. S s. 107 and 326.—

[*old* s. 350], *See* under s. 116(2),*post* .

19. S s. 107 and 411 : Transfer of proceeding under s. 107.—

1. Since the *old* s. 192 used the word 'case', it was held that a proceeding under s. 107 being a case, was liable to be transferred under this Section. [7]

2. But in the *new* Code, the word 'case' has been omitted from s. 192 and the section has been confined to the trial of an offence, as recommended by the Commission. [8] Hence, a proceeding under s. 107 can no longer be transferred under s. 192.

3. The provision for transfer of a 'proceeding' in the *new* Code is s. 411, under which a District Magistrate or Sub-divisional Magistrate may transfer any proceeding started before him to any Executive Magistrate subordinate to him. This provision will be applicable only when a proceeding under s. 107 has been initiated by the District Magistrate or the Sub-Divisional Magistrate himself, [9] but not when it has been initiated by any other Executive Magistrate.

4. After the transfer of a proceeding under s. 411, the jurisdiction of the transferee Magistrate shall be to 'dispose of the proceeding' so transferred, even though he may not have local jurisdiction, according to s. 107(2), to initiate a proceeding in that case. [10] But after transfer, the transferee Magistrate can draw up fresh proceedings [11] only if he has local jurisdiction under s. 107(2).

20. Other provisions of the Code which are not applicable to a proceeding under s. 107.—

Since a proceeding under s. 107 does not involve a 'trial' for any 'offence' and there is no 'conviction' therein, the following provisions of the Code have been held to be *not* applicable to such proceeding:

(i) S s. 161-162 do not apply to any statements taken by the Police in any investigation held under s. 107[12] because a proceeding under s. 107 is not against a person accused of any offence. Hence, such statements are admissible in evidence at a subsequent trial, though what value should be given to such statements should be determined by the Court in the light of the facts and circumstances of the case. [13]

(ii) For the same reason, s. 167 (procedure where investigation against an accused is not completed within 24 hours) is not applicable, even where a person proceeded against under s. 107 has been arrested. [14], [15]

> This view appears to have been approved by the Supreme Court in *Madhu Limaye's* case [16] where (though in connection with *old* s. 344), the Court has observed that where the person arrested is brought before the Magistrate, in a proceeding under s. 107, the Magistrate should immediately start the inquiry under s. 116(2), and, unless he asks him to execute an interim bond under s. 116(3), he should be released, so that there is no room for any order for remand.

(iii) Section 250, providing for compensation for frivolous accusation, cannot be attracted, for the same reason. [17]

(iv) Section 321 [*old* s. 494] providing for withdrawal relates to a 'prosecution' and does not apply to security proceedings under the present Chapter. [18]

(v) Section 357 [*old* s. 545] providing for payment of costs to the complainant is not applicable [19] because no sentence of fine can be imposed in such proceeding.

(vi) Section 363 [*old* s. 371] requiring the supply of a free copy of the judgment does not apply [20] but a free copy of the order made under s. 111 is to be delivered along with the summons or warrant served or executed under s. 114 [*old* s. 115].

(vii) The provision for appeal in s. 374 [*old* s. 410] does not apply where the person is imprisoned under s. 123 [*old* s. 124], for failure to give security [21] [Proviso to s. 373], though orders under s s. 117 and 121 are appealable [s. 373].

(viii) Section 389 [*old* s. 426] is not applicable because the person against whom an order is made under s. 117 is not a 'convicted' person. [22]

21. Conditions for the application of s. 107.—

1. Proceedings under the *new* section can be taken only by an Executive Magistrate irrespective of his status.
2. Only that Executive Magistrate shall be competent to exercise this power who has local jurisdiction according to sub-section (2), which says that a Magistrate can proceed under sub-section (1) only if—

   (a) the place of the apprehended disturbance, or

   (b) the person who is likely to commit such disturbance is within the local limits of the Magistrate's jurisdiction. [23] [*See* , further, under sub-section (2), *post* .]

3. Such Magistrate must be *informed* that a person is likely to commit, or to do any act which may probably occasion a breach of the peace or disturbance of the public tranquillity.

   Such information may be from any source, [24] *e.g.* , the Police [25] or the complaint of a private person. [26] In the case of a private complaint, it is competent for the Magistrate to call for a report from the Police. [27]

   But such information must be sufficient and based on tangible facts so as to satisfy the Magistrate as to the likelihood of breach of the peace [*see* next caption].

4. Such Magistrate, on receipt of such information, must be of opinion that there is sufficient ground for proceeding under this section for prevention of breach of the peach or public tranquility. He will, therefore, have to determine in each case, whether the materials before him are sufficient for taking act ion under this section [28] as distinguished from the analogous provisions in s s. 144, 145. [29] The choice between these alternative procedures will be of the Magistrate, founded on the materials before him, and not of the Police. [30]
5. It is entirely on the *discretion* of the Magistrate to act or not to act upon the information received, [31] but such discretion cannot be exercised arbitrarily, [32] or unless he is personally of opinion, from the materials on the record, that he should proceed under this section. The opinion must be his. [33] He cannot act upon orders received from a superior Magistrate; but he may initiate proceedings under the directions of a superior Court, which has been treated as a source of information. [34]
6. Such Magistrate can act under this section only if he substantially complies with the procedure laid down in the succeeding sections from s. 111 onwards. This procedure, in short, requires—

(a) That he must first make a preliminary order which has been held to be the foundation of his jurisdiction under the section. [35] This order may be passed in the presence of the party to be bound over or even in his absence. [36]

(b) The next step is to bring home this order to the person against whom it has been made—

(i) when he is present in Court [s. 112]; or

(ii) when he is not so present, by the issue of a summons or warrant to compel his presence [s s. 113-115].

No such process can be issued before making an order under s. 111. [37]

(c) When the person is or brought before the Court, as above, the Court must make an inquiry as to the truth of the information received by him under s. 107(1), on taking evidence as may be necessary [s. 116].

7. The order to show cause, in a proceeding under s. 107, would demand execution of a bond to keep the peace. An order to maintain good behaviour, under s. 107, would be illegal. [38]

22. Powers when to be exercised.—

Powers under s s. 107 and 110 of the Code have to be exercised only in case of serious nature and not in cases involving trivial quarrels and cannot be used as vehicle of personal vendetta. [39]

So, for invoking s. 107 there must be something more than mere past misconduct of the person sought to be proceeded with. [40]

It is imperative for the Court to see that all the relevant provisions are strictly complied with as it infringes on the liberty of an individual guaranteed under *Article 21 of the Constitution* . [41]

23. Criteria for determining breach of peace.—

1. Apprehension of the breach of peace can only be based on conduct either present or in immediate past. [42]

2. If after initiation there does not exist any breach of peace, the Magistrate may drop the proceeding under s. 107. But by dropping such proceedings, the Magistrate cannot drop a proceeding under s. 145 of the Code when dispute over possession between the father and son still exists. [43]

3. The proceeding under s. 107 of the Code is not to be initiated only on police report or statement of a police officer. The Magistrate must be satisfied on enquiry regarding the necessity of such proceeding. [44]

4. If the order of the Magistrate does not mention the fact about the satisfaction of the Magistrate for the apprehension of the breach of peace, the proceeding is vitiated and liable to be quashed. [45]

5. When the police investigation is pending for the single act of assault, under s. 353 of I.P.C. simultaneous proceeding under s. 107 of the Code is not proper. [46]

24. Sub-section (1) : 'Receives information'.—

1. Since this expression is used in s s. 107(1), 108(1), 109 and 110, they should have the same meaning in all these sections, as explained under the next caption.

2. The jurisdiction of the Magistrate to proceed under these sections depends on the initial information received, [47] though evidence of subsequent incidents may be admissible at the inquiry under s. 116(2).

25. Nature of the information upon which the Magistrate may act .—

1. Since an order under s. 111, read with s. 107, is a judicial act, the Magistrate cannot act arbitrarily. He can act only upon such information as convinces him that there is a likelihood of breach of the peace, and that there is sufficient ground for proceeding under this section. [48]

2. *Prima facie* , an apprehension of future breach of the peace can arise from act s of past misconduct. But there must be something *more* [49] than past conduct to satisfy the Magistrate that there is a likelihood of breach of the peace in future, *e.g.* , that there was a conflict between rival parties and the cause of friction is still *continuing* ; [50] or some overt acts showing contemplation of act s which lead to an inference of the future apprehension of breach of the peace, [51] , [52] though the proceeding itself may not be based on the commission of any overt acts. [53]

3. Such act s of misconduct should, however, be of the recent or immediate past. [54]

4. The information must be of a clear and definite [55] kind directly affecting the person to be produced against and should disclose tangible facts and details, [56] , [57] not only for the satisfaction of the Magistrate and to enable him to record the substance of the information under s. 111[58] but also to afford notice to such person of what specific accusation he has to meet. [59] , [60] Vague allegations that the opposite party is a person of 'bad character' or that he has committed 'diverse acts of oppression' would not suffice. [61]

5. Of Course, the information need not show the *particular* act which was in contemplation of the Respondents at the time; but what will satisfy the Magistrate must depend on the particular facts of the case. [62]

6. The information might not be in a position to give details, but the *sources* of the information might be sufficient to convince the Magistrate that a breach of the peace was likely and that the law required him to take act ion. But the information may be from *any* source, [63] , [64] public or private. [65] Such information may be the subject-matter of a current criminal trial. [66]

7. The words 'receives information' would obviously exclude personal knowledge of the Magistrate. [67] Hence, if the Magistrate institutes a proceeding under this Chapter on materials based on his personal knowledge, he disqualifies himself to proceed with the inquiry and the proceedings are liable to be

transferred from his Court. [68] But there would be no such disqualification where on receipt of the police report, the Magistrate issued a warning order, for which there was no provision in the Code. [69]

8. 'Information' under this section should be distinguished from the 'evidence' upon which the Magistrate may act at the inquiry under s. 116(2),*post* . Thus, while nothing but *legal* evidence can be admitted at the inquiry under s. 116(2),[70] which is to follow the procedure for a summons trial, the 'information' under s. 107, which is the foundation of the preliminary order under s. 111 need not constitute 'legal evidence', [71] and may be of the nature of hearsay. [72] For the same reason, though a Police report, as such, is not evidence of the inquiry, it may suffice for drawing up an order under s. 111.

9. But even though the 'information' may not constitute *legal* evidence, it must be 'credible' [73] information, and the word 'likely' in sub-section (1) has been interpreted to mean ' *reasonably* likely', [74] and not a bare possibility. [75] Though the information is the basis of the preliminary order, the Magistrate must take the responsibility of judicially determining whether he should proceed under this section. Hence, he cannot act on the direction of a superior Magistrate, [76] but shall be bound to draw up proceeding where a superior Court, reviewing the proceedings on appeal or revision, directs the Magistrate to proceed under this section where he had initially refused to do so. [77]

10. There is no bar to a proceeding under s. 107 being drawn on information as to apprehended acts for which prosecution would lie, because the scope of the two proceedings is different,—One being concerned with the *prevention* of breach of the peace in future, while a criminal trial seeks to *punish* the person after it is committed. [78]

26. Effect of dismissal of complaint or acquittal of substantive offence on proceeding under s. 107.—

Since the object of s. 107 is not punishment for an offence but its prevention, founded on an apprehension of breach of the peace resulting from the likelihood of the commission of an offence, a proceeding under s. 107, which does not lead to a conviction for an offence, would be maintainable even after a complaint on the same allegations has been dismissed [79] [s. 203,*post*] or the accused has been acquitted after trial, [80] and the same evidence which was not relied upon in the criminal case may be admissible in the s. 107 proceeding. [81] Neither *Art. 20(2) of the Constitution* nor s. 300 [*old* s. 203] is applicable to these proceedings. (*See* , further, under s. 118,*post* .)

27. 'Is of opinion ... proceeding'.—

1. The receipt of information, as has been seen (see *ante*), is not the only condition for the exercise of the power by the Magistrate under this section. He can act only, if upon such information being received, he forms the ' *opinion* that there is sufficient ground for proceeding' under this section. These words were substituted, in 1923, for the original words—'has reason to believe', which indicated some rationality or objectivity, and might have given a superior Court an opportunity of revising the belief of the Magistrate.

   But the responsibility for maintaining the peace being the responsibility of the Magistrate who is cognizant of the local situation, a revisional Court would not be justified to interfere with the *opinion* of the Magistrate, unless it appears that he has not applied his mind, [82] or exercised his power contrary to law or arbitrarily. [83] (*See* , further, under 'Revision', *post.*)

2. As has been pointed out (see *ante*), the word 'may' indicates that it is entirely discretionary with the Magistrate to initiate or not to initiate a proceeding on the basis of the information received.

3. He can start proceedings only if he forms the opinion that there is sufficient ground to proceed under this section, namely, the likelihood of a breach of the peace or a disturbance of public tranquility, and he has, for the same reason, the inherent power to drop the proceedings if at any time he is satisfied that there is no longer any such likelihood. [84] Thus, he cannot drop the proceedings for the reason that the Government has withdrawn from the inquiry. [85] On the other hand, the jurisdiction of the Magistrate does not cease merely because the immediate cause of the likelihood of breach of the peace has passed away, [86] where the ill-feeling between contending parties and reasonable probability of breach of the peace continues. [87]

4. This opinion must be the personal opinion of the Magistrate.

28. Whether the information received may be tested by any inquiry.—

1. Though there is no provision in the Code for making an inquiry for the purpose of determining whether the Magistrate should issue the preliminary order or notice under s. 111 and s s. 202-203 are not attracted to security proceedings, it has been held that since the Magistrate has to act only on his own responsibility, he *may* verify the credibility of the information, if necessary—

   (a) Where the informant is a private complainant, by examining him on oath, [1] or calling for a report from the Police. [2]

   (b) Where the information is received from the Police,—by calling for a report from subordinate Magistrate, [3] , [4] though he cannot act entirely on the opinion of another Magistrate. [5]

2. Obviously, such inquiry, prior to the making of an order under s. 111, would be administrative and informal. [6]

29. Source of information not to be disclosed.—

1. Magistrate is not bound to disclose the source of the information received by him under s s. 107-110. [7]

2. For the same reason, while the person proceeded against is entitled to get the substance of the information [8] from the order under s. 111, he is not entitled to get a copy of the information or the police report, which have been held not to form ‘part of the record’ within the meaning of s. 363(5) [*old* s. 548]. [9] The record has been held to start from the order under s. 111, and not from any stage earlier. [10]

30. Persons against whom such order may be made.—

1. An order under s. 107(1) may be made against the following classes of persons:

   I.

A. A person from whom there is an apprehension of a *breach of the peace* .

(a) The expression 'likely to commit a breach of the peace' means that the person is *about* to commit a breach [11] or he is doing some specific act which has a *tendency* to a breach of the peace [12] or from which an immediate inference can be drawn that he is likely to commit such breach. [13]

(b) Actual riot or unlawful assembly is not required, [14] and even where a state of conflict has passed away, a proceeding under this section may be tenable if there remains a probability of recurrence of it in the near future, [15] *e.g.* in case of rival claims to immovable property; [16] but not where the *cause* of tension has passed away. [17]

(c) On the other hand, a bare *possibility* , as distinguished from a reasonable probability, of a breach of the peace, would not justify such proceeding. [18] Thus, merely causing an excitement in a crowd, by raising objectionable shouts; [19] or mere existence of enmity between the parties. [20]

(d) But actual commission of offence, for which prosecution is the remedy, is not necessary for instituting a proceeding under this section, [21] which is founded on the *likelihood* of a breach of the peace. [22]

(e) A servant would be liable to be bound down if he commits wrongful act s from which disturbance of the peace may be apprehended, in which case, the master's order would be no plea in defence. [23] On the other hand, all employees of a landlord cannot be bound down, irrespective of their participation in a feud between their employer and his rival. [24]

B. Since the foundation of an order under this section is an apprehension or likelihood of a breach of the peace, such order would not be justified *merely* on the following grounds:

(i) Enmity or dispute between the parties, [25] in the absence of any overt acts which may lead to such apprehension. [26]

(ii) One solitary incident of violence by a non-resident when there is no chance of their visiting the place again, in the ordinary course. [27]

(iii) Commission of breach of the peace by the person in the remote past, [28] in the absence of materials to show that he was contemplating doing act s involving breach of the peace, in the future. [29]

II. A person from whom there is an apprehension of a *disturbance of public tranquillity* .

There being no definition of 'public tranquillity', reference may be made to Chapter VIII of the I.P.C. which deals with 'offences against public tranquillity' as including unlawful assembly [s. 141]; rioting [s. 116]; assaulting or obstructing public servant when suppressing riot, *etc* . [s. 152]; promoting enmity between groups on grounds of religion, *etc* . [s. 153A]; or wounding religious feelings of a class [s. 153B]; [30] harbouring persons hired for an unlawful assembly [s. 157]; being hired to take part in unlawful assembly [s. 158]; affray [s. 159]. The result is that s. 107 proceeding may be drawn against a person who is likely to commit any of the aforesaid acts, irrespective of the likelihood of breach of the peace, [31] *e.g.* , promoting enmity between religious communities; or being a member of an unlawful assembly or harbouring a person hired for taking part in an unlawful assembly. [32]

III. A person likely to commit a *wrongful act* that may occasion a breach of the peace or disturbance of public tranquillity on the part of others.

1. A 'wrongful' act, in this context, must be an act which is forbidden or made unlawful by law, and not a mere improper act ; [33] or an act, which though lawful by itself [34] might lead to a breach of the peace owing to the wrongful act s of *others* [35] ,, [36] or which might cause the displeasure of other people. [37]

A. The following acts, therefore, are *not* wrongful without more, even though they may lead to a breach of the peace on the part of others:

B.

1. On the other hand, the following *are* wrongful acts, for which a proceeding under s. 107 may be started, if the other conditions are satisfied.

(i) The opposite party committing adultery in houses situated near the applicant's house, [48] even though under s. 198 [*old* s. 199] it is only the husband who can launch a prosecution or for adultery with his wife.

(ii) The opposite party intimidating the witness of the Petitioner in a pending litigation between the parties. [49]

(iii) Wrongfully confining some officers of the petitioners and then resisting the Police seeking to recover the confined officials under search warrant,—the Opposite Parties being workmen under the Petitioner's Mills. [50]

(iv) Extorting money from members of a community against whom the opposite party had grievance. [51]

2. But the exercise of a legal right may become unlawful because of the *manner* in which it is sought to be exercised, *e.g.* , by show of force, [52] *e.g.* , where a person entitled to immediate possession of a land goes to take possession by force with an armed body of men [53] but not where force is used in exercise of the right of private defence by a person in possession. [54] In such a case, the mere fact that the wrongdoer has instituted a suit to establish his right, would not be a bar to a proceeding under the section, if breach of the peace was apprehended. [55]

3. The allegation of a wrongful act must not be vague but must refer to a definite wrongful act. [56] But in the order under s. 111 (*post*), the Magistrate is required only to set forth the substance of the information,—not to specify any definite acts which the person intends to commit. [57]

4. The commission of a wrongful act *per se* is not a ground for proceeding under this section unless, in the circumstances of the case, it *may probably* occasion a breach of the peace, *e.g.* , because the commission of the wrongful act is attended with act s or threats of violence. [58] Hence, casting a

slur on the character of a public servant, in a petition, is by itself no ground for proceeding under this section. [59]

5. But the object of the section is *not* to *punish* a person for wrongful acts done in the past. [60] A proceeding under this section may be drawn on the basis of the past misconduct only where there is *something more* on his part from which an immediate inference may be drawn that there will be a breach of the peace or disturbance of public tranquillity *in the near future* . [61]
6. Since each co-owner is entitled to exercise his rights over each part of the property, jointly with the other co-sharers until partition, there should not, normally, be any proceeding under this section in relation to a joint property. [62] If at all, the order should bind *both* parties, in a case of joint ownership. [63]

Even when one co-sharer claims exclusive possession, the proper proceeding should be under s. 145 and not s. 107. [64]

IV. *Abettors and instigators.*— The language of the sub-section is wide enough to include persons who are behind the act ual breakers of the peace as abettors or instigators, whose acts are likely to lead to a breach of the peace, [65] *e.g.* , leaders or controllers of a faction, [66] even though they themselves have not committed any act of violence or are not likely to commit such act. [67] Such abetment or instigation is itself a 'wrongful act ' within the meaning of this sub-section. [68]

V. Subject to the foregoing principles, a person may be bound down under s. 107 only if there is a danger of a breach of the peace from him, and not because somebody else may be aggressive against him. [69]

31. Whether both parties may be bound down.—

1. It is already been made clear that where one party is clearly in the wrong and there is an apprehension of breach of the peace from his wrongful acts, the order under s. 107 should be directed against him alone [70] (see *ante*).
2. In particular, a Criminal Court should respect recent delivery of possession given by the Civil Court or the finding of a possession in favour of a party, by giving protection to such person in the possible attempts by persons who indulge in wrongful act s by disturbing the possession of such person; in such a case, the Criminal Court cannot proceed against both parties, in a proceeding under s. 107. [71]
3. But where there is a *bona fide doubt* as to the existence of the rights of both parties,—the legality of the action of either not being clear,—the proper order would be to bind down both of them until their rights are determined by a proper tribunal. [72]

32. Can there be any vicarious liability?—

1. The liability under this section is primarily individual. [73] The person against whom a proceeding under s. 107(1) may be initiated is the person who is himself [74] likely to commit a breach of the peace or to do some wrongful act that *may probably occasion* a breach of the peace.

2. The latter expression would thus include an abettor or instigator (*see* above), who may be proceeded against under this section though he may not be likely to actually participate in the breach of the peace himself. But such vicarious liability will arise only where—

(a) he has engaged a servant specifically for the purpose; [75]

(b) he is the leader or controller of a faction from whom breach of the peace is apprehended; [76]

(c) his act s are of such a provocative nature that the only probable result would be a disturbance of the peace by other. [77]

But one person may not be required to furnish a bond for preventing another person from committing a breach of the peace, unless he has control over the activities of the latter, [78] e.g., merely because he is a wealthy or influential member of a party [79] or community. [80]

A servant would not be liable for the act s of his master merely because of his employment. [81] On the other hand, the master would not be liable for the acts of his servant, unless the latter has been engaged specifically for the purpose of committing such unlawful act s as are likely to lead to breach of the peace, [82] or the master instigates, supports or acquiesces in such acts of the servant. [83]

3. It follows that even where several persons are collectively connected with the act s likely to disturb the peace, the order under s. 107 should be passed against each of them individually, and not jointly, [84] after considering the allegations against them separately, [85] though a joint inquiry is permissible under s. 116(5),*post* . [86]

33. Can a proceeding under s. 107 be representative in character ?—

1. In some cases, the view has been taken that there is no bar for one person to represent another [87] or the members of the community to which he belongs, [88] in a proceeding under s. 145. But this view has been shaken by the decision of the Supreme Court in *Sunder v. Moni* [89] that only the parties to a proceeding under s. 145 or their successors-in-interest can claim the benefit of or be bound by an order in such proceeding. Thus, when the respondents in a proceeding under s. 145 were some fishermen, all fishermen of their community cannot claim their right of fishery against the landlords, in a subsequent suit brought in a representative capacity.

2. Hence, the view taken in a case [1] that where a proceeding under s. 107 is brought by a person as the *Pradhan* or leader of a village, the order made in such proceeding should be binding on all the villagers does not appear to be sound.

34. Procedure : 'In the manner hereinafter provided'.—

1. These words make it clear that the power under s. 107 is to be exercised only [2] in accordance with the procedure laid down in s s. 111-118. No action by a Magistrate outside such procedure is warranted by the Code, *e.g.* , to warn a person through the Police upon allegations of intimidation or other

misconduct, unless the complainant files a regular complaint or an application under s. 107, in which latter case, the procedure under s s. 111-118 must be followed. [3]

2. It follows that the words 'require such person to show cause', in s. 107, are to be read with s. 111, which deals with the preliminary order which has to be issued with the contents mentioned in that section. [4] This is the first step [5] in a proceeding under s. 107- 110 (as the case may be). That order is read out to the Opposite Party (where present in Court) or served upon him with the notice to show cause referred to in s. 107(1). [6] The form of such notice to show cause through summons is given in Form No. 14 of the 2nd Sch., *post* .

3. The preliminary order under s. 111 is to be made on the basis of the information received by him under s. 107(1), provided only he forms the opinion, on the basis of such information, that there is sufficient ground for proceeding under s. 107 against the person named in the information. There is no provision for issuing summons upon the parties, at this stage, to ascertain whether any facts and circumstances exist for making the preliminary order and notice to show cause; [7] or to require such person to execute a bond for his appearance in Court in the proceedings. [8] For the same reason, if the person against whom proceedings under s. 107 are intended is arrested and brought before the Magistrate, the Magistrate cannot order his detention, [9] without proceeding under s s. 111 and 116(3), which latter provision would enable him to take an interim bond from the person to keep the peace until completion of the inquiry, if immediate preventive measures are necessary, and if the person fails to furnish such bond, then only he can be imprisoned. [10]

35. 'Require such person to show cause'.—

1. There is no provision to issue a notice to show cause apart from the preliminary order to be made under s. 111.

   (a) Where the person is present in Court when that order is made, it is read out to him [s. 112], and that amounts to the notice to show cause, [11] and no further notice is required before proceeding to the inquiry under s. 116(2).

   (b) Where, on the other hand, such person is not present in Court at the time of the order under s. 111, a copy of that order is to be sent to him along, with the summons or warrant issued under s. 113 [s. 114], and that serves as the notice to show cause. [12]

2. Section 107 contemplates only one notice to show cause, containing the particulars mentioned in s. 111,*e.g.* , the amount of the bond, the number of sureties, *etc* . [13] There is no provision for issuing any preliminary notice to show cause without specifying those particulars. If he is satisfied from the information that his discretionary power should be exercised, he can exercise that discretion only in accordance with s. 111 and the succeeding sections. [14] , [15]

3. But before issuing the notice to show cause, the Magistrate is competent to make any inquiry to verify the information [16] in order to determine whether he should exercise his discretionary power for the maintenance of the public peace and issue notice under s s. 111-114,*e.g.* ,—

   (i) To call for a police report; [17] , [18]

   (ii) To call for a report from a subordinate Magistrate; [19]

   (iii) To make a local inquiry. [20]

36. Arrest for the purpose of making order under s. 111.—

1. A Magistrate has no power to order the arrest of a person with a view to proceeding against him under s. 107. Even if he be present at the spot where breach of the peace is apprehended, he cannot use his power under s. 44(2) [p. 213], to arrest the person from whom the disturbance is apprehended. In such a case, the proper course for him would be to formulate then and there an order under s. 111, read with s. 107, serve it on the person or persons concerned, and then to arrest such persons under the Proviso to s. 113,*post* , provided the apprehended breach of peace cannot be averted without immediately arresting such persons. The Magistrate has no competence to arrest a person or to issue a warrant for his arrest before starting proceedings under s. 107, and outside the provisions of s. 113, Proviso. [21]

2. Nor does the Code confer upon the Police any power to arrest a person *for the purpose of* moving a Magistrate for drawing up a proceeding under s. 107 against such person. But the police usually use their power under s. 151 (*post*) [22] to arrest a person without warrant, bring him before a Magistrate and then report against him for proceeding under s. 107. The propriety of such act ion has already been discussed (see *ante*).

37. Form and contents of bond.—

1. Form No. 12 of the 2nd Sch. Is the form of the bond to be executed under s. 107(1).
2. It is to be noted that the words ‘with or without sureties’, which existed in *old* s. 107(1), after the word ‘bond’, have been omitted from the *new* sub-section (1), by way of amendment in the *Lok Sabha* , and Form No. 12, which is the only form under s. 107, also does not provide for any clause for sureties. The change is deliberate and different provisions in this behalf have been made in the several provisions— Sections 106 to 110 of this Chapter:

   (i) With surety bond—under s. 110.

   (ii) With or without surety, in the discretion of the Magistrate.— s. 106(1); 108(1); 109.

   (iii) Without surety— s. 107. [23]

3. Since under new s. 107 a Magistrate cannot demand any surety bond, the question of the liability of a surety will *no longer arise* under the new section. [24]
4. After having ordered the person to execute the bond under this section, the Magistrate may dispense with *execution* of the bond if such person deposits the sum specified in the bond, in cash or in Government promissory notes (s. 445). But s. 445 does not enable the Court to *demand* under s. 107(1), cash security instead of a bond as provided therein. [25]

38. Quantum of security. —

See under s. 111,*post.*

39. 'Such period not exceeding one year, as the Magistrate thinks fit'. —

(1) Unless the Magistrate fixes a particular date from which the period is to commence, the period specified in the order shall commence from the date of the final order [26] under s. 117 (s. 119(2), *post*].

2. Where the period fixed in such order expires before the date of the final judgment in the proceeding, the period would commence from the date of that judgment. [27]

3. Where the order is stayed because of revisional or appellate proceedings, such period shall commence from the date when such proceedings are dismissed and the order of the Court or Magistrate is affirmed. In such a case, it cannot be contended in the proceeding before the superior Court that the order should be quashed merely because the period fixed in the order has expired by the time revision was being heard. [28] Unless, of course, the information has become stale, owing to the lapse of a long period of time, in which case, the proceedings may be dropped. [29] [See under s. 119,*post.*]

40. Termination of the order.—

(1) Where the order has taken effect, it would cease to operate on the expiry of the period for which security had been called for and furnished.

2. But where the order could not take effect because of stay of its operation, because of revisional or appellate proceedings, it cannot be contended that the order had become inoperative merely because the period for which the security had been demanded has, in the meantime, expired. [30]

41. The power to drop proceedings.—

See under s. 118,*post.*

42. Consequences of default in executing bond.—

See under s. 122,*post.*

43. Forfeiture of bond.—

See under s. 122,*post.*

44. Interim order for keeping the peace.—

1. After issue of the notice to show cause under s. 107, read with s. 111, the Magistrate is to make an inquiry under s. 116 [*old* s. 117], and the final order to furnish security for keeping the peace is to be made after the completion of such inquiry, under s. 117 [*old* s. 118].

2. But pending the completion of such inquiry, if the Magistrate considers that immediate measures are necessary for prevention of a breach of the peace, he may pass an *interim* order calling upon the Respondents to execute a bond for keeping the peace, under s. 116(3). The Proviso to s. 118(3) relates to a bond for keeping 'good behaviour' and not for 'keeping the peace'. [31]

3. But an interim order under s. 116(3) can be made only ' *after* the commencement of the inquiry' under s. 116(1), which takes place when the Respondent is present in Court or is brought before it [32] under summons of warrant issued under s. 113, whereupon the Magistrate proceeds to inquire into the truth of the information referred to in s. 107(1). Hence no interim order can be issued simultaneously with the issue of the preliminary order under s. 111 and before the Magistrate is *prima facie* satisfied about the truth of the information as to the need for an interim bond. [33]

4. 'Commencement of the inquiry', in s. 116(3), means commencing a trial according to the summons procedure. The power to demand interim bond was not given to the Magistrate to postpone the case and hear nobody and yet ask a person to furnish a bond for keeping the peace. He ought to enter upon the inquiry and satisfy himself, at least *prima facie,* about the truth of the information in relation to the alleged facts, before requiring an interim bond from the person proceeded against. [34] He cannot, after the appearance of the person, simply adjourn the proceeding and yet bind him down by an interim bond, the default in execution of which would mean imprisonment. [35]

5. The inquiry 'commences' when (a) the person being present in Court, the order under s. 111 is read or explained; [36] or (b) when a summons or warrant has been issued, and such person appears or is brought before the Court in compliance therewith. The Magistrate need not commence to record evidence [37] but must, nevertheless, be *prima facie* satisfied about the truth of the information, before requiring an interim bond, [38] *e.g* ., by examining the Police officer. [39]

6. It follows that, where the person is *not* present in Court, no order for interim bond can be passed without issuing summons or warrant for his appearance [40] and giving him an opportunity of showing cause; [41] a composite order under s s. 111 and 116(3) is, accordingly, bad. [42] [See further, under s. 116(3),*post.*]

45. Transfer of proceeding. —

1. The power under s. 107 being vested in an *Executive* Magistrate, the transfer of a proceeding under this section (which is a 'case') is governed by s. 411,*post.* Hence, after a proceeding under s. 107 has been *started* before a Magistrate the case may be transferred by him to any Magistrate who is 'subordinate' to him (see *ante*).

2. As to subordination to an Executive Magistrate, see s. 23.

3. On receipt of the case after transfer, the transferee Magistrate has jurisdiction to amend the proceedings or to draw up fresh proceedings against other persons, relying on the original information, or Police report. [43]

46. Sub-sec. (2) : History of. —

I. In the Code of 1882, there was no distinction between superior and inferior Magistrates regarding territorial jurisdiction, and the only test was the person or the place of apprehended breach of the peace being within the local jurisdiction of the Magistrate concerned. [44]

II. In sub-sec. (2), as it was enacted in the Code of 1898, a distinction was introduced between superior and inferior Magistrate. [45]

III. The foregoing distinction in the text of 1898 was removed by substituting the sub-section by the Amendment Act of 1955, giving all Magistrates of the first class and the Subdivisional Magistrates also the power to proceed against a person within his jurisdiction who was likely to commit disturbance beyond such jurisdiction or an outsider committing the breach within his jurisdiction. [46] *This restored the position as it was under the Code of 1882.*

IV.

1. The 1955 text has been adopted by the *new* Code, with the substitution of the words 'any Executive Magistrate' in place of 'any Magistrate'.
2. While by sub-sec. (1) *any* Executive Magistrate is empowered to proceed under this section, sub-section (2) delimits the local jurisdiction of such Magistrate *inter se;* an Executive Magistrate shall have jurisdiction of initiate proceedings under s. 107 in either of the two following cases:

(a) The place where the breach of the peace or disturbance is apprehended is within his local jurisdiction; or

(b) The person alleged to be likely to commit a breach of the peace or disturbance or to commit a wrongful at, as referred to in sub-section (1), is within his local jurisdiction, though the place where such disturbance or wrongful act is likely to be committed may be outside the local jurisdiction of such Magistrate.

47. Local jurisdiction of Magistrate.—

1. As to local jurisdiction of an Executive Magistrate, see under s. 22,*ante.*

(2) It follows from that section that an Executive Magistrate shall be competent to draw up a proceeding under s. 107 not only if the person to be bound is for the time being within the district in which he has been appointed but also if the *place* where the breach of peace is apprehended is within that district. Hence, residence or presence within his local jurisdiction is not the only condition to proceed under this section. Consequently—

(a) The section would be applicable to person *residing* within the Magistrate's local jurisdiction, even though he may have gone out of that jurisdiction temporarily on the particular date when the information was received, [47] or the order was passed. [48]

(b) On the other hand, even if the person resides outside the jurisdiction of the Magistrate, the Magistrate may proceed against him if he is *temporarily present* within such jurisdiction at the time of the order, [49] except when he is not voluntarily present but has been brought under detention in police custody, [50] or under summons issued by the Court in this proceeding. [51]

(c) Where the person has *changed* his residence to a place outside the jurisdiction of the Magistrate, the Magistrate cannot proceed against him, [52] unless he happens to be temporarily present (however short such duration may be) [53] within the Magistrate's jurisdiction or the place where the disturbance of peace or public tranquillity is apprehended is within the Magistrate's jurisdiction.

(d) A non-resident may be proceeded against if he is likely to commit breach of the peace within the Magistrate's jurisdiction. [54]

3. The word 'taken' implies that the proceedings must be initiated by a Magistrate having local jurisdiction as aforesaid, and that he cannot delegate this function to anybody else. [55] But if a Magistrate having local jurisdiction transfers it after drawing up the proceedings, there is no bar on the transferee Magistrate to continue the proceedings even though he had no local jurisdiction to 'take' proceedings under the section. [56] , [57]

4. Further, absence of territorial jurisdiction of the Magistrate who initiated the proceeding under s.107 is curable under s. 465 (*old* s. 537), if no objection to his jurisdiction was raised at the earliest opportunity, and no prejudice has been caused. [58]

48. Evidentiary value of statement made during investigation under s. 107.—

1. Where a Police officer makes an inquiry for reporting to the Magistrate for the purposes of s. 107, and a person makes a statement to such Police Officer, such statement would not be hit by s s. 161-162, inasmuch as the Police Officer was not collecting evidence as to the commission of an *offence* . [59]

2. Hence, such statement would be admissible as evidence in a subsequent proceeding against the person making such statement, say, as an admission. [60] Of course, what weight should be given to such statement is for the Court to determine, in such subsequent proceeding, in the light of the facts and circumstances of the case. [61]

3. Statement recorded by a Magistrate in a proceeding under s. 107 cannot be treated as substantive evidence in a subsequent criminal trial. [62]

49. Effect of compromise in proceeding under s. 107.—

1. Though there are decisions to the effect that an inquiry under s. 116(2) must be held notwithstanding any consent of the Opposite Party to give security, [63] the better view seems to be that since the procedure at a summons trial is to govern the inquiry, there is no reason why the consent of the Opposite Party should not be treated as a plea of guilty and the order passed thereon. [64]

2. At any rate, when both parties enter into a compromise and file it in the proceeding under s. 107 stating that they had settled the matter and that there was *no longer any apprehension* of breach of the peace, there is no reason why the Magistrate should not drop the proceeding on the basis of such compromise. [65]

3. But there is no provision like O. I, R. 8 of the C.P. Code, 1908, to enable any party in a proceeding under *s. 107,Cr.P.C.* to represent the members of the community to which he belongs. Hence a compromise by some members of a community in a s. 107 proceeding, however *bona fide* it might be, cannot debar the parties from asserting their *legal rights* in a civil court, *e.g.* in a declaratory suit regarding the right to take out processions, which had been the subject-matter in the previous s. 107 proceeding. [66] even though such agreement entered into outside such proceedings may have a representative character with reference to s. 127, Contract Act. [67]

50. Appeal.—

1. Appeal lies to Sessions Judge [(s. 373(i) : *old* s. 406], from a final order under s. 117, read with s. 107, ordering a person to give security for keeping the peace [68] except under s. 122(2), (4) [see, further, under s. 117,*post*].

2. There is a consensus of opinion that under s. 386(e) : [*old* s. 432(1)(d)], it is competent for the appellate Court, after setting aside an order requiring security under s. 107, to remand the proceeding for fresh inquiry, permitting parties to let in such additional evidence as they may desire, [69] because that would be an 'incidental order'. [70]

3. There is no provision for second appeal to High Court against the order of the Sessions Judge passed on appeal. [71] But if such appeal is filed, it may be treated as a petition for revision. [72]

51. Revision.—

1. Revision lies to the Sessions Judge or the High Court [(s. 397(3),*post*] to set aside an order under s. 111 or s. 117, read with s. 107.

A. Since wide powers have been conferred by these sections upon a Magistrate, for the prevention of breach of the peace, affecting the liberty of an individual who has not been found guilty of any offence, the superior Court should interfere to ensure that the power is exercised *strictly* in accordance with law, [73] on the grounds, *inter alia* :

(i) There was nothing to show, on the face of the order, that the Magistrate had considered the facts stated in the information lodged before him by the Police [74] or other person, or that he was satisfied that there was a likelihood of breach of the peace; [75] or the facts found or admitted or the materials on the record do not justify the order. [76]

(ii) Where the Police report or the complaint upon which the order under s. 111 is made does not contain any particulars. [77]

(iii) The preliminary order or the notice to show cause does not contain the particulars specified in s. 111; [78] or the order omits to refer to a material, such as the affidavit of a party, upon which he formed his opinion after receipt of the police report; or the substance of the accusation. [79]

(iv) That the Magistrate, instead of requiring a bond for keeping the peace has; in a proceeding under s. 107, called for a bond for 'maintaining good behaviour'. [80]

(v) That a composite order has been made under s s. 111 and 116(3),[81] without complying with the provisions of s s. 112-116(3). [82] [On this point, see further under s. 116(3),*post*].

(vi) That the proceedings were drawn up long after the Police report was received by the Magistrate. [83] In such a case, the Revisional Court may set aside the order and remand the case for further inquiry in the light of the subsequent situation. [84]

(vii) Where a kidnapped girl is arrested on the ground that there would be a breach of the peace if she were released. In such a case, the proper course for the Magistrate would be to proceed under s. 107 against those from whom breach of the peace was apprehended. [85]

(See, further, under s. 111,*post*).

B. On the other hand, the High Court should not interfere with the exercise of discretion of the Magistrate, cognisant of the local situation, unless it is illegal or definitely improper. [86]

Thus, the order would *not* be quashed merely because—

(i) The order itself does not refer to the petition of a complainant, if the notice served upon the person refers to such petition having been perused. [87]

(ii) It appears to the Court of revision, in the light of circumstances as they exist long after initiation of the proceedings, that s. 145 should have been resorted to by the Magistrate. [88]

2. By reason of s. 386(e) [*old* s. 423(1)(d), it is competent for the Appellate or Revisional Court, after setting aside the order, to remand the case for fresh inquiry, [89] in appropriate circumstances, *e.g.* where the order was made long after the information or police report was received. [90]

3. Revision would also lie against an order illegally dismissing an application of a private party for proceeding under s. 107. [91] It is true that s. 398 (*old* s. 436) is not applicable to a security proceeding under Chap. VIII where the person proceeded against is not 'accused of an offence'. [92] But under the power of revision conferred by s s. 397 and 399(1), and 401(1), the High Court or the Sessions Judge may interfere, as a revisional Court with any illegal order and also make any consequential or incidental order under Cl. (e) of s. 386—which power is *not* confined to cases of conviction only. It is, therefore, competent for the High Court to direct that proceedings under s. 107 be initiated by a competent Magistrate against the accused before it in an appeal or other proceeding. [93] Of course, such direction can be given only where from the records it is satisfied that the Magistrate refused to start proceedings or dropped the proceedings inspite of apprehension of breach of the peace which is still continuing. [94] Cases of interference with an order refusing to demand security will, therefore, be rare. [1] At least, the Revisional Court will not constitute itself a Court on facts. [2]

4. Revision would also lie if the proceedings are illegally terminated or dropped. [3]

C. Under the *new* Code, in view of s. 397(2), it has been held that an order under s s. 107-111 is an 'interlocutory order' because only a notice to show cause is issued. Hence, no revision lies at this state, unless of course the order is a nullity being without jurisdiction. A final order is made only at the stage under s. 116. [4]

52. Interference under inherent power. —

Section 482 [*old* s. 561A] has been used, in some cases, by the High Court to quash a notice under s. 107, read with s. 111, where from the activities of the Respondents as mentioned in the information upon which the Magistrate act ed, it could not be inferred that the Respondents were intending to commit any breach of the peace. [5]

53. Appeal to Supreme Court. —

Appeal lies to the Supreme Court by special leave, under Art. 136 from an order of the High Court refusing to set aside an order for keeping the peace under s. 116(3)[6] or 117. [7]

54. Constitutional remedy. —

An application for a wait of *habeas corpus* under Art. 32[8] or 226 [9] of the *Constitution* lies where a person has been arrested or detained under s. 107, without complying with the procedure laid down in Chap. VIII of the Code . [See, further, under s. 116,*post.*]

55. Criminal prosecution for false information. —

1. Prosecution would lie under s. 182, I.P.C. for giving false information to a Magistrate to proceed under s. 107 against a person, knowing or believing it to be false, whether the Magistrate does or does not actually act upon such information. [10]

2. If the Magistrate refuses to act upon such information, prosecution under s. 211, I.P.C would not lie, for, no criminal proceeding has, in such a case, been instituted. [11] But if the Magistrate makes a preliminary order under *s. 111 of the Cr.P.C.* and issues a notice to show cause, a 'criminal proceeding' has been instituted, and a prosecution under s. 111 would, therefore, lie for the false information, with the knowledge that there is 'no just or lawful ground for such proceeding'. Section 211 would also lie if the application under s. 107 is dismissed and the opposite party discharged after the issue of the notice after making some inquiry.[12]

56. Suit for defamation. —

It has been held that a statement made in a complaint or information to a Magistrate under s s. 107-110 against a person is absolutely privileged so that no suit for defamation would lie against such informant. The privilege extends to repetition of such statement to the Police to whom the Magistrate refers the information for investigation. [13]

57. Suit for malicious prosecution, whether lies. —

There has been a controversy as to whether a suit for malicious prosecution would lie against a person who maliciously gives false information against another under ss. 107-110 of the Code, as a result of which security

is demanded from him, with its penal consequences.

(A) The Madras [14] High Court has taken the view that no such suit lies because a proceeding under s s. 107-110 is not a ' *prosecution* for an *offence* '.

(B) The consensus of opinion, [15] on the other hand, is that 'prosecution' in the law of torts is not used in the same sense as in the criminal law, leading to a conviction and punishment, and that a proceeding under s s. 107-110 being *quasi* -criminal, there is a cause of action for malicious prosecution upon a false information leading to such proceeding, if the order conditions of a suit for malicious prosecution are satisfied.

58. Suit for establishment of right.—

A person against whom an order under this section has been made is not debarred from instituting a civil suit for the enforcement of those rights out of which the dispute leading to the security proceeding arose; and no order of forfeiture of the bond executed V him under s. 116(3) or 117 can be made on the ground that he has instituted such suit.' [16]

59. Suit against Magistrate. —

1. Where the imprisonment made in a security proceeding is totally without jurisdiction and is not within the purview of the Judicial Officers' Protection Act, 1850, a suit for damages for false imprisonment may lie against the Magistrate. [17] It is, therefore, necessary first to ascertain whether the action of the Magistrate would be immune under that Act . [18]
2. Under this Act—

   (a) When the act of a Judge or Magistrate, done in the discharge of his official duty, is within his jurisdiction, he would be absolutely immune, irrespective of any irregularity [19] or even bad faith. [20] , [21] Jurisdiction, in this context, means authority or power to act in a matter and not authority or power to do an act in a particular *manner or form.* [22]

   (b) Even when the act is done without jurisdiction, he would be immune, if it has been done in good faith, *e.g.* under a mistaken but honest belief [23] as to his powers, [24] or jurisdiction. [25]

   (c) But when the act is without jurisdiction, and there was absence of good faith, the Magistrate must answer in damages for his illegal act, [26] *e.g.* for a wrongful seizure of goods. [27]

3. Where suit is maintainable under the law against the Magistrate, service of notice under s. 80C.P. Code to institute a suit for damages against him may constitute contempt, [28] unless excluded by the *Contempt of Courts Act, 1971* .
4. Even where the Magistrate is liable in damages for false imprisonment or wrongful seizure, the State would not be liable in the absence of proof that the wrongful act was specifically authorised by the State. [29]

15 Inserted by Act No. 45 of 1978, S. 11 (w.e.f. 18-12-1978).

16 41st Rep. of the Commission, Vol. I, para 8.7.

17 41st Rep. of the Commission, Vol. I, para 8.7.

18 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [LNIND 1970 SC 501](para 34) : (1970) 3 SCC 746 [LNIND 1970 SC 501] : 1971 Crlj 1720 ; *Ramnarayan v. State of Bihar,* AIR 1972 SC 2225 [LNIND 1972 SC 332](para 5) : (1972) 2 SCC 532 [LNIND 1972 SC 332] : 1972 Crlj 1444 .

19 *Ramnarayan v. State of Bihar,* AIR 1972 SC 2225 [LNIND 1972 SC 332](para 5) : (1972) 2 SCC 532 [LNIND 1972 SC 332] : 1972 Crlj 1444 .

20 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [LNIND 1970 SC 501](para 34) : (1970) 3 SCC 746 [LNIND 1970 SC 501] : 1971 Crlj 1720 .

21 *Thirunavakkarasu* , in re., AIR 1959 Mad 339 341 [LNIND 1958 MAD 133][contrary view in *Srikanta* , 9 CWN 898; *Jiwan* , 52 All 593; *Sukhlal* , 39 Crlj 992, not sound].

22 *Emp. v. Paimal,* (1912) 13 Crlj 827 (All) .

23 *Medha Patkar v. State of M.P.,* 2008 Crlj 47 : (2007) 4 MP HT 219 (MP).

24 *Prakash Chand Sachdeva v. State,* AIR 1994 SC 1436 : (1994) 1 SCC 471 : 1994 Crlj 2117 ; *Kailash Singh v. State of Bihar,* 1987 NOC 228Pat ; *Madhu Limaye v. S.D.M. Monghyr,*

AIR 1971 SC 2486 [
LNIND 1970 SC 501]:
1971 Crlj 1720 .

25 *B. Moosa* *v.* *Amir,*
AIR 1967 Ker 194 [
LNIND 1966 KER 197]:
1967 Crlj 1330 .

26 *Ramnarayan* *v.* *State of Bihar,*
AIR 1972 SC 2225 [
LNIND 1972 SC 332](para 5) :
(1972) 2 SCC 532 [
LNIND 1972 SC 332] :
1972 Crlj 1444 .

27 *State of A.P.* *v.* *Kokkilagada,*
(1969) 1 SCC 160 (para 15).

28 *Mathai* *v.* *State,*
AIR 1952 TC 556 .

29 *State of A.P.* *v.* *Kokkilagada,*
(1969) 1 SCC 160 (para 15).

30 *Ajodhiya* *v.* *Sitaram,*
AIR 1949 All 350 [
LNIND 1948 ALL 34].

31 *Kartick* *v.* *Pannalal,*
AIR 1954 Cal 140 [
LNIND 1953 CAL 178].

32 *Bibhuti* *v.* *State,*
AIR 1958 Pat 160 (para 3).

33 *Manicka* , in re.,
AIR 1968 Mad 225 .

34 Cf. *Tulsibala* ,
(1953) 56 CWN 193 .

35 *Charan* , (1930) 9 Pat 131.

36 *Kartick* *v.* *Pannalal,*
AIR 1954 Cal 140 [
LNIND 1953 CAL 178].

37 *Venkatachinnaya* , (1920) 43 Mad 551(FB) ; *Haraballav v. State,* AIR 1954 Pat 242 .

38 *Llewlyn* , in re., AIR 1926 Bom 551 .

39 *Vir Bhan v. Sunder,* AIR 1966 Punj 458 .

40 *Teja Singh v. Kishan Singh,* AIR 1949 Lah 28 (paras 8-10).

41 *Teja Singh v. Kishan Singh,* AIR 1949 Lah 28 (paras 8-10).

42 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](paras 35, 44) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

43 *Kallu* , (1904) 27 All 92 (95).

44 *Krishnaswamy v. Vanamamalai,* (1906) 30 Mad 282.

45 *State v. Udragi,* (1961) NLJ 16n.

46 *Krishnaswamy v. Vanamamalai,* (1906) 30 Mad 282.

47 *State v. Udragi,* (1961) NLJ 16n.

48 *Thakur v. State of Bihar,* (1962) 1 Crlj 665 666Pat.

49 *Bairagi v. State of Orissa,* (1988) Crlj 286 (Or) ; *Sekar v. State,* (1994) Crlj 265 (NOC) (Mad) .

50 *Sheobalak v. Kamaruddin,* (1928) 2 Pat 94(FB) ; *Mclntosh v. Nirmal,* AIR 1958 Assam 114 .

51 *Hansraj v. Abdul,* AIR 1935 Pat 461 ; *Hari v. State of Bihar,* (1973) BLJR 356 .

52 *Harihar* *v.* *Unpendra,* AIR 1934 Pat 308 .

53 *Venkata* *v.* *Faladdin,* (1927) 28 Crlj 509 510Mad.

54 *Abinash* *v.* *Loknath,* (1917) 19 Crlj 367 (Cal) .

55 *Jagadiswaranand* *v.* *Commr.,* AIR 1984 SC 51 .

56 *Balajit* *v.* *Bhoju,* (1907) 35 Cal 117 .

57 *Subal* *v.* *State,* AIR 1967 Or 199 (para 4); *Sudarsan v. Govind,* (1971) 77 Crlj 1822 (All) .

58 *Subal* *v.* *State,* AIR 1967 Or 199 (para 4).

59 *Sudarsan* *v.* *Govind,* (1971) 77 Crlj 1822 (All) ; *Rajendra v. Chintamani,* AIR 1939 Pat 151 152 .

60 *Rajendra* *v.* *Chintamani,* AIR 1939 Pat 151 152 ; *Kamal v. Ghulam,* AIR 1961 J&K 4.

61 *Rajendra* *v.* *Chintamani,* AIR 1939 Pat 151 152 .

62 *Kanhaiyalal* *v.* *Devi* *Singh,* AIR 1961 MP 302 303 .

63 *Siem* *v.* *Lebanon,* AIR 1963 Assam 38 (para 6).

64 *Pitabas* *v.* *Krishna,* AIR 1968 Or 239 (para 2).

65 *Kanhaiyalal* *v.* *Devi* *Singh,* AIR 1961 MP 302 303 .

66 *Kanhaiyalal* *v.* *Devi* *Singh,* AIR 1961 MP 302 303 .

67 *State* *v.* *Raisingh,* ILR (1963) Cut 771 .

68 *Shankarappa* *v.* *Ramanagowda,* AIR 1969 Mys 297 (para 3).

69 *Malkappa* *v.* *Padmanna,* AIR 1959 Mys 122 ; *Iqbal v. State of Haryana,* (1985) Crlj 1757 (paras 8-10) P & H; *Devsingh v. Tarana,* (1987) Crlj 458 (para 12).

70 *Malkappa* *v.* *Padmanna,* AIR 1959 Mys 122 ; *Iqbal v. State of Haryana,* (1985) Crlj 1757 (paras 8-10) P & H; *Devsingh v. Tarana,* (1987) Crlj 458 (para 12); *Desraj v. Pal,* (1973) 75 PLR 57 .

71 *Desraj* *v.* *Pal,* (1973) 75 PLR 57 .

72 *Daitari* *v.* *State,* AIR 1967 Or 17 .

73 *Subal* *v.* *State,* AIR 1967 Or 198 ; *Satruhan v. State,* AIR 1964 Pat 445 .

74 *Satruhan* *v.* *State,* AIR 1964 Pat 445 .

75 *Kamal v. Ghulam,* AIR 1961 J & K 4.

76 *Madho* *v.* *Emp.,* AIR 1942 Pat 331 [contra *Ram v. Basudeo,* AIR 1949 Pat 482 , does not appear to be sound]. *Autar v. State,* AIR 1954 All 461 [*LNIND 1954 ALL 30*].

77 *Madho* *v.* *Emp.,* AIR 1942 Pat 331 [contra *Ram v. Basudeo,* AIR 1949 Pat 482 , does not appear to be sound]. *Autar v. State,* AIR 1954 All 461 [*LNIND 1954 ALL 30*].

78 *Kamal v. Ghulam,* AIR 1961 J & K 4.

79 *Kamal v. Ghulam,* AIR 1961 J&K 4; *Kanhaiyalal v. Devi Singh,* AIR 1961 MP 302 303 .

80 *Kanhaiyalal v. Devi Singh,* AIR 1961 MP 302 [*LNIND 1960 MP 103*]; *Harihar v. Emp.,* AIR 1934 Pat 463 .

81 *Kanhaiyalal v. Devi Singh,* AIR 1961 MP 302 [*LNIND 1960 MP 103*].

82 *Nahar Singh v. State,* AIR 1951 Raj 156 [*LNIND 1951 RAJ 190*].

83 *Syed Ismail v. Abdul,* AIR 1969 Mys 181 (para 7); *Deoballam v. Gorakhnath,* AIR 1947 Pat 235 .

84 *Berisal v. Matadin,* AIR 1953 Raj 119 [*LNIND 1952 RAJ 2*].

85 *Kamal v. Ghulam,* AIR 1961 J & K 4.

86 *Syed Ismail v. Abdul,* AIR 1969 Mys 181 (para 7); *Deoballam v. Gorakhnath,* AIR 1947 Pat 235 .

87 *Kamal v. Ghulam,* AIR 1961 J & K 4.

88 *Malkappa v. Padmanna,* AIR 1959 Mys 122 ; *Iqbal v. State of Haryana,* (1985) Crlj 1757 (paras 8-10) P & H; *Devsingh v. Tarana,* (1987) Crlj 458 (para 12).

89 *Subal v. State,* AIR 1967 Orissa 198 [re. user of water and fishery in a tank].

90 *Berisal v. Matadin,* AIR 1953 Raj 119 [*LNIND 1952 RAJ 2*].

91 *Malla v. State,* AIR 1966 J & K 29 (30).

92 *Berisal v. Matadin,* AIR 1953 Raj 119 [*LNIND 1952 RAJ 2*].

93 *Sankali v. State of Orissa,* (1974) Crlj 219 (Orissa) .

94 *Gobardhun* *v.* *Chaturbhuj,* AIR 1950 Assam 165 .

95 *Kamal v. Ghulam,* AIR 1961 J & K 4.

96 *Balraj* *v.* *Union* *of* *India,* AIR 1967 Delhi 31 [*LNIND 1966 DEL 119*]; *Madhu Limaye* , in re., (1969) ISCC 292.

97 *Balraj* *v.* *Union* *of* *India,* AIR 1967 Delhi 31 32 .

98 *Madhu* *Limaye* , in re., (1969) 1 SCC 292 .

99 Cf. *Madhu* *Limaye* *v.* *Ved* *Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 6, 18) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

1 *Shravan* *v.* *Supdt.,* AIR 1957 All 189 192 [*LNIND 1956 ALL 144*].

2 Cf. *Madhu* *Limaye* *v.* *Ved* *Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 6, 18) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

3 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 195 (197).

4 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 195 (197).

5 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 195 (197).

6 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 195 (197).

7 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 195 (197); *Satish v. Rajendra,* (1895) 22 Cal 315 .

8 41st Rep. of the Commission, Vol I, para 15.83.

9 *Ram Lall v. Ram Chand,* AIR 1956 Cal 315 [*LNIND 1956 CAL 2*].

10 *Kalia v. Emp.,* (1931) 32 Crlj 27.

11 Cf. *Gulam* , (1931) 59 Cal 1484.

12 *Barjerji* , in re., AIR 1932 Bom 196; *Pritam Singh v. Ranjit,* AIR 1972 Raj 59.

13 *Pritam Singh v. Ranjit,* AIR 1972 Raj 59.

14 *Shravan v. Supdt.,* AIR 1957 All 189 192 [*LNIND 1956 ALL 144*].

15 *Baijnath v. Kalicharan,* AIR 1927 All 531.

16 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 18-19): (1970) 3 SCC 739 [*LNIND 1970 SC 501*]: 1971 Crlj 1715.

17 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 18-19): (1970) 3 SCC 739 [*LNIND 1970 SC 501*]: 1971 Crlj 1715.

18 *Satyendra v. S.P.,* AIR 1963 Cal 336 [*LNIND 1962 CAL 28*].

19 *Sheo Prasad v. Mahangoe,* AIR 1924 All 694.

20 *Bibhuti v. State,* AIR 1958 Pat 160.

21 *Chand* *v.* *Emp.,* (1882) 9 Cal 928

22 *Charan* , (1929) 2 Pat 131.

23 *Emp.* *v.* *Gajanand,* AIR 1913 Nag 88 .

24 *Khangembam* *v.* *Haojam,* AIR 1969 Mani 90 92 .

25 Cf. *Balkishun* *v.* *Munno,* AIR 1970 Pat 107 .

26 Cf. *Govinder* *v.* *Bachubhai,* AIR 1972 SC 528 ; *Sudarsan v. Govind,* (1971) 77 Crlj 1822 (All) .

27 *Tulsibala* *v.* *Ghosal,* AIR 1953 Cal 109 [LNIND 1951 CAL 221].

28 *Kameshwar* *v.* *Ramadian,* AIR 1954 Pat 124 .

29 *Indra* *v.* *State* *of* *V.P.,* AIR 1952 VP 64 69 .

30 *Indra* *v.* *State* *of* *V.P.,* AIR 1952 VP 64 69 .

31 *Laxmi* *Narain* , (1933) 34 Crlj 42 (44).

32 *Chinnaya* *v.* *State* *of* *Mysore,* (1970) 76 Crlj 111 (para 3) Mys.

33 *Deoballam* *v.* *Gorakhnath,* AIR 1947 Pat 235 .

34 *Emp.* *v.* *Jafir,* (1881) 3 All 545 (553).

35 *Madhu* *Limaye* *v.* *Ved* *Murti,* AIR 1971 SC 2479 (paras 6-7) :

(1972) 4 SCC 2119 :
1971 Crlj 1712 .

36 *Madhu Limaye v. S.D.M.,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](para 36) :
(1970) 2 SCC 746 :
1971 Crlj 1720 .

37 *Narasayya v. State,*
AIR 1953 Nag 292 .

38 *Ram Saran v. Ramakant,*
(1962) 2 Crlj 575 (Pat) .

39 *Cristalin Costa v. State of Goa,*
1992 Crlj 3608 Bom .

40 *Chinnaya Chettiar v. State of Mysore,*
1970 Crlj 111 Mys .

41 *M.V. Meraman v. State of Gujarat,* 1989 Crlj NOC 5Guj DB .

42 *K. Nilkant v. State,* (1971) 2 Andh WR 189 (AP).

43 *Prabhas Chand Sachdeva v. State,*
AIR 1994 SC 1436 : (1994) 1 SCC 471 :
1994 Crlj 2117 .

44 *Chandramani Nayak v. State of Orissa,*
1992 Crlj 2188 Ori .

45 *Bairagi Charan v. State of Orissa,*
1988 Crlj 286 Ori ; *Bameshwar v. State of Bihar,*
1984 Crlj 56 Pat .

46 *A.B. Chandra Reddy v. Revenue Inspector,*
1980 Crlj 1169 .

47 *Shiblal v. State of Bihar,*
AIR 1962 Pat 369 (para 11).

48 *Deoballam v. Gorakhnath,*
AIR 1947 Pat 235 .

49 *Chinnaya v. State of Mysore,*
(1970) 76 Crlj 111 (para 3) Mys.

50 *Neelakanta v. State of A.P.,* (1972) 78 Crlj 117 (AP) .

51 *Shiblal v. State of Bihar,* AIR 1962 Pat 369 (para 11).

52 *Moosa v. Amin,* AIR 1967 Ker 194 195 ; *Jagnarain v. Mukhia,* (1973) BJLR 72.

53 *Shiblal v. State of Bihar,* AIR 1962 Pat 369 (para 11).

54 *Cheeki v. State of A.P.,* (1973) Crlj 1713 (DB) .

55 *Madhu Limaye* , in re., AIR 1971 SC 2486 [LNIND 1970 SC 501](para 43) : (1970) 2 SCC 746 : 1971 Crlj 1720 .

56 *Moosa v. Amin,* AIR 1967 Ker 194 195 ; *Jagnarain v. Mukhia,* (1973) BJLR 72.

57 *Channabasavanna v. State of Mysore,* (1973) Crlj 1049 .

58 *Emp. v. Ganesh,* (1914) 15 Crlj 696 (All) .

59 *Channabasavanna v. State of Mysore,* (1973) Crlj 1049 .

60 *Nikka v. State,* AIR 1954 Punj 6 .

61 *Jinnat* , (1903) 7 CWN 32 .

62 *Chinnaya v. State of Mysore,* (1970) 76 Crlj 111 (para 3) Mys.

63 *Chinnaya v. State of Mysore,* (1970) 76 Crlj 111 (para 3) Mys.

64 *Muthuswami* , in re., AIR 1940 Mad 23 (FB) ; *Het Ram v. State,* (1977) Crlj 117 (All) .

65 *Cheeki v. State of A.P.,* (1973) Crlj 1713 (DB) .

66 *Cheeki v. State of A.P.,* (1973) Crlj 1713 (DB) .

67 *Alimuddin* , (1902) 29 Cal 392 ; *Mathura* , (1916) 17 Crlj 484 .

68 *Rati Lal v. State,* AIR 1956 Bom 385 [LNIND 1956 BOM 17].

69 *Abdul v. Narulla,* AIR 1929 Cal 506 .

70 *Guruswami* , (1912) 13 Crlj 143 .

71 *Guruswami* , (1912) 13 Crlj 143 .

72 *Emp. v. Babua,* (1884) 6 All 132 .

73 *Emp. v. Ganesh,* (1914) 15 Crlj 696 (All) .

74 *Batuk* , (1884) AWN 54.

75 *Brijnanand* , (1915) 37 All 33 .

76 *Hanif* , (1922) 24 Crlj 246 .

77 *Emp. v. Jafir,* (1881) 3 All 545 (FB) .

78 *Thirunavukkarasu v. State,* AIR 1959 Mad 339 [LNIND 1958 MAD 133]; *Shiblal v. State of Bihar,* AIR 1962 Pat 369 (para 15).

79 *Jagnarain* *v.* *Mukhiaram,* (1973) BLJR 72 .

80 *Thirunavukkarasu* *v.* *State,* AIR 1959 Mad 339 [*LNIND 1958 MAD 133*]; *Shiblal v. State of Bihar,* AIR 1962 Pat 369 (para 15).

81 *Jagnarain* *v.* *Mukhiaram,* (1973) BLJR 72 .

82 *Bridhaj* *v.* *State,* AIR 1953 Cal 491 [*LNIND 1952 CAL 193*]; *Bairagi v. State of Orissa,* (1988) Crlj 286 (Or) .

83 *Harihar* , (1935) 36 Crlj 257 (Pat) .

84 *Jagdish* *v.* *State,* AIR 1957 Pat 106 (para 9).

85 Cf. *Satyendra* *v.* *Supdt.,* AIR 1963 Cal 336 [*LNIND 1962 CAL 28*].

86 *Basdeo* , in re., (1903) 26 All 190 .

87 *Ayodhya* *v.* *Emp.,* (1911) 12 Crlj 493 .

1 *Emp.* *v.* *Nga Po* , (1900) 2 Crlj (Rang) .

2 *Ismail* *v.* *Jagat,* (1938) 40 Crlj 193 (Lah) ; *Laxmi Narain v. Emp.,* AIR 1932 All 670 .

3 *Ismail* *v.* *Jagat,* (1938) 40 Crlj 193 (Lah) ; *Laxmi Narain v. Emp.,* AIR 1932 All 670 .

4 *Shamsuddin* *v.* *Ram,* (1923) 25 Crlj 89 .

5 *Deoballam* *v.* *Gorakhnath,* AIR 1947 Pat 235 236 .

6 *Raghu Raj v. Jiut Singh,* AIR 1955 NUC 2499 (Pat) .

7 *Anantapadmabhaiah v. Emp.,* [AIR 1930 Mad 975 *LNIND 1930 MAD 171*].

8 *Alimuddin* , (1902) 29 Cal 392 .

9 *Rajendra Narain* , (1912) 17 CWN 238 (261).

10 *Rajendra Narain* , (1912) 17 CWN 238 (261).

11 *Narindra* , (1904) 1 ALJ 418 .

12 *Khetrabala* , (1917) 19 Crlj 246 (Pat) .

13 *Haree Mohan v. Kalinath,* (1876) 25 WR 15 (Cr) .

14 *Kallu* , (1904) 27 All 92 .

15 *Ayodhya* , (1911) 12 Crlj 1080 (All) .

16 *Mahabir v. Samrathi,* AIR 1940 Pat 252 253 .

17 *Basdeo* , (1903) 26 All 190 .

18 *Abdool* , (1873) 20 WR 57 (Cr) .

19 *Suraj* , (1930) 32 Crlj 693 .

20 *Parman* , (1927) 29 Crlj 417 .

21 *Jiwan* *Singh* ,
AIR 1930 All 408 .

22 *Emp.* *v.* *Gajanand,*
AIR 1943 Nag 88 90 .

23 *Srikantha* ,
(1905) 9 CWN 898 (909).

24 *Ainuddin* ,
(1902) 24 Crlj 230 Cal ; *Grant* ,
(1921) 22 Crlj 745 (Pat) .

25 *Narindra* *v.* *Emp.,*
(1903) 1 ALJ 418 .

26 *Malla v. State,* AIR 1966 J & K 29 (para 6).

27 *Sri Ram v. Babu* , *AIR* 1948 Lah 62 (63).

28 *Jakka* *v.* *State* *of* *A.P.,*
(1969) Crlj 685 (para 4) AP.

29 *Moosa* *v.* *Amin,*
AIR 1967 Ker 194 195 .

30 Cf. *Satindra* ,
(1928) 32 CWN 477 .

31 Cf. *Jaguji* *v.* *Emp.,*
AIR 1918 All 93 ; *Ghasi Ram* ,
(1919) 20 Crlj 194 (Pat) .

32 Cf. *Murti* ,
(1911) 33 All 775 .

33 *Bacho* *v.* *State* *of* *Bihar,*
(1970) Crlj 1706 .

34 *Jai* *Prakash* ,
(1893) 6 All 26 (FB) .

35 Cf. *Satindra* ,
(1928) 32 CWN 477 .

36 *Tarlochan* *v.* *State,* ILR (1963) 1 Punj 290 ; *Govinda v. Emp.,* AIR 1942 Nag 45 46 .

37 *Jasoda* *v.* *Emp.,* AIR 1939 Sind 167 .

48 *Hatim v. State,* AIR 1963 J & K 56 (paras 7-8).

49 *Shyam Lal* *v.* *Ramballabh,* AIR 1968 Pat 295 .

50 *Moolesh* *v.* *Imumuddin,* AIR 1968 Cal 364 [*LNIND 1967 CAL 147*].

51 *Thakur* *v.* *State,* (1962) 1 Crlj 665 (para 3).

52 *Ram Kishan* *v.* *Emp.,* AIR 1933 Lah 36 .

53 *Nisar* , (1934) 35 Crlj 809 .

54 *Madho Singh* *v.* *Emp.,* AIR 1942 Pat 331 333 .

55 *Kulsam* *v.* *Imatul,* (1907) 11 CWN 121 .

56 *Moosa* *v.* *Amin,* AIR 1967 Ker 194 [*LNIND 1966 KER 197*](para 2).

57 *Jaguji* , (1918) 10 Crlj 876 (All) .

58 *Bepin* , (1919) 21 Crlj 651 (Cal) .

59 *Anandamay* , (1943) 47 CWN 731 (738).

60 *Shadi Lal* *v.* *Emp.,* AIR 1931 Lah 191 .

61 *Muthuswami* , in re., AIR 1940 Mad 23 (FB) .

62 *Thakur* , AIR 1926 Lah 695 .

63 *Bepin* *v.* *Pranakul,* (1904) 5 Crlj 19 .

64 *Sheoprasad* *v.* *Govind,* AIR 1940 Nag 265 266 .

65 *Dubey* *v.* *Emp.,* AIR 1947 All 392 .

66 *Dubey* *v.* *Emp.,* AIR 1947 All 392 .

67 *Dubey* *v.* *Emp.,* AIR 1947 All 392 .

68 *Tarlochan* *v.* *State,* ILR (1963) 1 Punj 290 .

69 *Saheb* *Singh* *v.* *State,* AIR 1955 NUC 2534 (Punj) ; *Suraj* , AIR 1950 Pat 502 .

70 *Din* *Dayal* , (1907) 34 Cal 935 (938); *Musaheb v. Nidhi,* AIR 1927 Pat 314 ; *Sheobalak v. Kamaruddin,* (1923) 2 Pat 94 104FB ; *Sekar v. Padmabsai,* (1987) Crlj 1405 (Mad) .

71 *Bacho* *v.* *State* *of* *Bihar,* (1970) Crlj 1706 (para 7).

72 *Din* *Dayal* , (1907) 34 Cal 935 (938); *Musaheb v. Nidhi,* AIR 1927 Pat 314 .

73 *Abdul* , AIR 1939 Lah 363 .

74 *Ghasi* *Ram* , (1919) 20 Crlj 194 (Pat) .

75 *Mohanlal* *v.* *State* *of* *M.P.,* (1958) MPLJ 143 n; *Bepin* , (1918) 21 Crlj 651 (Pat) .

76 *Ram* *Shankar* *v.* *Emp.,* AIR 1947 All 392 393 .

77 *Chunilal* , (1916) 17 Crlj 301 (All) .

78 *Jagat* *Narain* , (1910) ALJ 1161 (1163).

79 *Ram* *Shankar* *v.* *Emp.,* AIR 1947 All 392 393 .

80 *Abdul* , AIR 1939 Lah 363 .

81 *Ainuddin* , (1923) 24 Crlj 230 .

82 *Emp.* *v.* *Abdas,* (1919) 39 Cal 150 (FB) .

83 *Balalal* , (1917) 18 Crlj 374 .

84 *Ghasi* *Ram* , (1919) 20 Crlj 194 (Pat) .

85 *Abdul* *Kadir* , (1886) 9 All 452 .

86 *Prankrishna* , (1903) 8 CWN 180 .

87 *Turu* *v.* *State,* AIR 1955 Cal 397 ; *Rattan v. Raghubir,* AIR 1952 MB 165 .

88 *Takhellambam* *v.* *Sorokhaibam,* AIR 1969 Mani 52 .

89 *Sunder* *v.* *Moni,* AIR 1951 SC 247 [*LNIND 1951 SC 23*].

1 *Takhellambam* *v.* *Sorokhaibam,* AIR 1969 Mani 52 .

2 *Madhu* *Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 36) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

3 *Badri* , AIR 1954 All 591 [*LNIND 1954 ALL 6*]; *Satyanarayana* , (1926) 47 Crlj 872 (Mad) .

4 *Tulsibala* *v.* *Ghosal,* (1951) 56 CWN 192 (196).

5 *Madhu* *Limaye* *v.* *Ved* *Murti,* AIR 1971 SC 2608 [*LNIND 1970 SC 357*](para 7) : (1970 3 SCC 738 [*LNIND 1970 SC 357*].

6 *Badri* , AIR 1954 All 591 [*LNIND 1954 ALL 6*]; *Satyanarayana* , (1926) 47 Crlj 872 (Mad) .

7 *Chandra* *Mani* *v.* *Sangai,* AIR 1969 Mani 12 .

8 *Shiv Narain v. Durga Prasad,* (1954) MBLJ 1726.

9 *Sravan* *Kumar* *v.* *Supdt.,* AIR 1957 All 189 [*LNIND 1956 ALL 144*]; Under the *old* section, detention could be ordered under sub-sections (3)-(4) of Section 107, which have been omitted from the *new* section [Cf. *Raghunandan* , (1904) 22 Cal 80].

10 *Sravan* *Kumar* *v.* *Supdt.,* AIR 1957 All 189 [*LNIND 1956 ALL 144*].

11 *Zahir* *Ahmad* *v.* *Ganga* *Prasad,* AIR 1963 All 4 10 .

12 *Zahir* *Ahmad* *v.* *Ganga* *Prasad,* AIR 1963 All 4 10 .

13 *Sanjivi v. Koneri,* 49 Mad 315.

14 *Shiv Narain v. Durga Prasad,* (1954) MBLJ 1726.

15 *Sanjivi v. Koneri,* 49 Mad 315.

16 Cf. *Teja Singh v. Kishan,* AIR 1949 Lah 28 (para 10) FB.

17 *Tulsibala v. Ghosal,* (1951) 56 CWN 192 (196).

18 *Sanjivi v. Koneri,* 49 Mad 315.

19 *Sanjivi v. Koneri,* 49 Mad 315.

20 *Ram Pargat* , (1925) 26 Crlj 1149 .

21 *Baburam v. R.,* AIR 1949 All 21 [*LNIND 1948 ALL 11*].

22 Cf. *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 6, 10).

23 *Bashir v. State of Rajasthan,* (1977) Crlj 198 (NOC) (Raj) .

24 *Bashir v. State of Rajasthan,* (1977) Crlj 198 (NOC) (Raj) .

25 *Chari,* AIR148 All 238.

26 *Taranagowd,* (1927) 51 Mad 515.

27 *Ramnarain v. State of Bihar,* AIR 1972 SC 2225 [*LNIND 1972 SC 332*](para 6) : (1972) 2 SCC 532 [*LNIND 1972 SC 332*] : 1972 Crlj 1444 . [Contrary view in *Baburam v. Emp.,* AIR 1949 All 21 [*LNIND 1948 ALL 11*](para 8), no longer good law].

28 *Ramnarain* *v.* *State* *of* *Bihar,*
AIR 1972 SC 2225 [
LNIND 1972 SC 332](para 6) :
(1972) 2 SCC 532 [
LNIND 1972 SC 332] :
1972 Crlj 1444 . [Contrary view in *Baburam v. Emp.,*
AIR 1949 All 21 [
LNIND 1948 ALL 11](para 8), no longer good law]; *Balkishun v. Munno,*
AIR 1970 Pat 107 (para 6).

29 *Ramnarain* *v.* *State* *of* *Bihar,*
AIR 1972 SC 2225 [
LNIND 1972 SC 332](para 6) :
(1972) 2 SCC 532 [
LNIND 1972 SC 332] :
1972 Crlj 1444 . [Contrary view in *Baburam v. Emp.,*
AIR 1949 All 21 [
LNIND 1948 ALL 11](para 8), no longer good law].

30 *Ramnarain* *v.* *State* *of* *Bihar,*
AIR 1972 SC 2225 [
LNIND 1972 SC 332](para 6) :
(1972) 2 SCC 532 [
LNIND 1972 SC 332] :
1972 Crlj 1444 . [Contrary view in *Baburam v. Emp.,*
AIR 1949 All 21 [
LNIND 1948 ALL 11](para 8), no longer good law].

31 *Govinder* *v.* *Bachubhai,,*
AIR 1972 SC 528 : (1972) 4 SCC 643 :
1972 Crlj 316 .

32 *Purshotam* *v.* *State,*
AIR 1970 Pat 293 .

33 *Roshan* *Singh* *v.* *Ramu,*
AIR 1971 Raj 113 .

34 *Madhu* *Limaye* *v.* *Ved* *Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448](paras 16, 18).

35 *Madhu* *Limaye* *v.* *Ved* *Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448](paras 16, 18).

36 *Dulal* *v.* *State,*
AIR 1953 Cal 238 [
LNIND 1952 CAL 157].

37 *Dulal* *v.* *State,*
AIR 1953 Cal 238 [
LNIND 1952 CAL 157]; *Khangembam v. Haojam,*
AIR 1969 Mani 90 (para 9).

38 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448](paras 16, 18).

39 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448](paras 16, 18).

40 *Ramasrey v. State of Bihar,* AIR 1969 Pat 369; *Roshan v. Ramu,* AIR 1971 Raj 112 114; *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448]. [Contrary decisions are no longer good law, *e.g.* , *State of Gujarat v. Sama,* (1963) 1 Crlj 663 (Guj) ; *Sundar v. Chenulu,* AIR 1970 Or 184 (para 14); *Govinder v. Bachubhai,* AIR 1972 SC 528 (para 8)].

41 *Ramasrey v. State of Bihar,* AIR 1969 Pat 369; *Roshan v. Ramu,* AIR 1971 Raj 112 114; *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448]. [Contrary decisions are no longer good law, *e.g.* , *State of Gujarat v. Sama,* (1963) 1 Crlj 663 (Guj) ; *Sundar v. Chenulu,* AIR 1970 Or 184 (para 14); *Govinder v. Bachubhai,* AIR 1972 SC 528 (para 8)].

42 *Khangembam v. Haojam,* AIR 1969 Mani 90 (para 9); *Ramasrey v. State of Bihar,* AIR 1969 Pat 369; *Roshan v. Ramu,* AIR 1971 Raj 112 114; *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448]. [Contrary decisions are no longer good law, *e.g.* , *State of Gujarat v. Sama,* (1963) 1 Crlj 663 (Guj) ; *Sundar v. Chenulu,* AIR 1970 Or 184 (para 14); *Govinder v. Bachubhai,* AIR 1972 SC 528 (para 8)].

43 *Sarat v. Bepin,* (1902) 29 Cal 389; *Gulam,* (1932) 59 Cal 1484 .

44 *Rajendra,* (1885) 11 Cal 737 .

45 *Nirbeekar,* (1909) 9 Crlj 148 (Cal) .

46 *Bhola v. State,* AIR 1957 All 831 832 [LNIND 1957 ALL 101].

47 *Hanumantrao, in re.* ,
AIR 1940 Bom 204 .

48 *Hanumantrao, in re.* ,
AIR 1940 Bom 204 .

49 *Gajanand* ,
AIR 1943 Nag 88 .

50 *Krishnaji,* (1879) 23 Bom 32.

51 *Hamid,*
(1957) 54 All 341 .

52 *Hanwant v. Emp,*
AIR 1948 All 185 .

53 *Varadajulu,*
(1934) 35 Crlj 626 .

54 *Bhola v. State,*
AIR 1957 All 831 832 [
LNIND 1957 ALL 101]. [Contrary view in *Hridoy,* 41 CWN 1049, that temporary presence at the time of occurrence would not suffice, is no longer good law.]

55 Cf. *Munna,*
(1901) 24 All 151 ; *Nirbeekar,*
(1908) 13 CWN 580 .

56 *Haree Nath v. Kalinath,*
(1876) 25 WR 15 (Cr) .

57 Cf. *Munna,*
(1901) 24 All 151 ; *Nirbeekar,*
(1908) 13 CWN 580 .

58 *Ramdeo,*
(1926) 27 Crlj 1132 .

59 *Pritam v. Ranjit,*
AIR 1972 Raj 59 (para 16).

60 *Pritam v. Ranjit,*
AIR 1972 Raj 59 (para 16).

61 *Pritam v. Ranjit,*
AIR 1972 Raj 59 (para 16).

62 *Naunidh v. State of U.P.,* AIR 1982 SC 1299 [*LNIND 1981 SC 181*].

63 *Bipinkumar v. State,* (1962) 2 Crlj 537 (1) (Guj); *Ujagar,* AIR 1929 Pat 504 .

64 *Yasin v. State,* AIR 1969 Guj 267 [*LNIND 1968 GUJ 99*](para 4).

65 *Piru v. Kalandi,* (1969) 1 SCWR 522 (para 10).

66 *Piru v. Kalandi,* (1969) 1 SCWR 522 (para 10).

67 *Babu Ram v. Subhan,* AIR 1929 All 519 .

68 *Tejaram v. Bhairon,* AIR 1955 NUC 5030 (Raj) DB.

69 *Prakasa v. Jenala,,* AIR 1955 Andhra 55 . [Contrary view in *Dayanath v. Emp.,* (1905) 33 Cal 8 or *Narappa,* in re., AIR 1934 Mad 202 [*LNIND 1933 MAD 71*], did not consider *old* s. 423(1)(d)].

70 *Bhaiyalal v. Emp.,* AIR 1940 Nag 222 .

71 *Samad v. State,* AIR 1969 J&K 105 (para 1).

72 *Samad v. State,* AIR 1969 J&K 105 (para 1).

73 *Ramnarain v. State of Bihar,* AIR 1972 SC 2225 [*LNIND 1972 SC 332*](para 5) : (1972) 2 SCC 532 [*LNIND 1972 SC 332*] : 1972 Crlj 1444 .

74 *Rao v. State of Mysore,* (1972) 78 Crlj 405 (Mys) .

75 *Chinnaya* *v.* *State of Mysore,*
(1970) 76 Crlj 111 ; *Shivaputrappa v. State of Karnataka,*
(1977) Crlj 1369 (Kar) .

76 *Bacho* *v.* *State of Bihar,*
(1970) Crlj 1706 (Pat) .

77 *Shankar* *v.* *State of Bihar,*
(1973) BLJR 342 ; *Bairagi v. State of Orissa,*
(1988) Crlj 286 (Or) .

78 *Shankar* *v.* *State of Bihar,*
(1973) BLJR 342 ; *Bairagi v. State of Orissa,*
(1988) Crlj 286 (Or) .

79 *Shankar* *v.* *State of Bihar,*
(1973) BLJR 342 ; *Bairagi v. State of Orissa,*
(1988) Crlj 286 (Or) .

80 *Ramsaran* *v.* *Ramakant,*
(1962) 2 Crlj 575 (para 8) Pat.

81 *Shankar* *v.* *State of Bihar,*
(1973) BLJR 342 ; *Bairagi v. State of Orissa,*
(1988) Crlj 286 (Or) ; *Ramsaran v. Ramakant,*
(1962) 2 Crlj 575 (para 8) Pat; *Tulsibala v. Ghosal,*
(1951) 56 CWN 193 (196); *Yunus v. State,*
(1969) Crlj 73 (All) . See, further, s. 116(3),*post* .

82 *Ramsaran* *v.* *Ramakant,*
(1962) 2 Crlj 575 (para 8) Pat.

83 *Sukhlal* ,
AIR 1938 Cal 583 .

84 *Sukhlal* ,
AIR 1938 Cal 583 .

85 *Lalmani* *v.* *State,*
AIR 1957 Pat 689 (para 6).

86 *Lakshmanan,*
(1952) Crlj 909 (TC) .

87 *Kartar* *v.* *Sitaram,*
(1973) Crlj 368 .

88 *Lakshmanan,*
(1952) Crlj 909 (TC) .

89 *Prakasa* *v.* *Pitchireddi,* AIR 1955 AP 55 [LNIND 1954 AP 10](para 10).

90 *Sukhlal* , AIR 1938 Cal 583 .

91 *Hatim v. State,* AIR 1963 J&K 56 (para 14).

92 *Dayanath* *v.* *Emp.,* (1905) 33 Cal 8 .

93 *Emp.* *v.* *Jafir,* (1881) 3 All 545 (FB) .

94 *Santa* *v.* *Lakanlal,* AIR 1968 Pat 326 327 ; The contrary decision in *Ramlal* , (1925) 25 Crlj 1149 (Oudh) should be understood in this sense.

1 *Gyan* *Singh,* AIR 1934 All 24 .

2 *Ghous,* (1937) 38 Crlj 363 .

3 *Tejaram* *v.* *Bhairon,* AIR 1955 NUC 5030 (Raj) DB .

4 *Bindbasini* *v.* *State of U.P.,* (1976) Crlj 1680 (paras 12, 15) All DB; *Bhima v. State,* (1975) Crlj 1923 (Or) DB.

5 *Bindbasini* *v.* *State of U.P.,* (1976) Crlj 1680 (paras 12, 15) All DB; *Bhima v. State,* (1975) Crlj 1923 (Or) DB ; *Neelakanta v. State of A.P.,* (1972) 78 Crlj 117 (AP) .

6 Cf. *Govinder* *v.* *Bachubhai,* AIR 1972 SC 528 .

7 Cf. *Ramnarain* *v.* *State of Bihar,* AIR 1972 SC 2225 [LNIND 1972 SC 332].

8 *Madhu Limaye,* in re., (1969) ISCC 292 (296).

9 *Balraj v. Union of India,* AIR 1967 Delhi 31 32 .

10 *Teja Singh v. Kishan,* AIR 1949 Lah 28 (para 10) FB.

11 *Teja Singh v. Kishan,* AIR 1949 Lah 28 (para 10) FB.

12 *Teja Singh v. Kishan,* AIR 1949 Lah 28 (para 10) FB.

13 *Chunni v. Narsing,* AIR 1918 All 69 (FB) ; *Rajindra v. Durga,* AIR 1967 All 476 [LNIND 1966 ALL 86].

14 *Kandasami v. Subramania,* (1903) 13 MLJ 370 [LNIND 1902 MAD 138].

15 *Crowdy v. O'Reilly,* (1913) 18 IC 737 (Cal) ; *Inder Singh v. Harbans,* AIR 1955 Punj 139 .

16 *Sital,* (1919) 1 Lah 319.

17 *Anwar v. Ajoy,* AIR 1957 Assam 28 (36, 38, 50).

18 This Act has been fully dealt with in Author's *Commentary on the Constitution of India* , Latest Edition.

19 *E.g.* , the warrant not being in proper form [*Sewalram v. Abdul,* AIR 1938 Cal 177]; arrest after taking cognisance though complaint's statement was not recorded before the arrest [*Rahim v. Naiz,,* AIR 1944 Cal 4].

20 *Anwar v. Ajoy,* AIR 1957 Assam 28 (36, 38, 50).

21 *Teyen v. Ramlal,* (1890) 12 All 115 ; *State of U.P. v. Laxmi Narain,,* AIR 1962 All 137 139 [LNIND 1961 ALL 43].

22 *Teyen v. Ramlal,* (1890) 12 All 115 .

23 *Rohini* *v.* *Niaz,* AIR 1944 Cal 4 .

24 *Gurcharan* *v.* *Prov.* *of* *Madras,* AIR 1944 FC 41 .

25 *Rohini* *v.* *Niaz,* AIR 1944 Cal 4 .

26 *Babulal* *v.* *Prov.* *of* *Orissa,* ILR (1954) Cuttack 171 (191).

27 *Babulal* *v.* *Prov.* *of* *Orissa,* ILR (1954) Cuttack 171 (191); *Ramlal v. Ajit,* AIR 1973 Cal 372 [*LNIND 1973 CAL 67*].

28 *State* *of* *U.P.* *v.* *Laxmi* *Narain,,* AIR 1962 All 137 139 [*LNIND 1961 ALL 43*].

29 *Anwar* *v.* *Ajoy,* AIR 1957 Assam 28 (36, 38, 50).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 108
Security for good behaviour from persons disseminating seditious matters.

(1) When [30] [an Executive Magistrate] receives information that there is within his local jurisdiction any person who, within or without such jurisdiction—

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of—

(a) any matter the publication of which is punishable under Section 124A or Section 153A or *Section 153B* or *Section 295A* of the *Indian Penal Code (45 of 1860)*, or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the *Indian Penal Code (45 of 1860)*,

(ii) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in *Section 292 of the Indian Penal Code (45 of 1860)*,

and the Magistrate is of opinion that there is

sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

(2) No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the *Press and Registration of Books Act, 1867* (25 of 1867), with reference to any matter contained in such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf.

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1. Scope of s. 108. —

This section corresponds to *old* s. 108, with the following changes, other than verbal:

(a) While the *old* section empowered both Executive [31] and Judicial Magistrate of the superior rank, the Code of 1973 denied this power to the Executive Magistrate, as recommended by the Commission, [32] and only Judicial Magistrates of the first class could proceed under the *new* section. The reason given in the 41 st Report., [33] differing from the 37 th , [34] was that though the proceeding under this section is not a trial against an accused person, the function was to be exercised judicially since the proceeding affects the liberty of the person proceeded against.

(b) But though the Code of 1932 conferred the power only on a Judicial Magistrate of the first class, a compromise between the standpoints of the Government and of the public was affected by the Joint Committee, [35] by making the present provision subject to the provision in *new* s. 478, under which an Executive Magistrate could be vested with the power under the present section by the State Government *after consultation* with the High Court, *if the State Legislature by a resolution so requires.*

All this has been reversed by the *Cr. P.C.* Amendment Act 63 of 1980:

(i) In s s. 108, 109 and 110, the power is now vested *only* in an Executive Magistrate of the 1st class.

(ii) Judicial Magistrates shall have no power under s s. 108-110 unless (a) the State Legislative Assembly passes a resolution in this behalf, (b) the State Government issues a notification accordingly, after consultation with the High Court.

This amendment of 1980 is thus retrograde.

(c) In the list of offences specified in sub-sec. (1)—

(i) In Cl. (i)(a), ss. 153B and 295A of the I.P.C. have been added;

(ii) In Cl. (i)(b), it has been made clear that the protection offered by this provision to a Judge shall be confined only to such activities of a Judge as relate to [36] his official duties, by the insertion of appropriate words.

2. Conditions for the application of s. 108.—

1. This section provides for demanding a bond for maintaining good behaviour on the following conditions :

(i) The power is conferred only on an Executive Magistrate [37] of the first class (sub-section. (1)].

(ii) He can act only if he receives information about the presence within his local jurisdiction of a person who is involved in the dissemination of any matter concerning any of the offences specified in Cl. (1) of sub-sec. (1), or is responsible for an obscene matter in any manner as specified in Cl. (ii).

(iii) Such offences are—

(a) Offences under s s. 124A, 153A, 153B, 295A, I.P.C.;

(b) Offences under s *s. 499* , *503* , *IPC* concerning a Judge and relating to the purported discharge of his official duties;

(c) Offence under s. 292, I.P.C.

(iv) In the case of a matter falling under Cl. (i), the dissemination must be intentional. [38]

(v) Such offence may be committed within or without the local jurisdiction of the Magistrate.

(vi) But no action can be taken, without an order by or under the authority of the State Government (*i.e.* without its prior sanction), where such person is the proprietor, printer or publisher of a publication registered under the *Press and Registration of Books Act, 1867* , and it has been edited, printed and published in conformity with the provisions of that Act.

(vii) The Magistrate can take act ion only if, with reference to the information received, he forms the opinion that there is sufficient ground for proceeding under this section. In order to form such opinion, he has to determine two questions—

(a) Whether such person has been a party to dissemination of objectionable matter as enumerated in sub-sec. (1), and

(b) Whether there is a fear of repetition of such offence on his part, so as to necessitate binding him down for good behaviour. [39]

Though the Magistrate acts primarily on the information received, he must apply his mind to the antecedents of the person and the surrounding circumstances, so as to form his opinion as to the need for taking act ion under this section.

3. Whether a single act is sufficient for taking act ion under this section.—

1. There has been some controversy as to whether the dissemination or publication of such objectionable matter on a single occasion would suffice to justify a Magistrate taking action against a person under this section. But if the scope and object of the section is properly understood, there would be no room for such controversy:

(i) The object of the section is not to punish a person for having disseminated such objectionable matter, for which the proper forum would be a criminal prosecution, [40] but to secure good behaviour in future, [41] that is, to prevent the accused from continuing to act in the way he has done [42] or to prevent a repetition of such offence. [43]

(ii) Hence, even a record of previous convictions is not sufficient for the application of this section, for, if the Magistrate binds the person down solely on the basis of previous convictions, that would constitute an additional punishment for his past offences. [44] This would not mean that action under this section cannot be taken against a habitual offender, but then the foundation of the proceeding under this section would be, not the number of act s performed, but his *habit* to perform such offences, which must be proved as such. [45]

(iii) The real test for proceeding under this section, as stated already, is that there must be something to show that repetition of the offence was probable. [46] , [47] Hence, it would not be correct to make a general statement that no action under this section can be taken on the basis of one isolated speech. [48] , [49] or publication. It would depend on the antecedents of the person and the other circumstances in each case whether a conclusion as to the probability of repetition of such offence can be reasonably made. [50]

2. On the other hand, a proceeding under this section would be unjustifiable where the object of such proceeding is only to avoid the trouble of prosecuting such person for the alleged offence. [51]

4. Sub-sec.— (1) : 'Information'.—

See p. 482, *ante* .

5. Suit for malicious prosecution, if lies for giving false information.—

See under s. 107,*ante* .

6. 'Is within his local jurisdiction'.—

1. See under s. 107(2),*ante* .
2. If the person be within the jurisdiction of the Magistrate, he can proceed under this section even though the act s referred to in Cls. (i)-(ii) are done outside such jurisdiction.

7. Cl. (i) : Dissemination of objectionable matter.—

1. This clause has to sub-Cls. (a)-(b), both of which are governed by the following common conditions, which must be satisfied, in order to attract the application of this section:

   (a) 'Dissemination', which is not defined, must be understood in the Dictionary sense of the word, namely, 'to scatter abroad' (*Concise Oxford Dictionary)* 'to promulgate widely' (*Webster's New World Dictionary*).

   (b) Such dissemination may be made (i) by word of mouth; (ii) in writing (iii) in any other manner, *e.g.* by newspaper, gramophone, radio or other modern audiovisual media.

   (c) Such dissemination must be *intentional.*

   (d) If the foregoing conditions are present, not only (i) the person who actually disseminates, but also a person (ii) who attempts to disseminate, or (iii) abets the dissemination would come within the mischief of the section.

8. Sub-Cl. (b): Criminal Intimidation or defamation of a Judge.—

1. This clause refers to the offences under ss. 499 and 503, I.P.C. and brings a person under this clause if he disseminates a matter relating to such offence, provided—(i) it concerns a 'Judge'; in the absence of a definition of this word in the Code, it should be understood in the widest sense, in which it is used in s. 19 of the I.P.C.; (ii) it concerns such Judge while 'acting or purporting to act in the discharge of his official duties'. These words have been inserted by the *new* Code, according to the recommendations of the Joint Committee, [52] to ensure that a person should not be jeopardised by a security proceeding when the Judge himself is outside the protection of his official status and functions; if he is aggrieved, he should resort to private litigation.

   The expression 'acting or purporting to act in the discharge of his official duties' has acquired a technical meaning since the Privy Council decision in the case of *Meads.* [53] . In the result, the defamatory matter will not come within the purview of the present clause if it does not relate to an act of a Judge within the *scope* of his official duties. [54] [See, further, under s. 197,*post*].

9. Cl. (ii) : Obscene matter.—

This clause differs from Cl. (i) in the following respects:

(a) Under Cl. (i), *intentional dissemination* [55] of the objectionable matter is the essential ingredient of the offence, while under Cl. (ii), which is wider, intention is not an ingredient. Anybody who carries on any of the specified activities, *e.g.* sale, export, import, *etc.* of the offending matter, would come under Cl. (ii) irrespective of his intention.

(b) Under Cl. (ii), not only the 'circulation' but also the production or keeping for sale *etc.* , is included even though there has been, in fact, no circulation. Under Cl. (i) on the other hand, the author of a seditious matter cannot be bound down unless there has been a subsequent dissemination or publication thereof. [56]

10. Sufficient ground for proceeding.—

See *ante* .

11. 'Require such person to show cause'.—

The procedure for showing cause is laid down in s s. 111-114,*post* , which applies to all the security provisions in s s. 107-110 (see *ante*).

12. Custody or bail.—

See under s. 116,*post.*

13. Onus.—

When the inquiry is made under s. 116(2),*post* , after the appearance of the person asked to show cause under this section (see *post*) it is for the prosecution to prove that all requirements of s. 108 have been satisfied, [57] *e.g.*

(a) That the matter complained of constitutes an offence under any of the specified sections, *e.g.* ss. 124A, 153A, 153B, 292, 295A, 499, 503, I.P.C. [58]

(b) In addition thereto, the prosecution must also prove that the person proceeded against himself disseminates or attempts to disseminate or otherwise abets the dissemination of an offensive matter to which Cl. (i)(a) or (b) relates; or is the maker, publisher, importer *etc.* of an obscene matter which comes under Cl. (ii).

(c) In the case of an offensive matter falling under Cl. (i), the prosecution must further prove that the person did the act of dissemination, attempt or abetment thereof, *intentionally* . [59] Hence, though intention is not a requirement for conviction under s. 153, I.P.C., no action under the present section can be sustained in relation to a matter coming under s. 153, unless it is proved that the printer of such matter had the knowledge or intention that the matter offended s. 153A, while in the case of the author or publisher, knowledge of the contents of the publication may be presumed. [60]

Evidence of previous or connected speeches or act s is admissible to prove such intention. [61]

14. Amount of the bond to be executed.—

See under s s. 111, 117,*post.* It should not be 'excessive' *i.e.* , beyond the means of the person, as would practically send him to jail without being tried and convicted of an offence. [62]

15. 'With or without sureties'.—

See *ante.*

16. Liability of surety.—

Though there is a controversy, the consensus of judicial opinion is to the effect that s. 128 of the Contract Act under which the liability of a surety is co-extensive with that of the principal debtor is not applicable to a surety to a bond in proceedings under the present Chapter of the Code, and that in case of a breach of the terms of the bond by the principal, the surety would be liable to pay the amount stipulated in the bond executed by himself, irrespective of the failure or otherwise of the principal to pay the amount due on his own bond. [63]

17. Appeal and revision. —

See under s s. 111, 117,*post.*

18. Constitutionally of s. 108.—

1. *Prima facie,* s. 108 imposes a restriction on the freedom of expression. But it constitutes a 'reasonable restriction' because it is subject to a judicial procedure; hence it does not offend against *Art. 19(1)(a) of the Constitution* . [64]
2. But its validity must be subject to the narrow interpretation put by the Supreme Court to s. 124A. [65]

30 Substituted by Act No. 63 of 1980, S. 2 (w.e.f. 23-9-1980).

31 Cf. *Butchaiah v. Venkata,* AIR 1957 AP 247 .

32 41st Rep. of the Commission, Vol. I, pp. 8, 10, 11.

33 41st Rep. of the Commission, Vol. I, pp. 8, 10, 11.

34 37th Rep. para 286.

35 Rep. of the Joint Committee, [(p. ii) on Cl. 478].

36 Rep. of the Joint Committee on the Bill of 1970 [(p. xi), on Cl. 108].

37 See Sub-sec. (1) as amendment by Act 63 of 1980.

38 *P.K. Chakrabarti,* (1926) 54 Cal 59 .

39 *Vaman* , (1909) 11 Bom LR 743 .

40 *Emp. v. Sarupanand,* AIR 1941 Oudh 98 100 .

41 *Raja,* (1885) 10 Bom 174.

42 *Chiranji Lal v. Emp.,* AIR 1928 All 344 .

43 *Gudri v. Emp.,* AIR 1932 Pat 213 .

44 *Raja,* (1885) 10 Bom 174.

45 *Jagan Nath v. Emp.,* AIR 1932 Lah 7 .

46 *Gudri v. Emp.,* AIR 1932 Pat 213 .

47 Cf. *Ramphul* , AIR 1933 Lah 236 .

48 *Chiranji Lal v. Emp.,* AIR 1928 All 344 .

49 Cf. *Chandrabhan v. Emp.,* AIR 1934 Oudh 70 .

50 *Vaman* , (1909) 11 Bom LR 743 .

51 *Chiranji Lal v. Emp.,* AIR 1928 All 344 .

52 Rep. of the Joint Committee on the Bill of 1970 [(p. xi), on Cl 108].

53 *Meads v. Emp.,* AIR 1948 PC 156 See Author's *Commentary on the Constitution of India* , Latest Edition and the cases cited therein.

54 *Meads v. Emp.,* AIR 1948 PC 156 See Author's *Commentary on the Constitution of India* , Latest Edition and the cases cited therein.

55 *P.K. Chakraborty,* (1926) 54 Cal 59 .

56 *Pitre,* (1924) 25 Crlj (Bom).

57 *Pitre,* (1924) 25 Crlj (Bom).

58 *Jaganath v. Emp.,* AIR 1940 Nag 134 .

59 *P.K. Chakraborty,* (1926) 54 Cal 59 .

60 *Pitre,* (1924) 25 Crlj (Bom).

61 *Chidambaram,* (1908) 32 Mad 3 (14).

62 *High Court Bar Assocn.,* AIR 1932 Lah 559 .

63 *Narain v. Emp.,* AIR 1946 All 333 ; *Gandhi v. State,* (1962) 2 Crlj 447 (Punj) .

64 *Balroop v. State of U.P.,* [AIR 1956 All 270 *LNIND 1955 ALL 185*].

65 *Kedar Nath v. State of Bihar,* [AIR 1962 SC 955 *LNIND 1962 SC 519*]: 1962 Supp (2) SCR 769 : (1962) 2 Crimes 103 ; See Author's *Casebook* on *Indian Constitutional Law,* Latest Edition.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 109
Security for good behaviour from suspected persons.

When [66] [an Executive Magistrate] receives information that there is within his local jurisdiction a person taking precautions to conceal his presence and that there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

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1. Scope of s. 109.—

This section corresponds to *old* s. 109, with the following changes :

(a) The power has been conferred only on a Judicial Magistrate of the first class [subject to new s. 478], for the reasons referred to under s. 108,*ante.*

(b) Cl. (b) relating to absence of ostensible means of subsistence or failure to give a satisfactory account has been *deleted* , as recommended by the Joint Committee, [67] having regard to the complaint that the power was being abused.

(c) While retaining *old* Cl. (a), it has been restricted to cognizable offence only, as recommended by the Joint Committee. [68]

(d) The Magistrate has also been empowered to accept a bond *without* surety, if he so thinks fit, having regard to the fact that he is a Judicial Magistrate who may be expected to act impartially, with due regard to the rights of the person proceeded against as well as to the reasonable needs for the prevention of crime. [69]

2. S s. 41(2) and 109.—

I.

(1) Both these sections have been amended by the *new* Code, *Old* s. 55(1)(a), which has been substituted by the *new* s. 41(2) [p. 198], provided—

"Any Officer in charge of policy station may, in like manner, arrest or cause to be arrested—

(a) Any person found taking precautions to conceal his presence within the limits of such station, under the circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence."

Notwithstanding some changes in the language in the two sections, it was held that the foregoing provisions referred to the same class of persons as were referred to by *old* s. 109(a); while *old* s. 55(a) provided for their arrest, s. 109(a) provided for preventive action against them. [70]

This view seems to have been accepted by the *new* Code, by simply referring to the categories of persons who fall under s s. 109-110, and inserting the word ‘cognizable’ to qualify ‘offence’ in s. 109. It is clear that s. 41(2) and s. 109 of the new code refer to the same class of persons.

(2) But, though the same class of persons are referred to by s s. 41(2) and 109, there is no inter-dependence between the two provisions, so that it cannot be contended that no act ion can be taken against such a person under s. 109 unless he is first arrested under s. 41(2). [71] The Police may proceed under either section. Nevertheless, it has been held that once a proceeding under s. 109 has been held illegal, it would not be proper to arrest such person under s. 41(2) unless there are fresh materials. [72]

II. By Act 63 of 1980, the power has been vested in an Executive Magistrate of the first class.

3. S s. 109-110.—

1. There is some overlapping between s s. 109 and 110 because many of the offences dealt with by s. 110 are also cognizable, *e.g.* theft, kidnapping. But the foundation of an order under s. 110 is the 'habit'. Hence, there would be a miscarriage of justice, by reason of confusing the person proceeded against—

   (i) if proceedings under s s. 109 and 110 are started simultaneously, or amalgamated; [73] or

   (ii) if a joint inquiry is held against two persons required to give security under s s. 109 and 110, respectively; [74] or

   (iii) if an order is passed against the same person under both sections. [75]

2. On the other hand, a fact which is not relevant under one of these sections may be relevant under the order, so that there would be nothing wrong in proceeding under either section after a proceeding under the other has failed, [76] or the person has been imprisoned for default of furnishing security ordered under either section. [77]

3. The distinction between the scope of the two sections should be borne in mind by the Magistrate in order to prevent their abuse. Act ion under s. 110 cannot be taken except against a habitual offender. A criminal released from jail cannot be proceeded against under s. 110 unless he is a habitual offender or a person of a 'desperate or dangerous character' under Cl. (g). [78] But such person may be proceeded against under s. 109 if the two conditions of taking precautions for concealment and the object of committing a fresh offence, which is cognizable, are satisfied.

4. S. 109 and Preventive Detention.—

There is nothing in the law to bar an order under the law of preventive detention being made against a person, if the requirements of such law are satisfied, merely because an order under s. 109 is pending against such person. [79]

5. S s. 109 and 452: Disposal or confiscation of property.—

While making a final order under s. 109, it would be competent for the Magistrate to make an order also for confiscation of the movables found in the possession of the accused, under s. 452 [*old* s. 517]. [80]

6. Object of s. 109.—

1. The object of this section is not only to prevent a person from committing any cognizable offence but also to enable him to improve and keep good behaviour, [81] and empowers a Magistrate, with this end in view, to proceed against suspicious persons lurking within his jurisdiction, [1] so that their designs may be frustrated before they are carried out. [2]

2. It is an enabling and discretionary provision, and does not make it obligatory for the Magistrate to proceed under this section. [3]

7. Conditions for the application of s. 109.—

1. An order under this section can be made only on the following conditions:

(a) It can be made only by an Executive Magistrate [4] of the first class. If such order is made by any other Magistrate it would be void [s. 461(d),*post*].

(b) He can act only if he receives information from some source (see *ante*).

(c) Such information should be to the following effect.—

(i) that there is a person within the Magistrate's jurisdiction; (ii) who is taking precautions to conceal his presence; (iii) that there is reason to believe that such concealment is being resorted to with a view to committing a cognizable offence.

(d) Two conditions must co-exist in order to justify act ion against a person under s. 109, and if either of them does not exist, the order would be bad. [5] These two conditions are—

(i) He must be taking precautions to conceal his presence;

(ii) Such concealment must be with a view to committing a cognizable offence. [6]

(e) Where the foregoing conditions are present, it is no bar against taking action under s. 109 that the person could be prosecuted for a substantive offence. [7]

2. Since Cl. (b) of *old* s. 109 has been omitted from the *new* section, the following are no longer any ground to support a proceeding under s. 109—

(i) That the person has no ostensible means of livelihood.

(ii) That the person fails to give a satisfactory account of himself. [8]

3. Like the other preventive sections encroaching on a personal liberty, this section must be strictly construed and cautiously applied, so that it may not turn into an engine of oppression. [9]

8. 'Receives information'.—

The information must be credible, [10] and contain the necessary particulars to enable the person proceeded against to meet the charge against him. [11] (See further, *ante*).

9. 'There is within his local jurisdiction a person'.—

1. Under the *old* section, it was held in some cases [12] that act ion under the present section could be taken by a Magistrate only against a stranger who comes from outside into his jurisdiction to conceal his presence there, so that no such action could be taken against a person who was a resident within such jurisdiction.

2. *Change made by the new Code.* The foregoing view would have narrowed down the efficacy of the section. Hence, it has been redrafted, as recommended by the Commission, [13] to make it clear that act ion can be taken against any person who is concealing his presence with a view to committing a cognizable offence, if such person is taking precautions to conceal himself within the Magistrate's local jurisdiction, whether he comes from outside or is a resident of such jurisdiction or has a well-known residence. The redraft accepts the view taken by the Full Bench of the Allahabad High Court in *Emp. v. Phuchai* . [14] What is relevant is (a) the *presence* of the person within the Magistrate's jurisdiction, [15] and (b) his taking precautions to conceal himself within such jurisdiction. [16] Residence of such person is, therefore irrelevant. [17]

10. 'Taking precautions.....'.—

1. Owing to the dubious drafting of the section, several nice questions were raised in the courts under the *old* Code, on which different shades of opinion were expressed. In so far as the same language is substantially used in the *new* section, these questions have to be answered.

2. The first question is whether the taking of precautions has reference to the time when the information is given to the Magistrate or when he makes the order under this section. A liberal construction of the entire section would lead to the conclusion that both the conditions—(a) 'is within his local jurisdiction' as well as (b) 'taking precautions'— have reference to the information given to the Magistrate, and, therefore, to the time of the informant's observation. Otherwise no order under this section could be taken against a man who is arrested and brought before the Magistrate after receipt of the infor-mation. [18] , [19] Of course this would involve a little grammatical anomaly in reading 'taking' to mean 'has taken' or 'has been taking', [20] , [21] but that anomaly would arise only if the situation is considered from the point of time when the Magistrate makes the order. The author submits that the plain meaning of the section is to refer to the time when the informant discovers the fact of the presence of the person seeking to conceal himself.

3. Another question under the *old* section was whether the section requires a continuous course of conduct or a single act of concealment or attempt to conceal would suffice to warrant an order under this section.

   The Calcutta High Court [22] took the view that it requires a continuous act of concealment or concealment continuing for a sufficient period of time, so that a single act of or temporary concealment would not justify an order under this section. An anomaly which would result from this view is that if the person who had concealed himself for the purpose of committing a crime is found out and brought before the Magistrate after arrest (under s. 55), no act ion under s. 109 could be taken against him on the ground that his concealment was not continuous up to the time when the Magistrate is to take action. [23] , [24]

   The consensus of opinion [25] is, however, that it is not necessary to show that the person has been engaged in a continuous course of conduct to conceal his presence. Hence, a single act of concealment or attempt to conceal would suffice provided it is further established that it was done with a view to committing a cognizable offence. This view appears to be preferable because

otherwise the object of the section would be defeated if no preventive action could be taken against a person going to commit a cognizable offence simply because he had hid himself on a single occasion.

In fact, this latter view appears to have been adopted by the *new* section by omitting the word 'is' which was used before the word 'taking' in the *old* section. The *new* draft is—'there is a person.... taking precautions'. Hence, the implication of continuity arising from 'is taking' has been taken away, and the present emphasis is on the existence of the person within the Magistrate's jurisdiction who was taking precautions to conceal his presence. Hence, *there should not any longer* be any difficulty in taking act ion under s. 109 against persons who were preparing to commit a dacoity and concealed themselves on the approach of the police, say, behind a hedge or ina grove, [26] simply because such concealment was on a solitary occasion or was temporary. [27] Of course, there would be no concealment, if on seeing the Police they come out of their hiding and try to escape. [28]

But even though an order under s. 109 can be made where the act of concealment is not, in fact, continuous, no preventive act ion should be needed where it is not *intended* to be continuous. [29]

4. But as the word 'precautions' indicates, it is not necessary, to warrant an order under this section, that the concealment should be successful, [30] an attempt at concealment would be enough, if it is done with the intention to commit an offence. It follows that no order under this section can be made when there is no intention nor attempt to conceal and the person is deliberately preparing to commit a burglary, which he admits when caught. [31]

11. 'Conceal his presence'.—

It is clear under the *new* Code that this expression is to be read with the words 'within his local jurisdiction', so that in order to bring a person under this section, it must be shown that he was taking precautions to conceal the fact that he was *present* [32] within the Magistrate's jurisdiction; [33] and also that it was being done for the purpose of committing a crime, without being known.

A. Such 'concealment' of his 'presence' may be effected—

(i) by hiding himself [34] in a house or under some object sufficient to cover himself, *e.g.* , a hedge, [35] bridge or grove; [36]

(ii) by resorting to some disguise to hide his presence [37] by wearing a mask; [38]

(iii) by assuming a false name for the purpose of committing an offence. [39]

B. On the other hand, there is no such concealment by *mere* —

(i) impersonation of another person, [40] or false representation as to one's identity, [41] which may not necessarily constitutes a concealment of his 'presence', [42] *e.g.* where he gives a wrong name in a *bazar* , in broad daylight; [43]

(ii) standing still, without hiding, hoping that he would be mistaken for an inanimate object; [44]

(iii) dashing in and out of a crowd; [45]

(iv) moving from place to place on a Railway platform without ticket and muffling up his head with a piece of chaddar, it being a winter evening. [46] or going along the road with face covered by a cloth; [47]

(v) giving a false name, if he instantly gives his correct name and address, [48] but it would be otherwise if he gave different names at different times; [49]

(vi) running away on being challenged by the police, [50] or taking an unfrequented route [51] or a deserted road in the dark, [52] because requirement of the section is concealment of 'presence' with object of *committing an offence* and not escape from arrest. [53]

12. Where there can be concealment in a house.—

Since both the conditions must be present, the mere fact that a person is keeping inside a house cannot justify an action under this section; it must be further shown that he has taken some other steps to give it out to the world that he was *not* present in the house, [54] so that he might commit some offence, without being known. Hence, no act ion under s. 109 could be taken—

(a) Where some persons, who are drunk, merely occupy a house with the owner's permission but try to run away when people make them open the door. [55]

(b) Where the owner of a house made preparations, at midnight, in his own house, along with others, for committing a dacoity but opened the door and fled away, when people asked them to open the door, it was held that though action might be taken against these persons under some other provisions of law, s. 109 could not be used inasmuch as there was no concealment by simply remaining inside one's own house at midnight, and there was no refusal to open the door when asked. [56]

(c) Where a person hides himself in his own house, not for the purpose of committing an offence, but to avoid the Police for other reasons. [57]

13. With a view to committing a cognizable offence.—

1. As has been stated already, mere concealment would not justify an order under this section unless it is resorted to with the object of committing some offence, *e.g.* where the person conceals himself temporarily—

(i) to avoid the execution of a warrant, [58] or

(ii) to avoid the police, [59] even though he is an *old* offender. [60]

2. Similarly, where there is no preparation for committing an offence in future, previous conviction is no ground to justify an order under s. 109. [61]

3. There must be some material on the basis of which the deduction could be made that the concealment was for the purposes of committing a cognizable offence and mere speculation would not be enough [62] . Hence, in the absence of other circumstances, [63] mere possession of arms or house-breaking implements, [64] , [65] may not warrant such deduction, and no order under the present section can be made, when there is no attempt at concealment. [66]

14. Procedure.—

1. As has been explained *ante,* the procedure for act ion under all the preventive sections s s. 107-110 are governed by the common provisions in s s. 111 onwards. Hence, the procedure to be followed under the present section should be—

(i) First, a preliminary order and notice under s. 111;

(ii) An inquiry under s. 116;

(iii) A final order, under s. 117, founded on the result of such inquiry.

15. Joint inquiry, if permissible.—

1. Except in the case of associates, coming under s. 116(5),*post* joint inquiry against several persons would not be permissible in a proceeding under this section. [67]

2. Nor can there be any joint inquiry where two persons are proceeded against under different provisions, *e.g.* one under s. 109 and another under s. 110; [68] or where the same evidence is not applicable to all the persons. [69] [See, further, under s. 116(5),*post.*]

16. Onus.—

For the application of this section, it is for the prosecution to prove—

(a) that the person had taken some active steps to conceal his presence or done something to show that he did not wish it to be known that he was present, say, in his house; and

(b) that such steps were taken with a view to committing some cognizable offence. [70]

17. Evidence.—

1. Want of ostensible means of subsistence as a ground having been eliminated from the section, many of the *old* decisions have become useless.

2. The section being now solely aimed at prevention of the commission in future of a cognizable offence, previous conviction or bad conduct has become irrelevant under this section though it remains relevant under s. 110. [71]

3. A statement made by another person who is also being proceeded against is inadmissible except where a joint inquiry is held against them under s. 116(5),*post.* [72]

4. But since a proceeding under s. 109 is not an inquiry in respect of or prosecution for any 'offence' and s. 162(1) of this Code or *s. 26 of the Evidence Act* is not attracted, a statement made by the person proceeded against [73] to the Police is not inadmissible.

5. The evidence of a Police Officer, based on his personal knowledge, is not inadmissible, [74] but any statement based on inquiries made by him or, statement made to him by others is inadmissible. [75] The statement of a police officer, on his personal knowledge, is not to be discredited in a security proceeding merely because it is not corroborated by any independent witness. [76]

18. Form of bond.—

See Form No. 13, 2nd Sch. *Post.*

19. Measure of security.—

See *ante.*

20. No cash deposit in lieu of bond.—

No cash deposit can be accepted in lieu of a bond ordered under s. 109 because the case of a 'bond for good behaviour' is excepted by s. 445 (*old* s. 513], *post.*

21. With or without sureties.—

See *ante.*

22. Execution of bond by minor.—

See under Proviso (c) to s. 117,*post.*

23. Acceptance or rejection of surety.—

See under s. 121,*post.*

24. Default in furnishing security: consequences of.—

See under s. 122,*post.*

25. Breach of bond.—

See under s. 122(1)(b), *post.*

26. Appeal.—

See under s. 117,*post* Appeal lies to the Court of Session, from an order to give security under s. 117, read with this section [s. 373(i), *post* : *old* s. 406].

27. Revision.—

1. Revision lies to the High Court or Sessions Judge [s. 397.—see, further under s. 117,*post*].
2. An order under s. 109 may be quashed in revision on the following grounds, *inter alia*—

   (i) That the person in question has not 'concealed his presence' within the meaning of the section. [77]

   (ii) That the order specifies a period of imprisonment in default of execution of the bond required. [78] , [79]

   (iii) That the order under s. 111 is not clear whether the person was to meet a case under s. 109 or 110. [80]

3. On the other hand, the revisional Court will not interfere with a finding of fact made by the Magistrate unless there has been a departure from legal principles. [81]

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66 Substituted by Act No. 63 of 1980, S. 2 (w.e.f. 23.9.1980).

67 Rep. of the Joint Committee [p. (xii), under Cl. 109].

68 Rep. of the Joint Committee [p. (xii), under Cl. 109].

69 Rep. of the Joint Committee [p. (xii), under Cl. 109].

70 *R.* *v.* *Ram* *Dayal,* [AIR 1950 All 134 *LNIND 1949 ALL 72*](para 30).

71 *R.* *v.* *Ram* *Dayal,* [AIR 1950 All 134 *LNIND 1949 ALL 72*](para 30); *Haradayal,* (1926) 27 Crl. LJ 628 (630).

72 *Maiku* *v.* *Emp.* AIR 1919 All 160 .

73 *Gagan* *v.* *Emp.,* AIR 1929 Cal 775 .

74 *Gholam* *v.* *Emp.,* (1904) 8 CWN 543 .

75 *Rangaswamy,* (1913) 38 Mad 555.

76 *Satish,* (1912) 39 Cal 456 .

77 *Fateh* , AIR 1929 Sind 166 .

78 *Raja Sahib,* (1855) 10 Bom 174.

79 *Akbar v. State* , AIR1955 NSC (Assam) 2841.

80 *Pydi Ramana,* (1920) 42 Mad 9.

81 *Yasin* *v.* *State,* AIR 1969 Guj 1133 .

1 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB) ; *Satish* , (1912) 39 Cal 456 .

2 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB) ; *Satish* , (1912) 39 Cal 456 .

3 *Kartar* *v.* *R.,* AIR 1951 Punj 422 .

4 Substituted for the words ‘Judicial Magistrate’, by Act 63 of 1980.

5 *Sheetal* *v.* *R.*, AIR 1950 All 184 [*LNIND 1949 ALL 116*]; *Katipoojary*, AIR 1965 Mys. 264.

6 *Katipoojary*, AIR 1965 Mys. 264.

7 *Ram Lal* *v.* *Emp.* AIR 1942 Oudh 245 247.

8 Cf. *Narendra* *v.* *Emp.*, (1912) 13 Crlj 239 (Cal); *Samad Guru v. State,* AIR 1955 J&K 28,—a reference to which would be irrelevant and misleading under the *new* section on the *present* point.

9 *Victor*, (1926) 30 CWN 380 (381).

10 *Emp.* *v.* *Madho,* (1903) 31 Cal 557.

11 *Nikka Ram* *v.* *State,* AIR 1954 Punj 6.

12 *Gagan* *v.* *Emp.*, AIR 1929 Cal 775.

13 *Gagan* *v.* *Emp.*, AIR 1929 Cal 775; 41st Rep. of the Law Commission, Vol. 1, para 8.13, read with the 37th Rep., App. 8.

14 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB); *Satish,* (1912) 39 Cal 456.

15 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB); *Satish,* (1912) 39 Cal 456.

16 *Emp.* *v.* *Bishi,* AIR 1935 Pat 69.

17 *Emp.* *v.* *Bishi,* AIR 1935 Pat 69; *R. v. Ram Dayal,* AIR 1950 All 134 [*LNIND 1949 ALL 72*](paras 18-19).

18 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB) ; *Satish,* (1912) 39 Cal 456 .

19 *Emp.* *v.* *Bishi,* AIR 1935 Pat 69 .

20 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 (FB) ; *Satish,* (1912) 39 Cal 456 .

21 *Emp.* *v.* *Bishi,* AIR 1935 Pat 69 .

22 *Sunil* *v.* *State,* AIR 1958 Cal 191 [*LNIND 1957 CAL 68*].

23 *Emp.* *v.* *Bishi,* AIR 1935 Pat 69 ; *Sunil v. State,* AIR 1958 Cal 191 [*LNIND 1957 CAL 68*].

24 *Sunil* *v.* *State,* AIR 1958 Cal 191 [*LNIND 1957 CAL 68*].

25 *Emp.* *v.* *Phuchai,* AIR 1929 All 33 ; *Manik v. Emp.,* AIR 1934 Oudh 367 ; *State of Mysore v. Koti,* AIR 1963 Mys 264 (para 8).

26 Cf. *Abdul* *Gafoor* , AIR 1943 All 367 .

27 *Ram* *Lal* *v.* *Emp.* AIR 1942 Oudh 245 247 .

28 *State* *of* *Mysore* *v.* *Koti,* AIR 1965 Mys. 264 [Contra *Chhutai v. Emp.,* AIR 1941 Oudh 509].

29 *R.* *v.* *Ram* *Dayal,* AIR 1950 All 134 [*LNIND 1949 ALL 72*](paras 18-19).

30 *Ganpati* in re AIR 1938 Nag 465 .

31 *Bhairam* ,
AIR 1927 All 59 .

32 *Sheetal* *v.* *R.*,
AIR 1950 All 184 [
LNIND 1949 ALL 116](para 3).

33 *Lakshman* *v.* *Emp.*,
AIR 1941 Pat 478 479 .

34 *Lakshman* *v.* *Emp.*,
AIR 1941 Pat 478 479 .

35 *Chhutai* *v.* *Emp.*,
AIR 1941 Oudh 509 510 .

36 Cf. *Abdul* *Gafoor* ,
AIR 1943 All 367 .

37 *Rambirich*,
(1926) 27 Crlj 1128 .

38 *Abdul* *Gafoor* ,
AIR 1943 All 369 .

39 *Pramatha*,
(1914) 15 Crlj 255 (Cal) .

40 *Kashi* *Nath* ,
AIR 1934 All 45 .

41 *Kashi* *Nath* ,
AIR 1934 All 45 .

42 *Kashi* *Nath* ,
AIR 1934 All 45 .

43 *Ganga* *Ram* *v.* *State*,
AIR 1956 HP 43 .

44 *Hafiz* ,
AIR 1938 Nag 595 .

45 *Singaraju*,
(1955) 2 MLJ 336 .

46 *Sunil* *v.* *State,,* AIR 1958 Cal 191 [*LNIND 1957 CAL 68*].

47 *Thandavanarayan,* *(1955) 2 MLJ 659* .

48 *Gobra* *v.* *Emp.,* AIR 1929 Cal 729 .

49 *R.* *v.* *Ram* *Dayal,,* AIR 1950 All 134 [*LNIND 1949 ALL 72*].

50 *Emp. v. Bishi,* AIR 1935 pat 69; *Samad v. State,* AIR 1969 J & K 105 (para 11).

51 *Emp. v. Bishi* , AIR1935. pat 69.

52 *Gagan,* AIR 1929 Cal 775 .

53 *Jaganath* *v.* *State,* AIR 1953 Bhopal 12 .

54 *Sheetal* *v.* *R.,* AIR 1950 All 184 [*LNIND 1949 ALL 116*](para 3).

55 *Sheetal* *v.* *R.,* AIR 1950 All 184 [*LNIND 1949 ALL 116*](para 3).

56 *Prahlad v. State,* AIR 1960 pat 115.

57 *Satish,* (1912) 39 Cal 456 .

58 *Satish,* (1912) 39 Cal 456 .

59 *Thandavanarayan,* in re., *(1955) 2 MLJ 659* .

60 *Piru,* (1925) 41 CLJ 142.

61 *Abdul* *Gafoor* , AIR 1943 All 369

62 *State of Mysore v. Koti,* AIR 1965 Mys 264 .

63 *Ramji* , AIR 1936 Nag 265 .

64 *State of Mysore v. Koti,* AIR 1965 Mys 264 .

65 *Seetal v. R.,* AIR 1950 All 184 [*LNIND 1949 ALL 116*].

66 *Seetal v. R.,* AIR 1950 All 184 [*LNIND 1949 ALL 116*].

67 *Abdul Kadir,* (1886) 9 All 452 ; *Muhammad,* (1924) 25 Crlj 952 .

68 *Mohan,* (1901) 2 Crlj 224 .

69 *Muhammad,* (1924) 25 Crlj 952 .

70 *Seetal v. R.,* AIR 1950 All 184 [*LNIND 1949 ALL 116*].

71 *Abdul Gafoor* , AIR 1943 All 369 .

72 *Bhanga,* (1928) 49 Crlj 502 (Cal) .

73 *R. v. Ram Dayal,* AIR 1950 All 134 [*LNIND 1949 ALL 72*]; *Pritam v. Ranjit,* AIR 1972 Raj 59 (para 16; re. s. 107 proceeding).

74 *Pritam v. Ranjit,* AIR 1972 Raj 59 (para 16; re. s. 107 proceedings); *Lakshman v. Emp.,* AIR 1941 pat 478 480.

75 *Pritam* *v.* *Ranjit,* AIR 1972 Raj 59 (para 16; re. s. 107 proceedings); *Lakshman v. Emp.,* AIR 1941 pat 478 480.

76 *State of Mysore v. Koti,* AIR 1965 Mys 264 .

77 *Samad v. State,* AIR 1969 J&K 105.

78 *Seetal v. R.,* [AIR 1950 All 184 *LNIND 1949 ALL 116*].

79 *Samad v. State,* AIR 1969 J&K 105.

80 *Emp. v. Sundar,* (1934) 35 Crlj 189 .

81 *Iswar,* (1884) 11 Cal 13 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 110
Security for good behaviour from habitual offenders.

When [82] [an Executive Magistrate] receives information that there is within his local jurisdiction a person who—

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the *Indian Penal Code (45 of 1860)* , or under section 489A, section 489B, section 489C or section 489D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or

(f) habitually commits, or attempts to commit, or abets the commission of—

(i) any offence under one or more of the following Acts, namely:—

(a) the *Drugs and Cosmetics Act, 1940* (23 of 1940);

(b) [83] **[the *Foreign Exchange Regulation Act, 1973* (46 of 1973);]**

(c) the Employees Provident Funds [and Family Pension Fund] Act, 1952 (19 of 1952); [84]

(d) the *Prevention of Food Adulteration Act, 1954* (37 of 1954);

(e) the *Essential Commodities Act, 1955* (10 of 1955);

(f) the Untouchability (Offences) Act, 1955 (22 of 1955); [85]

(g) the *Customs Act, 1962* (52 of 1962); [86] **[* * *]** [87] **[(h) the *Foreigners Act, 1946* (31 of 1946); or]**

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

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1. Scope of s. 110.—

This section corresponds to *old* s. 110 with the following changes, other than verbal—

(a) The power has been confined to an *Executive* Magistrate, *first* class, subject to *new* s. 478 [See *ante*]. [88]

(b) *Old* Cl. (f) has been renumbered as Cl. (g).

(c) A new clause has been inserted as Cl. (f) include certain offences of an anti-social nature, as recommended by the Joint Committee. [89]

2. S s. 107 and 110.—

See *ante.*

2. While s. 107 is intended to prevent the commission of the *first* act involving breach of the peace, s. 110 is taken to prevent a repetition of such act by the person proceeded against.

3. But this is only a general proposition; there is no bar to proceed under s. 107 against an old offender in case of apprehension of imminent breach of the peace. Nor is there any bar to a proceeding under s. 110 being converted into a proceeding under s. 107 if the circumstances brought before the Magistrate attract the application of s. 107; but, since the facts required to be proved under the two sections are different, if the Magistrate decides to proceed under s. 107, after having initiated the proceeding under s. 110, he can do so only after issuing a fresh notice under s. 111. [90] (See *ante*).

4. While mere apprehension of a breach of the peace is sufficient for a proceeding under s. 107, there would be no justification to proceed under s. 110 unless the person to be proceeded against is a habitual criminal and there is a likelihood of the repetition of such crimes. [91]

3. S s. 107 and 145.—

1. While s. 107 is intended for public peace, s. 145 relates to *disputes* between parties regarding *possession* concerning land or water. [92]

2. Hence, the dropping of proceedings under s. 107 cannot furnish a ground for dropping proceedings under s. 145. [93]

4. S s. 109 and 110.—

1. The object of both sections being to bind down a person for good behaviour, there is no justification for orders under both sections against the same person at the same time, [94] which might also result in demanding security in excess of what the Magistrate was empowered to require under either section.

2. But there is nothing to bar a proceeding under s. 110, after an order under s. 109 had been made and the person had been imprisoned for failure to give security. [95]

5. S s. 110 and 145.—

There is overlapping between these two sections in so far as Cl. (e) of s. 110, which relates to the habitual commission of offences involving breach of the peace, may be in respect of a dispute regarding land or water. In such a case, generally speaking, the special provision under s. 145 should be resorted to, if its conditions are satisfied, rather than the general provision in s. 110. [96]

6. S s. 110(a) and 401, I.P.C.—

1. While under the present clause, security may be demanded for maintaining good behaviour from a person who is "by *habit* a robber, house-breaker, thief or forger" and persons of this description who are associated together for the purpose of carrying on such activities may be proceeded against jointly for the purpose of the inquiry under s. 116(5) [*post*], the membership of such an association is punishable under s. 401, I.P.C.

2. The difference between the two sections is that s. 401 is applicable when the act ivities of such a gang have *materialised* into robberies or thefts or attempts at such offences; while s. 110 is applicable whenever there is a strong *suspicion and evil repute* against such persons that they are engaging in such activities, by reason of which they may be bound down for good behaviour. While s. 401 is punitive, Sections 110 is preventive in its object, and is applicable notwithstanding that such act ivity may also fall within the purview of s. 401, I.P.C. in a case. [97]

3. It is open to the Police to proceed against a person under either of the two provisions. But after he has been tried and acquitted of the charge under s. 401, it would not be open to proceed against him under the present section, on the same evidence. [98]

4. Conversely, an order under the present section cannot bar a subsequent trial and conviction for any of the specific offences involved, under s. 401, I.P.C. But at the trial under s. 401, the evidence of being bound under the present section would not be admissible to prove the charge or the person's bad character. [1]

7. S. 110 and Art. 22 of the Constitution.—

Though the object of both provisions is preventive, under s. 110, the detention takes place after a *quasi* -judicial inquiry while there is no such inquiry under Art. 22. [2] The scope of the two provisions being different, there is no question of repugnancy between the two. [3] (See also *ante*).

8. Constitutionality of s. 110.—

Section 110 has been held *not* to be violative of Art.14[4] or 22. [5]

9. Object of s. 110.—

1. The object of this section is to afford protection to the public against a *repetition* of crimes against their person or property; [6] not a punishment of the offender for his past offences but securing his good behaviour for the future. [7]
2. The object of this section being preventive in nature, it cannot be confined to cases in which *positive evidence* of the commission of same crime is forthcoming against the person charged. [8] A proceeding under this section can therefore be initiated even after the *discharge* of an accused in a trial or where the Police do not prosecute the person even though there is a charge against him of having committed some substantive offence, [9] but unless he is a habitual criminal, s. 110 cannot be used as an indirect means to secure conviction in a case where a prosecution for a specific offence would have failed. [10] But a proceeding under s. 110 would be improper—

   (a) after the accused has been *acquitted* at a trial on the same charge, [11] in the absence of fresh evidence relating to subsequent conduct; [12]

(b) to punish him for a past offence, in the absence of the requirement of his being a 'habitual offender'; [13]

(c) merely because he is a person of tyrannical habits and criminal tendencies; [14] or an undisciplined man; [15] or a person of 'had character' [16] or is quarrelsome, [17] litigious, [18] or a nuisance [19] to his neighbours.

10. Conditions for the application of s. 110.—

1. Since this section confers drastic power to bind down persons suspected, but not proved, to have committed any of the offences specified in the various clauses, the power should be used with extreme caution and judicial discretion, and strictly according to the procedure laid down, so that it may not be used as an engine of oppression, [20] blackmail [21] or private vengeance [22] and the Magistrate should not be influenced by vague rumour or gossip.
2. The conditions which must be satisfied for the application of this section are—

(i) Under the *new* section, only a Judicial Magistrate can exercise this function [subject to the power of the State Government to appoint an Executive Magistrate, in the manner provided in *new* s. 478, *post* . If any other Magistrate exercises this power, the proceedings shall be void [s. 461(d); *old* s. 530(d)]. He must possess first class power both when the proceeding is initiated as well as when the final order is made. [23]

(ii) The Magistrate may proceed only on receipt of information.—that a person habitually commits any of the offences specified in any of the Cls. (a)-(f), or is a desperate and dangerous person within the meaning of Cl. (g).

Clauses (d), (e) and (f) include the attempt to commit or the abetment of commission of the offences mentioned therein, provided such attempt or abetment is *habitual.*

The Magistrate must, in his order, specify under which of the clauses the person is alleged to come. [24] Mere assertion that the person is of *criminal tendencies* or of *tyrannical habits* is not enough. [25]

(iii) Such person must be within his local jurisdiction :

1. As to the meaning of the expression 'within his local jurisdiction', see *ante.*
2. Though there has been some difference of opinion on the interpretation of this expression, the literal meaning of the verb 'is' would lead to the following conclusions:

(a) It does not require 'residence', [26] but means only presence [27] of the person at the time when the Magistrate makes his preliminary order on receipt of the information, [28] even though he may have come from outside.

(b) Hence, the Magistrate has no jurisdiction to proceed under this section against a person outside his jurisdiction [29], [30] or a person who, though resident, has left the jurisdiction (not for a temporary purpose) [31] at the time of the proceeding or is detained outside in a police custody. [32]

(c) But if a person has been arrested outside the Magistrate jurisdiction for an offence committed within his jurisdiction, and is in custody [33] or in jail [34], [35] within the Magistrate's local jurisdiction, such Magistrate is competent to proceed under s. 110 against such person, on failure of the prosecution for the substantive offence. [36]

(d) The verb 'is' is to be read along with the words ' a person who by habit', Hence, in case of casual presence of a person within a Magistrate's jurisdiction, it must also be shown that such person has been pursuing his evil career [37] or has acquired his evil reputation [38] within such Magistrate's jurisdiction which justifies the exercise of the Magistrate's power.

(e) The view [39] that a Magistrate cannot take action under this section against a man carrying on depredations within his jurisdiction [40] merely because he is a resident of another jurisdiction or comes from outside, is not sound and out of tune with the verb 'is'. It refers to the place where he was at the time when the information was received.

11. Duty of the Magistrate.—

1. The Magistrate can exercise the power under *s. 110 Cr.P.C.* only on convincing testimony of the person being a clear and present danger to society.[41]

2. Mere suspicion is not enough to establish a person as a habitual offender. [42]

3. The petitioner, a man of 71 years of age was in Jail from 23.02.1980 but was labelled as habitual offender under *s. 110 Cr.P.C.* The Supreme Court having found that the detention to be illegal quashed the detention. As there was no evidence that he was a habitual offender or a man of desperate character, the proceeding is also quashed.[43]

4. The petitioner was kept in detention under Sections 151(3) and 110 *Cr.P.C.* only because several criminal cases were pending against him. The detention was held to be illegal as there was neither any emergency nor was there any information to the police that the petitioner was of desperate and dangerous character creating problems for the security of the community.[44]

5. To invoke *s. 110 Cr.P.C.* there should be a number of conditions or course of conduct by general representation.[45]

12. 'Receives information'.—

1. See *ante.* [46]

2. The Magistrate cannot act on his own knowledge even though acquired in another capacity. [47] If he has such knowledge, he should not try the case. [48] [See further under s. 116(2),*post*].

3. In the absence of such information, mere suspicion of the Police is not enough. The object of the section is to protect the public from habitual criminals or desperate outlaws, for, the ordinary provisions of the penal law are not sufficient deterrents. [49] At the same time, its object is not to fill the jails with all bad characters or suspects [50] in the country, or to keep them under detention until the Police are able to make out a case against them. [51]

13. Cls. (a)-(f): 'Habit'; 'Habitually'.—

1. While the word 'habit' is used in Cls. (a)-(b), the word 'habitually' occurs in Cls. (c)-(f)—meaning the same thing, namely a depravity of character as evidenced by frequent repetition [52] , [53] or commission in the past of an offence of the nature mentioned and the readiness to commit them again. [54] When, therefore, 'habit' is sought to be proved by acts of misconduct committed several years ago, evidence of recent misconduct must be laid to justify an order under this section. [55]

2. It is clear that [apart from evidence of 'general repute' under s. 116(4),*post*] such habit can be proved only by an aggregate of acts [56] or past convictions; [57] so that a single instance, [58] even if it has resulted in conviction, would not suffice. [59] But how many instances would suffice to prove that the person has become a habitual offender will depend upon the circumstances of each case. [60] Thus, *old* incidents, all of which were compromised, may not justify an order under this section. [61]

3. Subject to what is stated under 'general repute' [s. 116(4)], habit can be proved only by facts based on the personal knowledge of the witnesses, [62] and not their suspicion, not supported by facts. [63]

14. Cl. (a) : 'By habit a robber, house-breaker, thief, or forger'.—

1. To prove this, evidence must be laid of a number of thefts [64] *etc.* committed by the person; or evidence that the was by general reputation [65] a habitual thief or the like.

2. 'General reputation' would be established not by proof of the number of occasions, but by the evidence of persons of his locality to the effect that he habitually commits theft or robbery, and the value of such evidence depends upon the number and respectability of such witnesses. [66] [See, further, under s. 116(4),*post*].

3. In an Allahabad case [67] it was held that a 'dacoit' not being mentioned in this clause, no proceeding under s. 110 can be taken against a habitual dacoit, and that he can only be prosecuted on a specific charge of dacoity [68] . This seems to be artificial because by definition (s. 391, I.P.C.), dacoity is robbery committed by five or more persons. It would be unreasonable to hold that if a person habitually commits robbery individually, he may be bound under the present section but not, if he commits robbery conjointly with others. [69]

4. A person cannot be held to be habitual robber merely because he associates with 'bad characters' [70] or gathers them at his house, unless [71] such association is proved to be for the purpose of committing robbery. [72]

5. The insertion of the word 'forger', by the Amendment Act of 1923, superseded a line of cases where it was held that 'forgery', not being specifically mentioned in the section, could not be brought in under 'cheating'.

15. Cl. (b) : 'By habit a receiver of stolen property.—

To satisfy this clause the person must be (i) a receiver of stolen property, within the meaning of s. 410 I.P.C.; and (ii) he must do it habitually. Mere rumor or suspicion is not enough, but it may be proved by evidence of general repute. [See under s. 116(4),*post*].

16. Cl. (c): 'Habitually protects or harbors thieves'.—

1. It is to be noted that this clause does not mention the habitual harbouring of *dacoits* as a ground for binding over under the present section, unless, of course, it may be brought under Cl. (g); the proper action against such person should be a prosecution for the substantive offence under s. 216A, I.P.C. [73]

2. The requirement of the clause would be satisfied only by proof of a multiplicity of instances [74] of protecting thieves with the intention of screening them from discovery and arrest and helping them to dispose of the stolen property, as distinguished from giving shelter to a hungry or wounded man on humanitarian grounds, [75] or merely associating with them or not offering opposition to them. [76]

3. As to aiding in the concealment of 'stolen property', see *ante.*

17. Cl. (d): 'Habitually commits...kidnapping....'.—

1. This clause brings a person within the fold of this section if he *habitually* [77] (i) commits, (ii) attempts to commit, or (iii) abets the commission of the following offences:

(a) Kidnapping [ss. 359-369, I.P.C.]; (b) Abduction [ss. 362-369, I.P.C.]; (c)

2. The offence must be committed by the person proceeded against, individually. If he does it as an agent of his employer in the performance of his duties, it cannot be held that he has habitually committed extortion or the like. [79]

18. Cl. (e) : 'Habitually commits offences involving breach of the peace'.—

1. In order to bring a person under this clause it is necessary to show that he—

(a) habitually (b) commits or attempts to commit or abets the commission of (c) offences of which breach of the peace is an ingredient. [80]

(b) The expression 'offences involving breach of the peace' [81] shall include—assault; attempt to commit rape, [82] riot. [83]

19. Cl. (f): Habitual commission of offences against specified Act s.—

1. This clause has been inserted in the *new* Code, in pursuance of the recommendation of the Joint Committee, [84] to include the habitual commission, attempt to commit or abetment of the commission of, certain *anti* social offences, such as—

(i) Under the *Drugs and Cosmetics Act, 1940* . —involving contravention of the prohibitions contained in s. 10*e.g.* , against importing a sub-standard or misbranded drug or a drug the import of which is prohibited.

(ii) Under the *Foreign Exchange Regulation Act, 1973* . [85] —involving violation of restrictions on dealing in foreign exchange [s. 4]; payment to a person resident outside India [s. 5]; refusal to sell foreign exchange to Government [s. 9]; failure in regard to declaration required by s. 12. [86]

(iii) Under the *Employees ' Provident funds and Family Pension Fund Act 1952.—e.g.* , default in complying with the provisions of the Act, or any scheme framed thereunder; making false statement or representation for avoiding payment required by the Act or any scheme there under [s. 14].

(iv) Under the *Prevention of Food Adulteration Act, 1954* .—*i.e.*, offences specified in s. 16*e.g.* , import of adulterated or misbranded food; or manufacture, sale or storing of such food; preventing a Food Inspector from exercising his powers under the Act. [87]

(v) Under the *Essential Commodities Act, 1955* .— [s. 7] *i.e.* , a contravention of any order made under s. 3 of the Act, such as, regulating the production, manufacture, distribution, prohibiting the withholding from sale or controlling the price of, an essential commodity. [88]

(vi) Under the *Untouchability (Offences) Act, 1955.—i.e.* enforcing religious disabilities [s. 3]; enforcing social disabilities [s. 4]; refusing to admit to hospital *etc.* [s. 5]; refusing to sell goods or render services [s. 6]; to a person on the ground of 'untouchability'; or other offences arising out of untouchability [s. 7].

(vii) Under the *Customs Act, 1962* .—*e.g.* , making false declaration *etc.* , in relation to the customs [s. 132]; obstructing a customs officer in the exercise of his powers under the Act [s. 133]; evasion of duty or prohibitions [s. 135]. [89]

2. Under the *old* Code, it was held that smuggler could not be brought under the present section because such offence did not necessarily involve a breach of the peace. [90] That lacuna has now been *removed* by the insertion of the *new* Cl. (e), so that if the act of smuggling involves a contravention of an Order issued under the Essential Commodities Act, s. 110 would be applicable.

20. Foreigners Act, 1946.—

The offences under the *Foreigners Act, 1946* have been brought within the purview of s. 110 as one of the offences for which a person can be bound down under s. 110 of the Code. This inclusion has been made by the *Cr.P.C.* (Amendment) Act, 2005 which has come into force with effect from 23.06.2008. In order to effectively deal with the offences under the *Foreigners Act, 1946* , a need has been felt to strengthen the hands of the State Authority by empowering them to take action under *s. 110 Cr.P.C.* against the persons assisting infiltration of foreigners in the territory of India. That is why clause (i) has been inserted enabling the Executive Magistrate to take security of good behavior under s. 110 of the code against any such person assisting in infiltration of foreigners in India.

21. Cl. (f)(ii) : Offences punishable under certain special laws.—

This clause, also added by the *new* Act, is very wide and includes offences under any special law, made by Parliament or the State Legislatures, which exists or may be passed hereafter, relating to :

(a) Prevention of hoarding;

(b) Prevention of profiteering;

(c) Prevention of adulteration of food or drugs. These there heads would comprise offences under the various Control Orders made under the Defence of India Act . [91]

(d) Prevention of corruption,—thus including offences under the *Prevention of Corruption Act* , 1947.[92]

22. Cl. (g): 'Desperate and dangerous...hazardous to the community'.—

1. In order to bring a person under this clause, it must be shown that he has such a reckless disregard for the safety of the person and property of his neighbours that his being at large would be detrimental to the community. [1] The question has to be determined on the facts and circumstances of each case. [2]

2. It is to be noted, however, that the word 'habit' or 'habitually' not having been used in the present clause, a person may be 'desperate and dangerous', even if he is not a 'habitual offender'. [3] His desperate and dangerous character is not dependent on the *number* of past offences or convictions, but on the *nature* of his conduct, [4] *e.g.* an attack against several persons indiscriminately, at a time. [5]

3. If follows that such desperate character need not necessarily be proved by evidence of specific act s [6] committed by him since such character can be proved by evidence of his 'general repute'—[see under s. 116(5),*post*]. On the other hand, there is no bar to proceed against a man both as a 'habitual offender' and as a 'desperate person' and arrive at a conclusion under Cl. (g) by inference from the incidents proved to show that he is a habitual offender. [7]

4. Where a person answers this description, the fact that he owns property or a house, is immaterial. [8]

5. Where the complaint is against a group or number of persons, the attribute of being 'desperate and dangerous; which is personal attribute, must be proved against each of them individually. [9]

6.

A. The following are instances where the person concerned *has been held* to be desperate and dangerous within the purview of the present clause—

(i) Though mere tyrannical conduct, not leading to any complaint, [10] or incriminating evidence [11] may not suffice to render a man 'dangerous' under this clause, it would be otherwise where even conviction on several occasions for mischief, assault or terrorisation has not deterred the accused from terrorizing members of his rival political party. [12]

(ii) A person who leads local factions for constant threat and bullying to different persons. [13]

(iii) A person who beats and threatens people at random, [14] particularly when he does so in a drunken state. [15], [16]

B. On the other hand, the following have been held *not* to be 'desperate and dangerous to the community' within the mischief of this clause—

(i) A person or persons carrying lathis for protection against a gang of ruffians. [17]

(ii) A person who promotes litigation, [18] or brings false cases, for which he may be punishable under s. 209, I.P.C. [19]

(iii) A quarrelsome person who occasionally gives threats. [20]

(iv) A person who is hazardous to a *particular* person or persons may not necessarily be dangerous to the *community.* [21]

(v) Merely because a person is a man of bad character or has bad associates, [22] or has tenants of a bad character, [23] or leads an undisciplined life, never having been accused of any offence. [24]

(vi) Where a notice for furnishing security for good behaviour was issued on the basis of the report of the S.H.O. in which there was nothing to show as to how the applicant was so desperate and dangerous as to render his being at large with security hazard to the Community and the notice was issued on such vague report, the notice was quashed as proceedings initiated on the basis of such vague notice amounted to abuse of the process of the Court. [25]

'At large'.— These words mean that the activities of such person are so desperate and dangerous that if he is allowed to move about freely, without any safeguard, he would be 'hazardous to the community', Hence—

(i) Where a person is already in prison, undergoing a sentence of imprisonment, there is no question of requiring security from him under the present section. [26]

(ii) On the other hand, a person released from imprisonment may come within this description if there is evidence that since his release, he has resumed his previous course of conduct. [27]

23. Evidence to prove habitual offender or desperate person.—

1. Mere suspicion is not enough to establish that a person is a habitual offender or a desperate or dangerous person against whom an order under s. 110 should be made. [28] The Magistrate can apply his power only on convincing testimony of the person being a clear and present danger to society. [29]
2. Whether a person is by habit a house-breaker, burglar or the like, may be proved in either of two ways—

(i) By proving that he has committed burglaries or thefts to such an extent that he can be said to be a habitual burglar or thief. [30] This may be proved either by evidence as to previous convictions or by other evidence that such and such thefts or burglaries were committed by him [31] e.g, the testimony. [See, further, under s. 116(2),*post*].

(ii) By proving that his general reputation is that of a habitual burglar or thief. In this case, proof of previous convictions is not necessary, nor is it necessary that the evidence as to specific instances or crimes alleged to have been committed by the person should be so strong as would secure a conviction [32] what is to be proved is that the general reputation of the person is such that security should be taken from him for good behaviour. [33] At the same time, the evidence should be clear and precise [34] and more than mere suspicion. [35]

This mode of proof will be discussed more fully under s. 116(4),*post* which authorises evidence as to 'general repute' for this purpose.

3. On the other hand, the following is no evidence for the purposes of s. 110—

The investigating or a Police Officer's opinion that the person in question is dangerous or desperate or that he suspects him to be a thief or burglar, [36] , [37] but if he states the facts personally noticed by him in support of his opinion, it would be admissible and left to the Court to decide whether to draw the same inference from those facts or not. [38] , [39] [See, further, under s. 116(1),*post*].

24. 'Information'.—

See under s. 107,*ante.*

25. Suit for malicious prosecution, if lies for giving false information.—

See under s. 107,*ante.*

26. 'To show cause'.—

By making an order under s. 111,*post.*

27. 'With sureties'.—

Under s. 110, the Magistrate has no discretion to require bonds without sureties.

28. Liability of the surety.—

A surety bond executed under this Chapter has not the same incidents as under civil law. Its object is to keep the person bound in good behaviour and the surety undertakes this responsibility; in case of failure, the surety will be liable in terms of the bond though the principal may have been dealt with [40] or his security has been forfeited only in part. [41] [See *ante,* and under s. 446(1),*post*].

29. Appeal.—

1. Appeal lies to the Sessions Judge from an order requiring security under s. 110, read with s. 117 (s. 373(i), *post*].
2. Under *old* s. 421, an Appellate Court was not required to write a judgment or to give reasons, when it dismissed the appeal summarily. But sub-sec. (3) has been inserted in the corresponding *new* s. 384, according to the recommendation of the Commission, [42] which requires a Court of Session (as well as the Chief Judicial Magistrate) to give reasons when he dismisses an appeal.

   There is no doubt, therefore, that under the *new* Code, even when an appeal from an order under s. 117 is dismissed summarily, the Appellate Court must give his reasons, showing that he has applied his mind to the pleas raised by the appellant both in the Court below and in the memorandum of appeal, [43] and the evidence adduced for the defence even where the counsel for the appellant has practically ignored it. [44]

3. While setting aside an order under this section, it is competent for the appellate Court to order rehearing or further inquiry. [45] (See, further, under s. 117,*post*).
4. As an appellate Court, the Sessions Judge can not only look into the questions of law, but also go into the evidence and interfere where *e.g.* , the Court below did not look into the evidence adduced on behalf of the defence. [46]

30. Revision.—

1. Revision lies against an order under s. 110, to the Sessions Judge or the High Court [s. 397,*post*], but if a party moves the Sessions Judge for revision, no further revision shall lie to the High Court [*new* s. 322(3)].
2. in exercising the power of revision, the revisional Court should be guided by the following considerations:

   (i) That the maintenance of the peace is a concern of the Magistrate and the local Police, so that the revisional Court should not interfere unless there has been a miscarriage of justice. [47]

   (ii) Not being a court of appeal [48] it should not ordinarily interfere with findings of facts, [49] and questions depending on demeanour of witnesses, [50] or interfere on the ground of insufficiency of evidence, [51] or weigh the evidence. [52]

   (iii) On the other hand it would be the duty of the revisional Court to interfere where the evidence has been misunderstood, ignored [53] or not properly considered or rules of evidence have been violated. [54]

3. The Court of revision would interfere—

   (i) Where under the law, the Magistrate is not entitled to demand security, [55] or he act s in excess of his powers [56] the conditions of the section not having been satisfied, *e.g.* , the evidence does not show that the person was a habitual offender. [57]

   (ii) Where the appraisal of evidence by the Magistrate borders on perversity, [58] or would not reasonably support the inference that it is necessary in the public interest to send a man to jail or to bind him down, [59] or where the evidence has not been properly considered or the rules of evidence have not been followed. [60]

   (iii) Where the order was made without any inquiry under s. 116[61] or while the inquiry was in progress. [62]

   (iv) Where the proceedings are not *bona fide.* [63]

   (v) Where the object of the proceeding under s. 110 is to detain the person until the Police are able to work out a case against the accused. [64]

   (vi) Where there has been a miscarriage of justice. [65]

4. In cases of miscarriage of justice, the Revisional Court may act *suo motu.* [66]
5. It would be competent for the Revisional Court to remand the proceeding for a rehearing where so required in the interests of justice. [67] [See, further, under Art. 117, *post*]

31. No reference.—

Under *old* s. 438, the Sessions Judge, while exercising his power of

revision, could refer or report to the High Court in any case he might think fit.

But, on the recommendation of the Joint Committee, [68] this provision has been omitted by the *new* Code, giving final power to the Sessions Judge as a Revisional Court and the only ground on which he can now make a reference under s. 395 [*old* s. 432] is the constitutional validity of the law involved in the case before it, the determination of which is necessary for disposal of the case before it.

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82 Substituted by Act No. 63 of 1980, S. 2 (w.e.f. 23-9-1980).

83 Subs. by Act 56 of 1974, S. 3 and second sch.

84 Ins. by *ibid* .

85 Now *Protection of Civil Rights Act, 1955* (22 of 1985).

86 The word 'or' omitted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 14 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

87 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 14 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

88 Substituted for the words 'Judicial Magistrate', by Act 63 of 1980.

89 Rep. of the Joint Committee [(p. (xii) on Cl. 110].

90 *Krishnaswami v. Vanamamalai,* (1906) 30 Mad 282.

91 *Haider,* (1886) 12 Cal 520 .

92 *Prakash Chand Sachdeva v. State,* (1994) Cri-J 2117 (para 3) : AIR 1994 SC 1436 : (1994) 1 SCC 471.

93 *Prakash Chand Sachdeva v. State,* (1994) Cri-J 2117 (para 3) : AIR 1994 SC 1436 : (1994) 1 SCC 471.

94 *Rangasami* , in re., (1913) 38 Mad 555.

95 *Fateh* *v.* *Emp.,*
AIR 1929 Sind 166 .

96 *Dost* *Md.* ,
AIR 1939 Sind 261 .

97 *Ram* *v.* *Emp.,*
AIR 1947 Oudh 86 .

98 *Hubdar* *v.* *Emp.,*
AIR 1933 Oudh 251 .

1 *Kasam* *v.* *Emp.,*
AIR 1920 Cal 87 .

2 *Seetharaman,*
AIR 1956 Mad 292 [
LNIND 1955 KANT 44].

3 *Mannava* *v.* *China,*
AIR 1957 AP 90 .

4 *Deodat* *v.* *State,*
AIR 1951 All 718 [
LNIND 1951 ALL 51].

5 *Seetharaman,* ,
AIR 1956 Mad 292 [
LNIND 1955 KANT 44].

6 *Nawab,*
(1880) 2 All 835 .

7 *Jaffar,*
AIR 1933 All 659 .

8 *Raj* *Karan* ,
(1909) 32 All 55 .

9 *Sundar* *v.* *Emp.,*
AIR 1933 All 676 .

10 *Munnilal* *v.* *Emp.,*
AIR (1928) 51 All 459 .

11 *Raja Ram v. Emp.,* AIR (1920) 22 Crlj 273 (Oudh) .

12 *Munnilal v. Emp.,* AIR (1928) 51 All 459 .

13 *Raja,* (1885) 10 Bom 174.

14 *Raja Ram v. Emp.,* AIR (1920) 22 Crlj 273 (Oudh) .

15 *Rathiram,* AIR 1938 Mad 35 [*LNIND 1937 MAD 268*].

16 Cf. *Kaku* , (1901) 3 Bom LR 269 .

17 *Emp. v. Vijai,* AIR 1948 Nag 28 ; *Bangilal v. Emp.,* (1931) 32 Crlj 1070 (All) .

18 *Iswar,* (1918) 19 Cr LJ 781 (All).

19 *Asghar,* (1915) 16 Crlj 781 (All) .

20 *Emp. v. Vijai,* AIR 1948 Nag 28 .

21 *Kali v. Emp.,* AIR (1910) 38 Cal 156 .

22 *Kali v. Emp.,* AIR (1910) 38 Cal 156 .

23 *Puran v. Emp.,* AIR 1916 All 222 1 .

24 *Puran v. Emp.,* AIR 1916 All 222 1 ; *Sohan v. Emp.,* AIR 1926 Lah 45 .

25 *Puran v. Emp.,* AIR 1916 All 222 1 .

26 *Manindra,*
(1919) 46 Cal 215 .

27 *Munna,*
(1916) 39 All 39 ; *Sonardi,*
(1931) 35 CWN 255 (265).

28 *Munna,*
(1916) 39 All 39 ; *Sonardi,*
(1931) 35 CWN 255 (265); *Hanumantrao* ,
AIR 1940 Bom 204 .

29 *Manindra,*
(1919) 46 Cal 215 .

30 *Satindra,*
(1928) 29 Crlj 842 (843).

31 *Satindra,*
(1928) 29 Crlj 842 (843).

32 *Krishnaji,* (1897) 23 Bom 32.

33 *Fateh* *v.* *Emp.,*
AIR 1929 Sind 166 .

34 *Manindra,*
(1919) 46 Cal 215 .

35 *Emp* . v. *Nga,*
(1916) 17 Crlj 88 (FB) (Rang) .

36 *Manindra,*
(1919) 46 Cal 215 .

37 *Kasi,*
(1904) 31 Cal 419 .

38 *Durga* *Halwai,*
(1916) 43 Cal 153 .

39 Taken in *Ketaboi* *v.* *Emp.,*
(1900) 27 Cal 993 (995).

40 *Durga* *Halwai,*
(1916) 43 Cal 153 .

41 *Gopalan v. State of Kerala,* (1981) Crlr 94(SC) .

42 *Kavey v. State,* [AIR 1959 All 347 *LNIND 1958 ALL 149*].

43 *Gopalamachari v. State of Kerala,* [AIR 1981 SC 674 *LNIND 1980 SC 448* 1981 Crlj 357]: 1980 (Supp) SCC 649.

44 *Shyam v. Special Executive Magistrate,* 1999 Crlj 2676 Bom .

45 *Subbayyan Achari v. State of Kerala,* 1981 Crlj 1359 Ker .

46 *Hiranand,* ILR (1922) 1 Pat 621 .

47 *Rabi Lal v. State,* AIR1956 Bom 385.

48 *Rabi Lal v. State,* AIR1956 Bom 385.

49 *Rathiram* , AIR 1938 Mad 35 37 .

50 *Emp. v. Rahul,* AIR 1921 All 278 .

51 *Emp. v. Paimal,* (1912) 13 Crlj 827 (All) .

52 *Hanumantrao* , AIR 1940 Bom 204 .

53 *Bhubaneswar,* AIR 1927 pat 128.

54 *Hanumantrao* , AIR 1940 Bom 204 .

55 *State of Mysore v. Shivappa,* (1971) 2 Mys LJ 54 (56).

56 *Kasemali,* (1919) 47 Cal 154 (159).

57 *Bhona,* (1911) 38 Cal 408 .

58 *State of Mysore v. Shivappa,* (1971) 2 Mys LJ 54 (56).

59 *Kali Prasanna,* (1909) 38 Cal 156 (157).

60 *Firangi* , AIR 1933 pat 189 190.

61 *Wahid Ali,* (1906) 11 CWN 789 .

62 *Rup Singh,* (1904) 1 ALJ 616 .

63 *Alep,* (1906) 11 CWN 413 (415).

64 *Guruditta v. Emp.* , AIR1930, 345.

65 *Emp v. Kumera,* AIR 1929 All 650 .

66 *Ram Din v. Emp.,* ILR 1946 Oudh 50 .

67 *Ram Prasad,* AIR 1925 All 250 .

68 *Ram Prasad,* AIR 1925 All 250 .

69 Cf. *Chandan v. Emp.,* AIR 1930 All 274 275 DB.

70 *Nilkamal,* (1905) 6 Crlj 403 .

71 *Budhan,* (1924) 47 All 733 .

72 *Budhan,* (1924) 47 All 733 .

73 *Munni Lal,* ILR (1928) 51 All 459 .

74 *Firangi,* AIR 1933 pat 189 190.

75 *Alimuddin v. Emp.,* ILR 1924 All 569 .

76 *Miharban,* (1915) 16 Crlj 781 (All) .

77 *Rahman v. Emp.,* (1927) 29 Crlj 574 .

79 *Hari,* (1900) 27 Cal 781 (784).

80 *Kaliprasanna,* (1910) 38 Cal 156 .

81 *Rahman v. Emp.,* (1927) 29 Crlj 574 .

82 *Ganti Yeera,* AIR 1938 Mad 615 [*LNIND 1938 MAD 279*].

83 *Kaliprasanna,* (1910) 38 Cal 156 .

84 Rep. of the Joint Committee, p. (xii).

85 The Repealing and *Amending Act* , 1974, has amended item (b) of s. 110(f) of the Code to substitute the *new* Foreign Exchange Act, 1973; for the *old* Act of 1947; and items (c) to add the Family Pension Fund Act .

86 Cf. *Union of India v. Rai Bahadur Shreeram, Daya Prasad,* (1969) 1 SCC 91 [*LNIND 1968 SC 345*] AIR 1970 SC 1597 [*LNIND 1968 SC 345*]; *Becker Gray and Co. (1930) Ltd. v. Union of India,* (1970 1 SCC 352 [*LNIND 1970 SC 15*] : AIR 1971 SC 116 [*LNIND 1970 SC 15*].

87 Cf. *Sarjoo v. State of U.P.,* (1961) 3 SCR 324 [

LNIND 1960 SC 350]; *Baburally v. Corpn. of Calcutta,* (1966) 2 SCR 815 [LNIND 1965 SC 340]; *Ibrahim v. Food Inspector,* (1969) 2 SCWR 304 .

88 Cf. *Makiat Singh v. State of Punjab,* (1969) 1 SCC 157 [LNIND 1968 SC 334] : AIR 1970 SC 713 [LNIND 1968 SC 334]; *Ganga Prasad v. State of Bihar,* AIR 1970 SC 989 ; *Nathulal v. State of M.P.,* AIR 1966 SC 43 [LNIND 1965 SC 97]: 1966 Crlj 71 ; *Nagarmul v. State of Bihar,* (1970) 1 SCC 587 [LNIND 1970 SC 101].

89 Cf. *Remo v. State of W.B.,* (1973) 77 CWN. 979; *Harbansingh Sardar Lenasingh v. State of Maharashtra,* AIR 1972 SC 1224 : (1972) 3 SCC 775.

90 *Abdul Karim* , AIR 1935 Pesh 80 82 .

91 *State v. Banshdhar,* AIR 1969 All 184 [LNIND 1967 ALL 73].

92 *Choudhary v. State of U.P.,* AIR 1959 SC 1310 : (1960) 1 SCR 290 : 1959 Crlj 1497 .

1 *Parbati v. Emp.* AIR 1934 Cal 482 ; *Iqbal v. R.,* AIR 1949 All 12 [LNIND 1948 ALL 21].

2 *Iqbal v. R.,* AIR 1949 All 12 [LNIND 1948 ALL 21].

3 *Bhubaneswar,* (1925) 6 Pat 1.

4 *Iqbal v. R.,* AIR 1949 All 12 [LNIND 1948 ALL 21].

5 *Thakur v. State of Bihar,* (1962) 1 Crlj 665 .

6 *Ranga Reddi,* (1919) 43 Mad 450 (462) no longer good law in view of s. 116(4) [*old s.* 117(3)] which was amended in 1923 to include the case of desperate and dangerous persons.

7 *Mana,*
AIR 1938 Mad 448 449 .

8 *Kalu* *Mirza,*
(1909) 10 Crlj 460 (462).

9 *Krupasindhu* *v.* *R.,*
AIR 1951 Orissa 277 279 .

10 *Rathinam,* in re.
AIR 1938 Mad 35 [
LNIND 1937 MAD 268].

11 *Emp* .v. *Vijai,* ,
AIR 1948 Nag 28 .

12 *Kalesa* , in re.,
AIR 1957 AP 268 [
LNIND 1956 AP 65](para 8).

13 *Mana,*
AIR 1938 Mad 448 449 .

14 *Sahdeo* *v.* *Emp.,*
AIR 1942 Oudh 356 .

15 *Iqbal* *v.* *R.,*
AIR 1949 All 12 [
LNIND 1948 ALL 21]; *Thakur v. State of Bihar,*
(1962) 1 Crlj 665 .

16 *Thakur* *v.* *State* *of* *Bihar,*
(1962) 1 Crlj 665 .

17 *Abdul* *Hamid* *v.* *Emp.,*
AIR 1948 Cal 107 .

18 *Iswari* *Dutt* *v.* *Emp.,*
AIR 1918 All 318 .

19 *Bapujee,*
(1917) 19 Crlj 885 (Oudh) .

21 *Kullu,*
(1904 27 All 92 .

22 *Ram Prasad v. Emp.,* AIR 1921 All 145 .

23 *Nilkamal,* (1907) 6 Crlj 711 .

24 *Rathinam,* in re, [AIR 1938 Mad 35 *LNIND 1937 MAD 268*].

25 *Har Charan v. State of U.P.,* 2008 Crlj 2972 : (2008) 4 ALJ 122 (All) .

26 *Bhubaneswar,* (1925) 6 Pat 1.

27 *Emp. v. Ram Lal,* (1929) 30 Crlj 562 (564).

28 *Karey v. State,* [AIR 1959 All 347 *LNIND 1958 ALL 149*](para 3).

29 *Gopalan v. State of Kerala,* (1981) Crlr 94(SC) .

30 *Karey v. State,* [AIR 1959 All 347 *LNIND 1958 ALL 149*](para 3).

31 *Karey v. State,* [AIR 1959 All 347 *LNIND 1958 ALL 149*](para 3).

32 *State v. Keshava,* (1933) Crlj 1246 (TC) ; *Peddasiva,* (1881) 3 Mad 238.

33 *State v. Keshava,* (1933) Crlj 1246 (TC) .

34 *Rajendra,* (1913) 17 CWN 238 .

35 *Emp. v. Ram Lal,* (1929) 30 Crlj 562 (564).

36 *Karey* v . *State,* [AIR 1959 All 347 *LNIND 1958 ALL 149*](para 3).

37 *Ranga* *Reddi*
AIR 1920 Mad 534 537 .

38 *Karey* *v.* *State,*
AIR 1959 All 347 [
LNIND 1958 ALL 149](para 3).

39 *Ranga* *Reddi* ,
AIR 1920 Mad 534 537 .

40 *Babu* *v.* *State,*
AIR 1962 MP 317 [
LNIND 1961 MP 81].

41 *Babu* *v.* *State,*
AIR 1962 MP 317 [
LNIND 1961 MP 81].

42 41st Rep. of the Commission, para 31.28.

43 *Emp.* *v.* *Lal* *Behari,*
(1915) 38 All 393 .

44 *Fidol* *Hossein* *v.* *Emp.,*
(1912) 40 Cal 376 .

45 *Prakasa* *v.* *Jonnala,,*
AIR 1955 AP 55 [
LNIND 1954 AP 10].

46 *Fidol* *Hossein* *v.* *Emp.,*
(1912) 40 Cal 376 .

47 *Parbati* *v.* *Emp.,*
AIR 1934 Cal 482 .

48 *Gayani,*
(1916) 17 Crlj 461 (All) ; *Iqbal v. Emp.,*
AIR 1934 Cal 482 .

49 *Iqbal* *v.* *Emp.,*
AIR 1934 Cal 482 .

50 *Gayani,*
(1916) 17 Crlj 461 (All) .

51 *Sahdeo* *v.* *Emp.,* AIR 1949 All 12 [*LNIND 1948 ALL 21*].

52 *Sahdeo* *v.* *Emp.,* AIR 1949 All 12 [*LNIND 1948 ALL 21*].

53 *Nizamuddin,* (1918) 23 CWN 488.

54 *Raghubar,* (1935) 36 Crlj 33 (All).

55 *Emp.* *v.* *Gyan* *Singh,* AIR 1934 All 34.

56 *Gayani,* (1916) 17 Crlj 461 (All).

57 *Karey* *v.* *State,* AIR 1959 All 347 [*LNIND 1958 ALL 149*](para 10).

58 *Gauri* *Shanker* *v.* *State,* AIR 1952 All 927 [*LNIND 1952 ALL 58*].

59 *Alimuddin,* AIR 1924 All 569.

60 *Emp.* *v.* *Mulchand,* (1914) 37 All 30.

61 *Emp.* *v.* *Mulchand,* (1914) 37 All 30.

62 *Savalram,* (1915) 16 Crlj 91.

63 *Nizamuddin,* (1918) 23 CWN 488.

64 *Emp.* *v.* *Paimal,* (1912) 13 Crlj 827 (All).

65 *Parbati* *v.* *Emp.,* AIR 1934 Cal 482.

66 *Satindra,* (1928) 48 Crlj 143 .

67 *State* *v.* *Wahid,* AIR 1957 Pat 563 (DB) .

68 Rep. of the Joint Committee, p. viii (on Cl s. 397-402).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 111
Order to be made.

When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

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1. Scope of s. 111.—

1. This section reproduces *old* s. 112, without any change.

2. An order under this section (known as a 'preliminary order) is a condition precedent for taking further steps in any proceeding under s s. 107-110. [69] Such order, with its required contents, must be recorded and communicated even where the Police have brought before the Magistrate a person under arrest as a suspected offender (*e.g.* under s s. 41, 56,*ante*), [70] or under s. 151,[71] even though no summons need be issued because the person is already before the Court.

3. The first thing that the Magistrate must do, after receipt of the information referred to in s s. 107-110, is to apply his mind to such information and, if he is satisfied that there is ground for proceeding under this Chapter, to pass an order in writing under the present section. [72] Conversely, he cannot make an order under s. 111 without receiving any information and without considering it. [73]

4. An order issuing show cause notice must satisfy the dual test. It must set forth the substance of information received as well as the bond to be executed, terms for which it is to be in force, and number, character and class of the sureties (if any) required. The order must reflect that the Magistrate has asserted the truth of the information and the need for taking act ion. [74]

5. When the Executive Magistrate in his preliminary order omits to mention the period for which bond is to be executed, the order is erroneous as it required the concerned person to execute the bond for an indefinite period. [75]

6. When the notice is issued in cyclostyled sheet of paper with gapes filled up by hand and stands contradictory to the order starting the proceeding, the notice does not reflect intelligent appreciation and the notice being bad the proceeding is liable to be set aside. [76]

7. Similarly, notice to show cause issued in a mechanical manner not disclosing the substance of information received is bad in law and the Magistrate has no jurisdiction to proceed on the basis of such show cause notice. [77]

8. The determination of the amount of bond is to be made in exercise of the judicial discretion of the Executive Magistrate. [78]

9. The extent of information to be incorporated in the notice to show cause depends upon the circumstances of each case. [79]

   But it must indicate the time and place of incidents alleged with definite and to tangible information. [80]

10. The subsequent procedure in a security proceeding under s s. 107-110 (as the case may be) is laid down in s s. 112-124.

2. Order and notice.—

Section 111 provides for the passing of a preliminary order, stating the substance of the information *etc.* , which will be served as a notice. It does not contemplate a notice different from such order. [81] If the persons charged are present in Court, the order is to be read to them [s. 112; *old* s. 113], and that would amount to notice; if they are not present, a copy of the order is to be sent along with a summons or warrant, as the case may be [s. 113: *old* s. 114; s. 114: *old* s. 115].

No final order can be passed asking the person to execute a bond without issuing a notice under *s. 111 Cr.P.C.* [82]

Similarly any enquiry initiated without an order to show cause under *s. 111 Cr.P.C.* is illegal.[83]

3. Whether the order may be made ex parte .—

1. Since the preliminary order under s. 111 is made on the basis of the information received by the Magistrate under s s. 107-110 (as the case may be), if need not be made in the presence of the party to be affected by the order, hence, it may be passed *ex parte;* [84]

2. But no final step in the proceeding can be made without giving an opportunity to such person to show cause, [85] by reading over the order to him if he happens to be in Court when the order under s. 111 is made [s. 112], or by issuing a notice to him with summons or warrant in the manner prescribed in s s. 113-114.

3. As to the procedure to be adopted when the person does not appear after service of notice, see under s. 113,*post.*

4. Though the jurisdiction of the Magistrate to proceed under s. 107 (or s s. 108-110, as the case may be) arises from the information received under these sections, no order to show cause under s. 111 can be issued by the Magistrate until he is satisfied that there is a likelihood of breach of the peace or public tranquillity. [86] He has a discretion and is not bound to draw up an order under s. 111 in every case he receives information under s s. 107-110. [87]

4. Contents of the order under s. 111.—

1. The order under s. 111 must be in a writing [88] and contain the following elements.—

(a) Substances of the information received under s s. 107-1110 (as the case may be). [89]

(b) That upon a consideration of such information he has formed the opinion that there is a likelihood of a breach of the peace and that it is necessary to proceed under the relevant section (s s. 107-110, as the case may be). [90] He is not bund to draw up an order under s. 111, merely because he has received a Police report or other information. [91]

(c) The amount of the bond to be executed.

(d) The term for which the bond is to remain in force.

(e) The number, character and class of sureties required, in case under s. 110, and, if so required, under s s. 107-109.

2. On the other hand, the order need *not* give—

(i) The *source* [92] of the information received (see *ante*), or supply a copy of the Police report. [93]

(ii) The list of witnesses in support of the information or the order. [94]

(iii) The definite acts which the person intends to commit where the substance of the information is communicated. [95]

(iv) A reference to s. 111 itself, if the substantive section (107-110, as the case may be) is mentioned in the order. [96]

(v) The period of imprisonment to be suffered in default in execution of the bond,—

because than can be ordered only under s. 122. [97]

3. Nor should the order contain any extraneous matter, *e.g.* —

A condition that the opposite Party should not attempt to realise rent from his tenants by force. [1]

5. 'Setting forth the substance of the information'.—

1. The object of setting forth in the order the substance of the information received by Magistrate is to inform the person asked to show cause what allegations he has to answer. [2]
2. Though a security proceeding under s s. 107-110 is not a trial, it simulates a trial under the summons procedure [(s. 116(2)], and the preliminary order under s. 111 serves to be a notice in the nature of a charge to the person proceeded against, who has to meet the allegations on the basis of which the order under s. 111 is made, and the substance of which is to be recorded therein. Subsequent proceedings in the Chapter cannot travel beyond the ambit of the order under s.111. [3]
3. 'Substance' means that the information need not be repeated bodily, in the order; at the same time, it requires that the most important parts of the information or so much thereof should be communicated as to give the person concerned a proper notice of what has moved the Magistrate to take the act ion, [4] and also to defend himself properly against such charge. [5] Sufficient time should also be given to the person to meet it, since its communication. [6]
4. The extent of the information which must be set forth must, therefore, depend upon the circumstances of each case, [7] but the order would be set aside in revision, if the party, before showing cause, [8] challenges the order on the ground and shows that it contains no information [9] or that the information supplied is vague. [10]

   (i) It should at least state under what clause of s. 110 he is charged or what particular class of offenders he is said to belong to. [11] But the names of the informants need not be given. [12]

   (ii) Where the apprehension of breach of the peace relates to immovable property or user thereof, the order must mention that property, so that the Opposite Party could meet the allegations made against him. [13]

   (iii) Where the Magistrate, in fact, relies on information received from two sources, *e.g.* , a Police report and an affidavit of the complaint, non-mention of the facts alleged in the affidavit would vitiate the order. [14]

   (iv) It must indicate the time and place of the incidents alleged, with definite and tangible information. [15]

5. On the other hand, where the order does not give the substance of the information, the following will *not* suffice—

   (i) Merely mentioning the clauses of the section; [16]

(ii) Merely reproducing the words of the section under which the order is intended to be made; [17]

(iii) Merely making general accusations (without facts) against the person, such as 'a habitual thief, [18] a person of 'tyrannical habits' and the like. [19]

6. The substance is to be recorded by the Magistrate who makes the order under s. 111 who receives it on transfer from another Magistrate who had only issued a notice to show cause 'why proceedings under s. 107 should not be taken' against the opposite party. [20]

7. The order need not be in any particular form. [21]

6. 'Amount of the bond to be executed'.—

1. None of the sections of this Chapter s s. 106-110, specify any amount for which the bond may be required by the Court to be executed by the person in question, but leaves it to the discretion of the Court.
2. It has been laid down by the Courts that this discretion is to be judicially exercised, having regard to the following considerations:

(a) The amount required should not be harsh or *excessive,* [22] because these security proceedings do not seek to punish a person for commission of any offence and the Legislature could not have intended that the person should have to undergo imprisonment for a long term for failure to furnish an excessive security. [23] Hence, where the person is too poor to offer security for the amount ordered by the Magistrate, the Revisional Court would reduce the amount. [24]

(b) Subject to the foregoing consideration, the amount specified in the Magistrate's order should be determined according to the circumstances of each case, *e.g.* , the circumstances in which a person sought to be bound under s. 107 as arrested. [25]

But the following need not necessarily be taken into account in determining such amount:

That the person had previous convictions. [26]

[See, further, under s. 117, Proviso (b), *post*].

7. Contents of the bond to be executed.—

See under s. 120,*post.*

8. Term of the bond.—

1. In the preliminary order under s. 111, the Magistrate is required to specify not only the amount for which the bond is to be executed, but also the period for which it is to be in force, that is, the period of the security (say, one year, or less) subject, of course, to the preliminary order being final, under s. 117, after the inquiry under s. 116 is held.
2. In fixing the period, the Magistrate is to have regard to the circumstances of the case (see, further, under s. 117,*post*), and the maximum period which is specified in the relevant principal section, as follows :

   S. 107....1 year;

   S. 108.... 1 year;

   S. 109.... 1 year;

   S. 110.... 3 year;

3. The determination of the period should be made in the exercise of judicial discretion, [27] because by reason of Proviso (a) to s. 117,*post,* the period so specified in the order under s. 111 cannot be exceeded in the final order under s. 117, whatever be the results of the inquiry held.
4. In this context, see also, s. 122(2), (4),*post.*
5. Though in the order under s. 111 the period of security should be mentioned, it would be proper not to specify the date from which it should commence; that date would be the date of the final order, unless specified otherwise.

9. 'Sureties' (if any) required.—

1. See *ante,* as to the cases where the order may require the bond to be executed by sureties .
2. Where sureties are required, the order under s. 111 must specify the 'number, character and class of sureties'. In laying down such conditions, the Court should not impose such conditions or restrictions under which no surety would be available to the person proceeded against, [28] and the person would have to go to jail,— which is not the object of a security proceeding. [29]
3. Where more than one sureties are required, the order should specify whether they would be liable for the amount mentioned in the bond individually or collectively [30] . [See Form No. 13, *post*].

10. Liability of surety.—

See *ante.*

11. Whether a joint order permissible.—

1. Each person against whom a proceeding under this Chapter is drawn, is entitled to know the charges against him individually. [31]

2. Hence, he should get a separate notice, [32] and his case should be considered separately, on its own merits, except in so far as a joint inquiry is permitted by s. 116(5), in the case of 'associates' [see under s. 116(5),*post*]. But even when a joint trial is permissible, the Magistrate must make his finding against each person separately, [33] without being prejudiced by the case against the others. [34] , [35]

3. It follows from the above that when the information is against several person [not coming under s. 116(5)], [36] the Magistrate must draw up a separate order under s. 111 against each of them.

12. Composite order under s s. 111 and 116(3) or 117.—

1. An order to give security under this Chapter can be passed only after completion of the inquiry, as laid down in s. 117 [*old* s. 118].

2. An exception to the foregoing statement is an interim order required by emergency, under s. 116(3) [*old* s. 117(3)].

3. A composite order under s s. 111 and 117 would be invalid. [37] Nor can an order under s. 116(3) be made together with the order under s. 111 before starting the inquiry under s.116(1). [38]

4. Even where the order under s. 116(3) is not composite, it would be illegal if it is made without *some* kind of inquiry under s. 116,[39] for the *prima facie* satisfaction of the Magistrate, [40] as to the need for taking immediate measures, which is a condition separate from the consideration which prompts the Magistrate to make the preliminary order under s. 111.

13. Amendment of order if permissible.—

1. The consensus of opinion is that the object of the preliminary order being to give the person proceeded against an opportunity to meet the allegations made against him as well as the nature of the order proposed, the preliminary order under s. 111 can be amended, [41] or a supplementary order made, [42] provided it is served afresh on such person, [43] if it is changed in material particulars, [44] and sufficient time should be given to him to consider it [45] and to show further cause against it, as if it were a supplementary order. [46]

2. Such amendment will not be interfered with unless it has caused prejudice to the party affected. [47]

3. Subject to the foregoing conditions, the amendment may be made—

   (i) to remove a clerical error, which may be made even by the Appellate Court, [48] *e.g.* to cite the proper clause of the relevant section which is borne out by the facts already in the order; [49]

   (ii) to modify the order in the light of fresh incidents which come to the notice of the Magistrate during the proceedings. [50]

4. If a substantial amendment is to be made, *e.g.,*- as to the nature of the bond or the period of the security, after the evidence has been taken, [51] fresh proceeding should be started *ab initio* on the basis of the new order.

   But, once the proceedings have been completed without objection as to amendment from the party proceeded against, the superior Court, at the revisional stage, would not interfere in the absence of prejudice. [52]

5. Where a Magistrate issues order under s. 111 against only some of the persons named in the application of an informant and refuses to proceed against the rest, his successor-in-office cannot continue the proceedings against the rest, unless his predecessor's order of discharge is set aside by a superior Court, or he receives fresh materials upon which he can draw up a fresh order under s. 111. [53]

14. Onus and Evidence.—

1. The words 'show cause' in s s. 107-110, which are also referred to in the present section, indicate that in making an order under s. 111, read with the relevant principal sections [s s. 107-110], the Magistrate must give to the person against whom the order is made sufficient time and opportunity, not only to put in a written statement but also to bring his witnesses on the date fixed for his appearance. [54]

2. These words also indicate that when appearing to 'show cause', the accused must bring his witnesses [(this also follows from s. 254(1) : *old* s. 244(1)], so that evidence may be taken that very day, [55] and, if he is unable to bring them without summons, he should apply to the Court for issuing summons. [56]

3. It is the duty of the Magistrate to assist not only the prosecution but also the defence in summoning witnesses and also to grant reasonable time [57] for the purpose, subject to the discretion of the Magistrate in this behalf, under s. 254(2) [*old* s. 244(2)].

4. But the inquiry, under s. 116(2), is to be made, according to the summons procedure, and the words 'show cause' do not imply that the ordinary rule of onus upon the prosecution, in every criminal proceeding, is excluded in security proceedings. [58] It is for the State to justify the action of the Magistrate in calling upon the person to furnish security, by adducing legal evidence and not for the person to proved the negative. [59]

5. In general, the prosecution must prove the case as indicated by the substance of the information recorded in the order under s.111, but if there is any variation in the evidence laid, it becomes a question of prejudice [60] to the person affected.

15. Show cause notice when invalid.—

1. When the Additional Sessions Judge in appeal set aside the order of the Executive Magistrate when he failed to comply with the provisions of *s. 111 Cr.P.C.* , the High Court in revision did not interfere as in the meantime five months passed and there was nothing to show the continuance of apprehension of the breach of peace, for which the proceedings under *s. 107 Cr.P.C.* had been initiated.[61]

2. When no preliminary order was passed in writing as required under *s. 111 Cr.P.C.* and was not sent along with the summons order and the summons order being bereft of all mandatory details is illegal. Moreover, in a proceedings under *s. 107 Cr.P.C.* notice to show cause was given to execute a bond of two years when the bond was required for one year, the proceeding were quashed by the High Court.[62]

3. When the proceedings was drawn up simply on receipt of enquiry report but substance of accusation or fact that led to the satisfaction of the Magistrate for apprehension of the breach of peace was not mentioned, the proceedings was liable to be quashed. [63]

4. Drawing of proceedings under *s. 107 Cr.P.C.* only on the basis of police report and there was nothing to show the satisfaction of the Magistrate regarding the apprehension of the breach of peace, the proceeding is liable to be quashed.[64]

16. Effect of irregularity.—

1. Though after the proceedings are completed, a non-compliance with the requirements of s. 111 will not vitiate the order (read with s s. 107-110 as the case may be), in the absence of prejudice, [65] by reason of s. 465 [*old* s. *537*], the interlocutory order [66] or the warrant of arrest under s. 113, Proviso, [67] is liable to be set aside in revision, during the pendency of the proceedings, for non-compliance with s. 111, in the following respects, *inter alia;*

   (i) Issuing a notice under s. 107, without making a preliminary order under s. 111, which is a condition precedent to taking further steps under the Chapter. [68]

   (ii) Omission to mention the substance of the information [69] which induced him to take act ion under s s. 107-110 or the amount of the bond to be executed, in the order under s. 111.

   (iii) Where the order, instead of specifying the offence under s. 110, merely repeats the words of the various clauses of that section. [70]

   (iv) Where a composite order under s s. 111 and 116(3) is made, without making even a *prima facie* inquiry as to the need for taking immediate measures, [71] or without first giving the person an opportunity to show cause against the order under s. 111. [72]

2. After the proceedings are complete, they would not be quashed on the ground of any irregularity in the absence of a *prejudice* to the party aggrieved, [73] unless there is absence of initial jurisdiction. [74]

There cannot be any such prejudice,—

Where, on receipt of the order and notice under s. 111, the person does not ask for further information or complain of absence of details, in his petition showing cause. [75]

17. Absence of materials upon which the Magistrate could be satisfied as to the necessity for the order.—

On this point, a distinction must be made between (a) absence of *any* material whatever, and (b) the existence of *some* material, whatever be its nature. [76]

(a) Where there is absolutely no data over which the Magistrate could apply his mind with a view to coming to his decision whether to take action under s s. 107-110 (as the case may be), the Court of revision would quash his order under s. 111. [77]

(b) But where there is *some* relevant material, the revisional Court would not interfere with the Magistrate's opinion and substitute its own opinion on the basis of such data because the law leaves it to the Magistrate to form his independent opinion, and a Court of revision can interfere only on the ground that he did not apply his mind. [78]

18. Appeal.—

1. Under s. 373(i), *post,* appeal lies from a *final* order under s. 117 to give security (whether for keeping the peace or for good behaviour) to the Court of Session. It follows that no appeal lies from an order under s. 111 or any other order antecedent to the final order; but in an appeal against the final order, the legality of the preliminary order may be challenged [79] (*e.g.,* on the ground that it has been passed by a Magistrate without territorial jurisdiction), [80] since that order is the very foundation of the final order.

2. But no appeal lies when the case is referred to the Sessions Judge under s. 122(2) or (4) [Proviso to s. 373].

3. There is no appeal to the High Court [s. 372], either from the order of the Magistrate or the appellate order of the Sessions Judge, because such order does not constitute 'conviction on a trial', within the meaning of s. 374(2),[81] even when he is imprisoned under s. 122, on failure to give security. [82]

19. Revision.—

1. Under s. 397(1),*post,* revision lies either to the Sessions Judge or to the High Court, but under *new* sub-sect. (2) of that section, once the person aggrieved has made an application to the Sessions Court, no further application shall lie to the High Court, or *vice-versa.* [83] Of course, the inherent power of the High Court [84] under s. 482 [*old* s. 561 A], to interfere in proper cases, would remain.
2. Revision lies on the grounds (see also under s. 107,*ante*) *inter alia*—

(i) That the requirements of s. 111 have not been complied with [85] in making the preliminary order, [86] *e.g.,* —it is not in writing, [87] or has been made without applying his mind to the necessity of making such order on the information received, [88] e *.g.,* without even reading the Police report. [89]

(ii) That the Magistrate has issued the order against several persons without considering the cases against them individually. [90]

(iii) That the order does not contain definite particulars but makes vague recitals, [91] or does not indicate the nature of the information received.

(iv) That a wrong conclusion has been arrived at, [92] or a conclusion without any materials to support it. [see *ante*).

(v) That there has been some irregularity in the procedure, causing prejudice to the party proceeded against.

(vi) That the situation has returned to normalcy and the apprehension of breach of the peace has passed off by the time the revision petition is heard. [93]

3. In some cases, the view has been taken that the *omission* to state the substance of the information in the order under s. 111 is an irregularity curable under s. 465(1) [*old* s. 537]. [94]

The other view that constitutes an *illegality* [95], [96] appears to have been supported by the Supreme Court [97] which has held that the person proceeded against must be informed of the allegations made against him, by giving him the substance of the information, so that he may meet such allegations. But even in the case of a charge, any *defect* would be curable under s. 464 [*old* s. 537(b)] where such defect has not occasioned any failure of justice. Hence, if the person proceeded against enters into the inquiry under s. 116(1) (2), without any complaint as to lack to information in the order under s. 111 and cross-examines the prosecution witnesses, the order would not be quashed in revision. [98]

But the omission to record an order in writing *at all* , as required by s. 111 (as distinguished from a defective writing), [1] has been regarded as an illegality, vitiating the subsequent proceedings. [2]

4. The Petition for revision cannot be thrown out as premature on the ground that the Petitioner has come to the revisional Court immediately after the notice to show cause has been served upon him, without waiting till the decision of the Magistrate after inquiry. [3]

20. Constitutional remedy. —

1. A proper petition under Art. 226 to quash an order made under Art. 111 can be made where it has been passed without jurisdiction [4] or for *habeas corpus* where the petitioner has been imprisoned in pursuance of an order under s. 116(3), which is founded on an illegal order under s. 111,[5] or arrested under warrant, without making an order in writing at all. [6]

2. It cannot be said that an order under s. 111 is without jurisdiction because it does not give the substance of the information as required by the section. [7]

But a composite order under s s. 111 and 116(3) is without jurisdiction. [8]

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69 *Banarsi* *v.* *Neelam,,* AIR 1969 Delhi 304 [*LNIND 1969 DEL 88*].

70 *Rajbansi* *v.* *Emp.,* AIR 1920 All 286; *Nihal,* (1926) 49 All 5.

71 Cf. *Birdhaj* *v.* *State,* AIR 1953 Cal 491 [*LNIND 1952 CAL 193*](DB).

72 *Shravan Kumar v. Supdt.,* AIR157 All 189.

73 *Tulsibala* *v.* *Ghoshal,* AIR 1953 Cal 109 [*LNIND 1951 CAL 221*](114); *Jagdish v. State,* AIR 1957 Pat 107.

74 *Bairagi* *v.* *State of Orissa,* 1988 Crlj 218 Ori.

75 *Mahadevaswamy* *v.* *State of Karnataka,* 1989 Crlj 756 Kant.

76 *Shatrughana* *v.* *Haris Chandra,* 1994 Crlj 149 Ori; *Rama Chandra v. Murlidhar,* 1988 Crlj 218 Ori.

77 *Naresh Kumar Jain* *v.* *State of U.P.,* 1993 Crlj 1352 All.

78 *Yasin* *v.* *State,* AIR 1969 Guj 1133.

79 *Kashar* *v.* *Sitaram,* 1973 Crlj 368 Pat.

80 *Charles* *v.* *State of Mysore,* (1965) 1 Crlj 536 (Mys).

81 *Zahir v. Ganga Prasad,* AIR 1963 All 4 [*LNIND 1962 ALL 12*](para 24).

82 *C. Costa v. State of Goa,* 1992 Crlj 3608 Bom .

83 *M. Satyanarayana v. State,* 1996 Crlj 1809 .

84 *Madhu Liuaye v. Ved Murti,* AIR 1971 SC 2479 (paras 6-7).

85 *Kishan,* (1928) ALJ 312 .

86 *Jagdish v. State,* AIR 1957 Pat 107 (paras 5-6).

87 *Laxmi Narayan,* (1933) 34 Crlj 42 (44).

88 *Emp. v. Rameshwar,* (1914) 36 All 262 .

89 *Sunder v. Chenulu,* (1970) Crlj 1378 (Or.) .

90 *Jai Prakash,* (1883) 6 All 26 (FB) .

91 *Rupdeo v. Natha,* AIR 1970 Pat 134 .

92 *Rajendra,* (1912) 17 CWN 238 (261).

93 *Ananthapadmanabhiah,* AIR 1930 Mad 975 [*LNIND 1930 MAD 171*].

94 *Chintaman v. Emp.,* (1907) 35 Cal 243 (DB) .

95 *Jaguji,* (1918) 19 Crlj 876 .

96 *Kanhaiyalal v. Devi Singh,* [AIR 1961 MP 302 *LNIND 1960 MP 103*].

97 *Ramji,* in re., AIR 1936 Nag 265 .

1 *Kulsum v. Umatul,* (1906) 11 CWN 121 .

2 *Madhu Limaye v. SDM,* [AIR 1971 SC 2486 *LNIND 1970 SC 501*](para 37) : [(1970) 3 SCC 746 *LNIND 1970 SC 501*] : 1971 Crlj 1720 .

3 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 5) (Gau).

4 *Madhu Limaye v. SDM,* [AIR 1971 SC 2486 *LNIND 1970 SC 501*](para 37) : [(1970) 3 SCC 746 *LNIND 1970 SC 501*] : 1971 Crlj 1720 .

5 *Balkishun v. Munno,* AIR 1970 Pat 107 ; *Kartar v. Sitaram,* (1973) Crlj 368 (Pat) .

6 *Muthuswami,* in re, 1940 Mad 23FB .

7 *Balkishun v. Munno,* AIR 1970 pat 107; *Kartar v. Sitaram,* (1973) Crlj 368 (Pat) ; *Muthuswami,* in re, 1940 Mad 23FB .

8 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 5) (Gau); *Balkishan v. Munno,* AIR 1970 Pat 107 ; *Kartar v. Sitaram,* (1973) Crlj 368 (Pat) .

9 *Birdhaj v. State,* [AIR 1953 Cal 491 *LNIND 1952 CAL 193*](DB) .

10 *Balkishun v. Munno,* AIR 1970 Pat 107 ; *Kartar v. Sitaram,* (1973) Crlj 368 (Pat) .

11 *Raghunath* *v.* *State,* AIR 1953 Pat 1 4 (FB).

12 *Mithu,* in re., (1904) 27 All 172 .

13 *Balkishun* *v.* *Munno,* AIR 1970 Pat 107 ; *Kartar v. Sitaram,* (1973) Crlj 368 (Pat) .

14 *Yunus* *v.* *State,* (1969) 75 Crlj 73 (All) .

15 *Ranga Reddy,* (1919) 43 Mad 450; *Sanatan* AIR 1952 Or. 33 ; *Ramsaran v. Ramakant,* (1961) 2 Crlj 575 ; *Charles v. State of Mysore,* (1965) 1 Crlj 536 (Mad) .

16 *Nikka* *Ram* AIR 1954 Punj 6 .

17 *Bhutnath,* (1928) 33 CWN 852 ; *Amanat,* AIR 1929 Pat 67 .

18 *Rajbansi,* (1920) 42 All 646 (648).

19 *Vijaidatta,* AIR 1948 Nag 28 ; *Ram Rup v. Emp.,* AIR 1929 All 813 .

20 *Ram* *v.* *Lall,* AIR 1956 Cal 315 [LNIND 1956 CAL 2].

21 *Bishnupada* *v.* *State* *of* *W.B.,* (1977) Crlj 1344 (para 6) Cal (DB).

22 *High* *Court* *Bar* *Assocn,* AIR 1932 Lah 559 (This condition is expressly mentioned, as regards the final order, under s. 117 Proviso (b)].

23 *Yasin* *v.* *State,* AIR 1969 Guj 1133 (para 5).

24 Cf. *Gani v. State,* AIR 1959 J&K 125 (para 8).

25 *Yasin* *v.* *State,*
AIR 1969 Guj 1133 (para 5).

26 *Yasin* *v.* *State,*
AIR 1969 Guj 1133 (para 5).

27 *Yasin* *v.* *State,*
AIR 1969 Guj. 1133 (para 5).

28 *Raghunandan,*
(1922) 23 Crlj 400 .

29 *Bhagwan v. State,* (1954) Pepsu 31.

30 *Ibrahim* *v.* *Emp.,*
(1914) 16 Crlj 100 Lah .

31 *Ram* *Lal,*
AIR 1929 All 273 274 .

32 *Ram* *Lal,*
AIR 1929 All 273 274 .

33 *Jangi,*
AIR 1959 Pat 304 ; *Dhanoo,*
(1929) 34 CWN 144 .

34 *Ram* *Lal,*
AIR 1929 All 273 274 .

35 *Abdul* *Kadir*
(1886) 9 All 452 .

36 *Bhagwan v. State,* (1954) Pepsu 31.

37 *Jagdish* *v.* *State,,*
AIR 1957 Pat 106 (para 6).

38 *Madhu* *Limaye* *v.* *Ved* *Murti,,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448]:
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 .

39 *Madhu* *Limaye* *v.* *SDM,,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](para 43) :

(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

40 *Madhu Limaye v. SDM,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](para 43) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

41 *Hyder*
(1933) MWN 551 ; *Emp. v. Rasulbux,*
AIR 1942 Sind 122 125 .

42 *Srinivasalu,* in re,
AIR 1942 Mad 242 1 .

43 *Hyder*
(1933) MWN 551 ; *Emp. v. Rasulbux,*
AIR 1942 Sind 122 125 .

44 *Hyder*
(1933) MWN 551 ; *Emp. v. Rasulbux,*
AIR 1942 Sind 122 125 .

45 *Srinivasalu,* in re,
AIR 1942 Mad 242 1 .

46 *Swamikannu,* in re,
AIR 1955 NUC 210 (para 2).

47 *Ram v. Emp.,*
(1945) 47 Crlj 642 (645).

48 *Ahesanali v. Emp.,*
(1938) 39 Crlj 747 748Nag.

49 *Ahesanali v. Emp.,*
(1938) 39 Crlj 747 748Nag.

50 *Swammikannu,* in re, AIR. 1955 NUC 210 (para 2).

51 *Nim,*
AIR 1933 Sind 8 .

52 *Ahesanali v. Emp.,*
(1938) 39 Crlj 747 748Nag.

53 *Ajadhiya* *v.* *Sitaram,* AIR 1949 All 350 [*LNIND 1948 ALL 34*](para 4).

54 *Karamuddin* *v.* *Emp.* (1914) 41 Cal 806 .

55 *Emp.* *v.* *Narayan,* (1907) 9 Bom LR 1385 [*LNIND 1907 BOM 189*] (1386).

56 *Emp.* *v.* *Narayan,* (1907) 9 Bom LR 1385 [*LNIND 1907 BOM 189*] (1386).

57 *Karamuddin* *v.* *Emp.,* (1914) 41 Cal 806 .

58 *Abdul* *Kadir,* (1886) 9 All 452 .

59 *Abdul* *Kadir,* (1886) 9 All 452 .

60 *Ram Murti* *v.* *Emp.,* (1946) 47 Crlj 642 (645).

61 *Balkishan* *v.* *State of Delhi,* 1998 Crlj 3030 Del .

62 *Nimmagadda Ravi* *v.* *State of A.P.,* 1998 Crlj 1823 AP .

63 *Rameswar Harijan* *v.* *State of Bihar,* 1984 Crlj 56 Pat .

64 *Kailash Singh v. State of Bihar,* 1983 Crlj NOC 228Pat .

65 *Raghunath* *v.* *State,* AIR 1933 Pat 1 (FB) .

66 *Banarsi* *v.* *Neelam,* AIR 1969 Delhi 304 [*LNIND 1969 DEL 88*](para 15); *Zahir v. Ganga Prasad,,* AIR 1963 All 4 [*LNIND 1962 ALL 12*](para 10).

67 *Narsayya* *v.* *State,*
AIR 1953 Nag 292 .

68 *Banarsi* *v.* *Neelam,,* [
AIR 1969 Delhi 304
LNIND 1969 DEL 88
AIR 1963 All 4
LNIND 1962 ALL 12](para 15); *Zahir v. Ganga Prasad,,* [ ](para 10).

69 *Balkishun* *v.* *Munno,*
AIR 1970 Pat 107 ; *Rama v. Murlidhar,*
(1988) Crlj 218 (Or) ; *Syananad v. State,*
(1994) Crlj 1298 (All) .

70 *Madhu* *Limaye* *v.* *S.D.M.,* [
AIR 1971 SC 2486
LNIND 1970 SC 501](para 43) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

71 *Madhu* *Limaye* *v.* *S.D.M.,* [
AIR 1971 SC 2486
LNIND 1970 SC 501](para 43) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

72 *Jagdish* *v.* *State,*
AIR 1957 Pat 106 (para 8).

73 *Basu* *Chaudhury* *v.* *State* *of* *Bihar,*
AIR 1971 Pat 106 (para 8); *Ram Deo,*
(1926) 27 Crlj 1132 .

74 *Bengali* *v.* *Chaudhury,*
AIR 1941 Pat 241 .

75 *Basu* *Chaudhury* *v.* *State* *of* *Bihar,*
AIR 1971 Pat 106 (para 8).

76 *Yunus* *v.* *State,*
(1970) 75 Crlj 73 (All) .

77 *Yunus* *v.* *State,*
(1970) 75 Crlj 73 (All) .

78 *Yunus* *v.* *State,*
(1970) 75 Crlj 73 (All) .

79 Cf. *Ramlal v. State,* 1951 Raj 116 .

80 Cf. (1962) 1 Crlj 386 (387).

81 Cf. *Chand Khan v. Emp.,* (1882) 9 Cal 878 .

82 *Emp. v. Manu,* AIR 1936 Sind 188 .

83 *Vide* Rep. of the Joint Committee, p. viii, on Cl s. 397-402.

84 *Jasoda v. Emp.,* AIR 1939 Sind 167 170 .

85 *Muthuswami,* (1940) 41 Crlj 238 (241).

86 *Balkishun v. Munno,* AIR 1970 Pat 586 (para 5).

87 *Krishna Swami,* (1906) 30 Mad 282.

88 *Birdhaj v. State,* 1953 Cal 491 DB .

89 *Loknath v. State,* (1923) 24 Crlj 123 .

90 *Zahuruddin v. State,* AIR 1955 NUC 1444 (Pat) .

91 *Moosa,* AIR 1967 Ker 194 [*LNIND 1966 KER 197*].

92 *Muthuswami,* (1940) 41 Crlj 238 (241).

93 *Jagdish v. State,* AIR 1957 Pat 106 (para 8).

94 *Nihal,* AIR 1926 All 759 ; *Rizawanar v. State,* AIR 1955 NUC 3330 (MB) .

95 *Zahuruddin* *v.* *State,*
AIR 1955 NUC 1444 (Pat) .

96 *Maqsud* *v.* *State,*
AIR 1955 NUC 2680 (All) .

97 *Madhu Limaye* *v.* *SDM,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](para 37).

98 *Sanatan,*
AIR 1952 Or 33 ; *Nikka* , (1954) Punj 6.

1 *Sanatan* *v.* *State,*
AIR 1952 Or 33 .

2 *Banarsi* *v.* *Neelam,*
AIR 1969 Delhi 304 310 ; *Jangir Singh v. State,*
AIR 1960 Punj 225 (paras 4, 7); Cf. *Zahir v. Ganga Prasad,*
AIR 1963 All 4 [
LNIND 1962 ALL 12](DB) .

3 *Balkishun* *v.* *Munno,*
AIR 1970 Pat 586 (para 5).

4 *Balkishun* *v.* *Munno,*
AIR 1970 Pat 586 (para 5).

5 *Balkishan* *v.* *Munno,*
AIR 1970 Pat 586 (para 5).

6 Cf. *Zahir* *v.* *Ganga* *Prasad,*
AIR 1963 All 4 [
LNIND 1962 ALL 12](DB) .

7 Cf. *Yunus* *v.* *Dt.Magistrate,*
AIR 1959 All 346 [
LNIND 1958 ALL 193].

8 *Prabhakar* *v.* *Dt.* *Magistrate,*
AIR 1960 All 467 [
LNIND 1959 ALL 232](para 5) DB.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 112
Procedure in respect of person present in Court.

If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

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1. Scope of s. 112.—

1. This section reproduces *old* s. 113, without any change.
2. The object of this section is to explain to the person what the allegations against him are. [9] With this object, it requires that where the person against whom an order under s. 111 is made is present in Court.

   (i) the order is to be read over to him; and

   (ii) if he so desires, its substance is to be explained to him.

3. Section 112 is not applicable to a case where the person proceeded against is *not* present in Court. In such a case, a copy of the order has to be delivered to him along with the summons or warrant [s. 114]. Hence, there is no need to read over the order when he appears or is brought before the Court under the summons or warrant. [10]

2. 'Is Present in Court'.—

1. It is immaterial for the purposes of this section how the person has come to or has been brought before the Court. It follows, therefore, that—

   (a) Any illegality or the manner in which the person has been brought before the Court would not absolve the Magistrate of his duty [11] of reading over and explaining the order under s. 111, if the person proceeded against happens to be present in Court when it is made, whether he appears voluntarily, or has been brought under arrest, [12] say, under s. 41; or in pursuance of summons in another case. [13]

   (b) Nor would the illegality in the arrest or the mode of service of a summon affect the legality of the order under s. 112. The Magistrate has jurisdiction to make the order under s. 111, after complying with the requirements of the present section, even though the arrest has been illegal. [14]

3. Effects of non-compliance.—

1. The requirement of the present section is *not* a mere formality. [15]

2. No inference that the order was read over and explained to the person can be made from the mere fact that the person was present in Court when the order was passed. [16] It must appear from the record that the order was read out, [17] but it would be immaterial if s. 112 is not specifically mentioned. [18]

3. As sub-sec. (1) of s. 116 [*old* s. 117] says, no order under that section can be passed unless the order made under s. 111 has been read or explained as required by s. 112. Hence, if an order to execute an interim bond is passed under s. 116(3) without first reading over the order under s. 112, the order directing the person to execute interim bond shall be illegal and quashed. [19]

4. Revision.—

Revision lies (see under s. 111,*ante*), where the record does not show that the order under s. 111 was read over [20] , [21] to the person who was present, unless, in the circumstances of the case, it has caused him no prejudice. [22]

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9 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [LNIND 1970 SC 501] (para 37).

10 *Matuki v. State,* AIR 1963 Pat 312 (para 9).

11 *Rameshwar,*
(1914) 36 All 262 .

12 *Emp.* *v.* *Ghulam,*
(1911) 12 Crlj 533 2Bom.

13 *Chowdhury,* (1869) 2 BLR App. xxviii.

14 *Emp.* *v.* *Ghulam,*
(1911) 12 Crlj 533 2Bom.

15 *Malla v. State,* AIR 1966 J&K 29 (30); *Ram Gowda v. State of Mysore,*
AIR 1960 Mys 259 (para 3).

16 *Malla v. State,* AIR 1966 J&K 29 (30); *Ram Gowda v. State of Mysore,*
AIR 1960 Mys 259 (para 3).

17 *Dindayal,*
(1927) 28 Crlj 8 .

18 Cf. *Kanhaiyalal,* ,
AIR 1961 MP 302 305 [
LNIND 1960 MP 103].

19 *Rameshwar,*
(1914) 36 All 262 .

20 *Dindayal,*
(1927) 28 Crlj 8 .

21 *Nahar* *Singh,*
(1951) 52 Crlj 1209 (Raj) .

22 Cf. *Ram* *Murti* *v.* *Emp.,*
AIR 1946 Oudh 230 231 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 113
Summons or warrant in case of person not so present.

If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court :

Provided **that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.**

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1. Scope of s. 113.—

1. This section reproduces *old* s. 114, without any change.
2. While s. 112 deals with the situation when the person against whom an order has been made under s. 111 is then present in Court, the present section deals with the situation when such person is not present in Court, and lays down the conditions for issuing a summons or warrant to bring such person to Court, for the purpose of proceeding under s. 116.
3. Neither s. 112 nor s. 113 has any application until an order has been passed under s. 111. [23]

2. Conditions for the application of s. 113.—

This section provides for three modes for bringing to Court the person against whom an order under s. 111 has

been made, who is not already present in Court:

I. Ordinarily summons should issue (s. 61,*ante*) requiring such person to appear. [24]

II. Where such person is already in custody, the Court should issue a warrant directing the officer in whose custody he is, to bring him to Court.

III. Where urgent act ion is necessary to prevent a breach of the peace, the Magistrate may, instead of issuing a summons, issue a warrant for the arrest of such person, on the following conditions, as laid down in the Proviso—

(a) There must be the report of a Police officer or other information, as to the need for issuing warrant or arrest.

(b) The substance of such report or information must be recorded [25] by the Magistrate.

(c) The Magistrate must be satisfied [26] from such report or information that—

(i) there is reason to fear the commission of an imminent breach of the peace;

(ii) such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person. [27]

But he cannot, in such a case, demand an interim security under s. 116(3), without bringing such person to Court by issuing a warrant of arrest under the Proviso to s. 113 and then giving him an opportunity to show cause, [28] commencing the inquiry. [29]

IV. The summons or warrant so issued, must be accompanied by a copy of the order made under s. 111, which copy serves as the ‘notice’ of the preliminary order to the person proceeded against (see, further, under s. 114,*post*). No separate notice is necessary before arrest. [30]

V. There is a third alternative, mentioned in the concluding part of s. 113, namely, that when the person to be proceeded against is not a free person but is already in custody, neither summons nor a warrant of arrest would be necessary or useful; in such a case, the Court should issue a warrant *directing* the officer in whose custody he is, to bring him before the Court. This provision would apply whether or not the person had been arrested within the jurisdiction of the Court proceeding under this Chapter. [31]

3. Scope of the Proviso; Issue of warrant for arrest.—

1. As has just been stated, the warrant, under s. 113, is a process alternative to summons, to bring the person before the Court, for the purpose of proceeding under s. 116,*i.e.* , to inquire into the truth of the information received against him.

2. The Proviso simply states the circumstances, in which the Magistrate may issue warrant instead of, or in addition to, summons, to bring the person to Court, namely, the apprehension of an immediate breach of the peace which can be averted only by arresting the person. The proviso is not a substantive provision and has to be read with the enacting part of s. 113. Hence, the Proviso cannot be used—

   to re-arrest a person who has already appeared and has been released on bail [32] or after he has executed the bond as required. [33]

4. Arrest under Proviso to s. 113 and detention under s. 116(3).—

1. The arrest under the Proviso to s. 113 is to bring the person before the Court when he is absent and the Magistrate is satisfied [34] that the procedure of issuing summons would be prejudicial to the public peace because there is such a likelihood of imminent breach of the peace being committed by such person that much breach of the peace cannot be averted without immediately arresting him. But a warrant for such arrest cannot be issued unless the Magistrate records an order [35] that such an emergency exists as appears to him from the Police report or other *information.* [36] Mere belief of the Magistrate will not suffice. [37] The order must be signed by the Magistrate and it must appear therefrom that he applied his mind in making it.
2. While s. 113 relates to a stage *prior* to appearance of the person, the detention under s. 116(3) relates to a stage *subsequent* to his appearance, either voluntarily or under summons or warrant, as aforesaid. Such detention, again, can be ordered only if the following conditions have been fulfilled—

   (a) The Magistrate must have commenced the inquiry under s. 116(1)- (2);

   (b) An emergency as to immediate breach of the peace exists or continues to exist after such appearance;

   (c) The Magistrate, on being satisfied as to the existence of such emergency, makes an order requiring the person to execute an interim bond, under the first part of s. 116(3);

   (d) The Magistrate makes an order for his detention until he executes such interim bond or, in case of default, until the inquiry under s. 116(2) is completed. The person cannot be sent to jail under s. 116, until and unless the foregoing stages have taken place. [38] , [39]

5. Applicability of s. 87 [old s. 90] .—

1. Section 87 (see *ante*) provides that in any case where a Court is empowered to issue a summons, the Court may, in lieu of or in addition to summons, issue a warrant for the arrest of such person to secure his appearance, in either of the two conditions specified in Cls. (a)-(b) of that section. The question is whether a warrant may be issued under s. 87 in a proceeding under Chap. VIII to which s. 113 applies:

   It has been held by a single Judge of the Allahabad High Court that where the person against whom a summons had been issued under s. 113, with a copy of the order made under s. 111,

does not appear in compliance with the summons or notice, a warrant for arrest may be issued under s. 87(b).

Under s. 113, on the other hand, the only contingency in which a warrant of arrest may be issued is that provided in the proviso, *viz.* , where the Magistrate is satisfied that an *imminent* breach of the peace cannot be averted unless the person is immediately arrested. It has been held that the terms of the proviso are mandatory and that the issue of a warrant of arrest cannot be justified under this section unless the requirements of the Proviso are satisfied. [40] The Supreme Court has further held that the provisions in s s. 107-118 form a self contained code into which the other provisions cannot be imported, *e.g.* , s. 91]. [41]

But the proviso does not deal with the situation resulting from non-appearance on service of summons but confers an independent power to issue a warrant without issuing a summons or even after the issue of summons, if the contingency mentioned in the Proviso arises. It would, therefore, appear that s. 113 being *silent* as to the situation arising from default in appearance after service of summons, it may legitimate to apply s. 87; [42] otherwise there is no other means to bring the person to Court in a case where the Proviso to s. 113 is not attracted.

2. Though the word ‘ *whenever’* is used in the Proviso, it does not appear that the power to issue a warrant for arrest can be exercised by the Magistrate after the person appears in Court either voluntarily or in compliance with summons, for, as explained by the Supreme Court, in *Madhu Limaye’s,* case, [43] the only course then left to the Magistrate is to start the inquiry under s. 116(1) and, if immediate measures are necessary for maintaining the peace, make an under s. 116(3).

6. Bail in security proceedings.—

See under s. 116,*post.*

7. Resistance to arrest.—

It has been held that a person in a security proceeding not being *accused* of any *offence* , a resistance to arrest in such proceeding cannot be punished under ss. 224-225, I.P.C. [44] Nor can there be a conviction under s. 332, I.P.C., where the warrant of arrest is invalid. [45] But the person may be liable under s. 323, I.P.C., if hurt is caused to the officer executing such warrant, in the absence of any reasonable apprehension of death or grievous hurt to himself. [46]

8. Effect of irregularity: Revision.—

If the requirements of the Proviso to s. 113 are not complied with, the warrant of arrest may be quashed, in revision, *e.g.,* —

Where, though the Police reports for the immediate arrest of the person, the Magistrate makes no order, recording the substance of that information and showing that it was necessary to make an immediate arrest to prevent a breach of the peace. [47]

9. Petition under Art. 226.—

Where there has been a breach of any of the mandatory provisions of the Code, the person may get the resulting order quashed *e.g.* , in a petition for *habeas corpus;*

(i) Where he is arrested in execution of a warrant issued in contravention of the Proviso to s. 113. [48] , [49]

(ii) Where such warrant has been issued without making a preliminary order as required by s. 111 [*old* s. 112]. [50] , [51]

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23 *Narsayya* *v.* *State,* AIR 1953 Nag 292 .

24 *Madhu* *Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [LNIND 1970 SC 501](para 38).

25 *Maniruddin,* (1923) 24 Crlj 829 .

26 *Doulat,* (1891) 14 All 45 .

27 *Doulat,* (1891) 14 All 45 .

28 *Chatra* *v.* *Sewa,* AIR 1955 NUC 3773 (MB) .

29 *Madhu* *Limaye* *v.* *SDM,* AIR 1971 SC 2486 [LNIND 1970 SC 501](para 38).

30 *Chandan,* AIR 1930 All 274 .

31 *Manhindra,* AIR 1919 Cal 702 706 .

32 *Kontam,* in re., AIR 1944 Mad 575 576 .

33 *Nathan,*
(1929) 30 Crlj 809 811Pat.

34 *Maniruddin,*
(1923) 24 Crlj 829 .

35 *Prabhakar* *v.* *D.M.,*
AIR 1960 All 467 [
LNIND 1959 ALL 232](para 7).

36 *Babu,*
(1883) 6 All 132 .

37 *Babu,*
(1883) 6 All 132 .

38 *Mnairuddin,*
(1923) 24 Crlj 829 .

39 *Jangir* *Singh* *v.* *State,,*
AIR 1960 Punj 225 (para 6).

40 *Zahir* *v.* *Ganga* *Prasad,*
AIR 1963 All 4 [
LNIND 1962 ALL 12](para 29) DB.

41 *Madhu* *Limaye* *v.* *Ved* *Murti,*
AIR 1971 SC 2481 2486 : (1970) 3 SCC 739 :
1971 Crlj 1715 .

42 *Gopi* *v.* *State,*
(1974) Crlj 1410 (para 6).

43 *Madhu* *Limaye* *v.* *Ved* *Murti,*
AIR 1971 SC 2481 2486 : (1970) 3 SCC 739 :
1971 Crlj 1715 .

44 *Narsayya* *v.* *State,*
AIR 1953 Nag 292 (para 12).

45 *Narsayya* *v.* *State,*
AIR 1953 Nag 292 (para 12).

46 *Narsayya* *v.* *State,*
AIR 1953 Nag 292 (para 12).

47 *Zahir* *v.* *Ganga* *Prasad,* [AIR 1963 All 4 *LNIND 1962 ALL 12* (1967) 71 CWN 1039](paras 28-29); *Din Md. v. State,* .

48 *Narsayya* *v.* *State,* AIR 1953 Nag 292 (para 12).

49 Cf. *Zahir* *v.* *Ganga* *prasad,,* [AIR 1963 All 4 *LNIND 1962 ALL 12*](paras, 21, 29).

50 *Narsayya* *v.* *State,* AIR 1953 Nag 292 (para 12).

51 Cf. *Zahir* *v.* *Ganga* *prasad,,* [AIR 1963 All 4 *LNIND 1962 ALL 12*](paras, 21, 29).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 114
Copy of order to accompany summons or warrant.

Every summons or warrant issued under Section 113 shall be accompanied by a copy of the order made under Section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

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1. Scope of s. 114.—

1. This section reproduces *old* s. 115, without any change.
2. The object of sending a copy of the order made under s. 111 along with the summons or warrant is to apprise the person served with the case he has to meet.

2. Effect of non-compliance: Revision.—

1. This provision being mandatory, where the notice issued under this section is not accompanied by a copy of the order under s. 111, subsequent proceedings are liable to be set aside. [52]
2. But it has been held in a number of cases that the omission to send a copy may be cured by s. 465 [*old* s. 537], where the object of the section has been served otherwise, *e.g.* —

(a) Where the person is otherwise aware of the contents of the order under s. 111. [53]

(b) Where, though the summons or warrant is not accompanied by a copy of the order, a substance thereof is set out in the process. [54]

(c) Where the order is read out when the person appears, and sufficient time and opportunity to show cause is given to him before the inquiry is held, under s. 116(1)- (2). [55]

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52 *Subba* *Niaken,* (1907) 17 MLJ 438 .

53 *Karim* *v.* *State,* (1961) Raj LW 491 .

54 *Rameshwar,* (1920) 21 Crlj 321 ; *Bishnupada v. State of WB.,* (1977) Crlj 1344 (paras 6, 12) Cal (DB); *Zahir v. Ganga,* AIR 1963 All 4 [*LNIND 1962 ALL 12*](para 24) DB.

55 *Karuthan* , in re., (1919) 26 MLJ 388 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 115
Power to dispense with personal attendance.

The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader.

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1. Scope of s. 115: Power to dispense with personal attendance.—

1. This section reproduces *old* s. 116*with the addition* of the words ‘or for good behaviour’, thus extending its scope to all security proceedings under this Chapter. (Under *old* s. 116, no such exemption was permissible in cases under s s. 108-110).
2. It confers a discretionary power upon the Magistrate to dispense with the personal attendance of a person against whom an order under s. 111 has been made, permitting him to appear by a pleader.
3. Like other discretionary power vested in a court, it has to be judicially exercised; [56] otherwise it will be quashed on revision, *e.g.* —

Where the Magistrate refused to grant such exemption to a person—

residing at a great distance from the Court, and there were no special circumstances requiring his personal attendance. [57]

56 *Sushilabala* *v.* *State,* AIR 1955 NUC 3093 (MB) .

57 *Dinanath* *v.* *Girija,* (1885) 12 Cal 133 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 116
Inquiry as to truth of information.

(1) When an order under Section 111 has been read or explained under Section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under Section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons cases.

(3) After the commencement, and before the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded :

Provided that—

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 111.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs :

Provided **that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.**

(7) Where any direction is made under sub-section (6) permitting the continuance of proceedings, the Sessions Judge may, on the application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse.

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1. Scope of s. 116.—

Sub-sections (1)-(5) of this section correspond to sub-secs (1)-(5) of *old* s. 117, with the following changes, other than verbal—

(i) In sub-sec. (3) for the word 'pending' the words 'after the commencement and before' have been substituted, at the beginning of the section, to make it clear that no order demanding an interim bond can be made before the inquiry under sub-sec. (1) has commenced. This is in accord with the view expressed by the Supreme Court in *Madhu Limaye's* case. [58]

(ii) Sub-secs. (6)-(7) are *new,* added on the recommendation of the Joint Committee, [59] in order to put a *time limit* for completing the proceedings under this Chapter, which confer drastic powers to keep a person under detention without trial [see, further, under sub-secs (6)-(7), *post*].

2. Sub-sec. (1) : Procedure on appearance of the person.—

1. This section lays down the procedure to be adopted subsequent to the making to the order under s. 111 and the appearance of the person concerned in Court in answer to summons or warrant (issued under s. 113) or where he is already present in Court :

(a) Where he is present when the order under s. 111 is made, the order should be read and explained to the person.

(b) Where he appears on being summoned or arrested, no reading of the order is necessary.

But in either case, the next step [60] is an inquiry into the allegations made in the information lodged under s s. 107-110 (as the case may be), in the manner referred to in sub-sec. (2), *below* .

2. There is no provision warranting an order on such person to furnish bail. This view has received support from the Supreme Court in *Madhu Limaye's case.* [61] Where it has been observed that s s. 111-124 prescribe a self-contained procedure to be followed in security proceedings under Chap. VIII, which could not be departed from under other provisions. Hence, after the person concerned appears or is brought before the Court under summons or warrant of arrest, [62] the only course left to the Court is to proceed to make an inquiry under s. 116(2). [63] The very object of the proceedings for keeping the peace would be frustrated if he is released on bail, which is not mentioned in s. 116 or the relevant sections. [64]

3. For the same reason as in the preceding paragraph, there is no room for the application of s. 88 [*old* s. 91] at any stage subsequent to the drawing up of an order under s. 111 [*old* s. 112]. [65] After an order under s. 111 has been drawn up, the Magistrate must act under s s. 113 and 116, and not under s. 91 or any other provision which is not specified in this context. Besides, s. 88 is applicable only where the person is present in Court and is free and the bond under this section may be required from him only to ensure his appearance in court for trial. There is no question of demanding such a bond when the man has been brought under warrant of arrest issued under s. 113 and is already in custody so that his appearance in Court is no longer dependent on his volition. [66] Even when he voluntarily appears or in obedience to summons, he cannot be sent to jail for failure to furnish a bond for his appearance purported to be demanded under s s. 88; the only contingency in which he may be sent to jail in his failure to furnish interim bond ordered under s. 116(3).

4. There is no provision in the Code authorising a Magistrate to direct a party who appears before him in answer to a *summons* issued under this section to be arrested, or to furnish bail, unless he was accused or suspected of the commission of any non-bailable offence, within the meaning of s. 436(1).

5. Preventive detention of the detenu on apprehension of the breach of peace has been made and his remand has been extended from time to time. But the enquiry has been made under sub-section (3) of *s. 116 Cr.P.C.* Such detention is illegal.[67]

3. Bail in security proceedings.—

1. The scope of bail in security proceedings has not so far been dealt with in order to make a comprehensive treatment of the subject, explaining the bearing of the different provisions of this chapter which are relevant, read in the light of the observations of the Supreme Court in *Madhu Limaye's* case which call for a rethinking on some points. The subject should be dealt with reference to the several stages in a security proceeding.

1. Section 436(1) (which corresponds to *old* s. 496*)* is as follows:

"When any person other than a person accused of a non-bailable offence is arrested or detained

without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail :

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

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

II.

1. It is clear from the above text that where a person is arrested in security proceedings, he would be a person 'other than a person accused of a non-bailable offence' within the meaning of s. 436, so that section relating to bail and the consequential provisions of Chap. XXXIII apply to proceedings under ss. 107-110, read with s s. 113, 122(2),[68] excepting detention for default of an order for interim bond [under s. 116(3) vide the 2nd Prov. To s. 436(1),*post*].

2. Hence, a bond executed by a surety under s. 107 may be forfeited under s. 446 [*old* s. 514]. [69]

III. *Arrest prior to order under s. 111.*—

1. It has been stated earlier that, in order to bring a person before a Magistrate with a view to drawing up proceedings under s s. 107-110, the Police usually resorts to s. 151 (*post*) which empowers a Police Officer to arrest without warrant a person who is designing to commit a cognizable offence, which cannot be prevented without arresting him.

   In such a case, the provisions relating to bail are attracted by reason of s. 66 (see *ante*) under which it is *obligatory* for the Officer in charge of the Police Station to grant bail where the offence in question is *bailable* [70] and the person is prepared to give bail, [71] where the offence is non-bailable the Officer in charge has the discretion to offer bail, in accordance with the provisions of s. 437(1),*post* . [72]

   But, as *new* sub-sec. (2) to s. 151 makes it clear, on arrest under s. 151 the Police Officer shall have no power to detain the person beyond 24 hours; the question of bail being granted by the Police Officer is, therefore, relevant to the period of 24 hours following the arrest. If further detention is necessary, the Police Officer must produce the person arrested before a Magistrate [ss. 56-57], and thereafter, the power to grant bail, under s s. 436-437, shall belong to the Court, unless, of course, the person has already been released on bail by the Police Officer.

2. The provisions in sub-secs (3)-(4) of *old* s. 107, relating to the power of a Magistrate, not empowered under s. 107(1), to arrest and detain a person for proceedings before a competent Magistrate, having been *omitted* by the *new* Code (see *ante*), decisions relating to bail on such-arrest have become obsolete.

IV. *Arrest under the Proviso to s. 113.—*

1. As has been explained earlier, the object of s. 113 is to bring before the Court the person to be proceeded against, where he is not already before the Court. The ordinary process for this purpose is summons. But a warrant of arrest may be issued under the Proviso to s. 113 where an immediate breach of the peace cannot be averted without arresting such person. The High Courts held that where the person is thus arrested under a warrant issued under the Proviso to s. 113, the provisions in s s. 436-437 were not excluded. [73]
2. But the above view appears to have been superseded by the Supreme Court decision in *Madhu Limaye* 's case. [74] In this case, though the observations of the Majority (6 : 1) are somewhat laconic, when read with the opinion of the dissenting Judge (BHARGAVA, J), the following propositions appear to have been laid down :

(a) There is no doubt that a person arrested under a warrant issued under the proviso to s. 113 must be brought before the very Court which has issued the order s. 111 and is to make the inquiry as to the truth of the information upon which the order had been issued.

(b) Such inquiry under s. 116(1) must be started immediately after the appearance of the person under arrest. [The dissenting view of BHARGAVA, J, that there may be a time-lag before the inquiry can actually be started, owing to practical reasons, such as summoning of witness, was not accepted by the majority.]

(c) At such a stage, therefore, if the person were released on bail, [75] the very purpose of the security proceeding would be 'frustrated'.

V. *Detention under order under s. 116(3).—*

1. As will appear shortly, where the Magistrate demands an interim bond for maintaining the peace or for preventing the commission of an offence, as an emergency measure, he has the power to make a further order that the person be detained in custody until such bond is executed or, in default of execution, until the inquiry under s. 116(1)- (2) is completed.
2. The proviso to s. 436 says that 'nothing n this section shall be deemed to affect the provisions of sub-sec. (3) of s. 116". This means that where, owing to the apprehension of an imminent breach of the peace, the Magistrate is entitled to ask for an interim bond from the Opposite Party, under s. 116(3), to keep the peace pending the inquiry under s. 116, such person shall *not* be entitled to be released on bail, in lieu of executing the interim bond called for.

VI. *Imprisonment in default of security.—*

1. Section 122(1) provides that if the person who has been ordered to give security by a final order under s. 117 fails to give it up by the date fixed, he may be detained in prison until such security is furnished.
2. But this power of the Magistrate shall only have an interlocutory effect where the security demanded was for a period exceeding 1 year, in which case, the Magistrate shall have to make a reference to the Sessions Judge, under sub-sec. (2) of s. 122. The question is whether the Sessions Judge has power to grant bail while such reference is pending.

Under the *old* Code, the wording of s. 498(1) was very wide—'may, in any case, whether there be an appeal on conviction or not', and, hence, it was held that under this wide language, the Sessions Judge had the power to grant bail to a person whose case had been referred under *old* s. 123. [76]

But the language in s. 439(1)(a) of the *new* Code, which corresponds to *old* s. 498(1), has been radically changed, to restrict it only to "any person accused of an offence". Of course, *new* s. 122(3) [*old* s. 123(3)] empowered the Sessions Court to "pass such order on the case as it thinks fit", but such order can be passed only after the hearing on the reference has been made. [77]

4. 'Shall proceed to inquire into the truth of the information'.—

1. It has already been pointed out that the next step to be taken by the Magistrate after the requirements of s. 112 have been complied with, or on the appearance of the person under summons or warrant of arrest, is to hold the inquiry into the truth of the information upon which the preliminary order under s. 111 had been made. [78]

2. No final order under s. 117 can be made without holding such inquiry [79] and arriving at a legal finding, after giving the person a reasonable opportunity to show cause [80] why he should not be bound over, and upon legal evidence [81] taken in the manner indicated in sub-sec. (2).

5. Scope of the inquiry.—

Since this is an urgent proceeding to prevent breach of the peace and the final order is to be passed within 6 months, the approach of the inquiry should be to find out the truth of the information or allegations. It does not envisage detailed evidence. [82]

6. 'Take..... further evidence'.—

1. This means that apart from examining the Police Officer or other person giving him the information, the Magistrate may take the evidence of witnesses for the prosecution as well as the Opposite parties or such of them as he thinks necessary. [83] He may also ask the parties to adduce further evidence if he feels the necessity for further information. [84]

2. But no fresh evidence for the prosecution should be admitted after close of the defence case, except in accordance with s. 311 [*old* s. 540]. [85]

3. But if, on taking evidence, the Magistrate is satisfied that the evidence is insufficient for making an order under s. 117, he must discharge the Opposite Party under s. 118. Once a Magistrate comes to the conclusion that a positive order under s. 118 was not possible then he must discharge the notice under s. 119 of the Code. [86]

4. A controversy has, however, arisen as to what evidence would be admissible under the expression ‘and to take... further evidence’.

A. The literal interpretation is that this expression refers to evidence *ejusdem generis* with the words immediately proceeding; *viz.* , evidence relevant to ‘the information upon which action has been taken’. [87] According to this view, therefore, the Magistrate cannot take any evidence extraneous to the information upon which the Magistrate initiated the proceeding under s s. 107-110 (as the case may be), or as to incidents other than those recorded in the order under s. 111,[88] even though they are subsequent events supporting the allegations made in the initial information.

B. But, according to the Madras, [89] Patna, [90] Orissa [91] High Courts, on the other hand, the words ‘further’ evidence refers to the evidence ‘other than’ that relating to the information recorded in the order under s. 111, so that the Magistrate, in his inquiry under s. 116(1), is not confined to the subject-matter of the notice issued under s. 111, but may take any other evidence [92] which may enable him to form his opinion that the Opposite Party should be required to execute a bond for keeping the peace, *e.g.* , evidence relating to the *subsequent* conduct of the Party, such as incidents taking place between drawing up of the proceeding and the final order under Section 117[93] which have been a bearing upon the points on which he has to be satisfied.

This latter view [1] appears to have received the support of the Supreme Court [2] where it has been observed that ‘the Court is not precluded from taking into account the subsequent events". [3]

5. Of course, the *jurisdiction* of the Magistrate to act under s. 111 rests on the initial information. [4]

(a) Where, therefore, the allegations made in initial information would not support an order under s. 111, read with the relevant s s. 107-110, no evidence of any subsequent conduct would be admissible to justify the order under s. 111,[5] which is without jurisdiction in such a case. [6]

(b) But where the order under s. 111 is justified on the allegations made in the initial information, any subsequent event which would go to support the initial information *e.g.* , the subsequent conduct or overt acts of the person against whom the preliminary order has been made, would be indicative of the continuance of the apprehension of breach of the peace, the Magistrate can allow the evidence of such subsequent events or conduct to be given, provided the person has been given an opportunity to meet such further evidence.—preferably, by issuing a supplementary order under s. 111. [7] , [8]

(c) Conversely, where the order under s. 111 had been based on some specific incident or overt act, the subsequent acquittal of the accused at the trial for such specific incident would not necessarily vitiate a proceeding under s. 107 inasmuch as a proceeding under s. 107 need not be founded on the commission of any overt act, and even though the accused has been acquitted on a specific charge, the apprehension of breach of the peace may still continue. [9] owing to other circumstances; further, an acquittal may not always be due to the falsity of a case. [10]

(d) For the same reason, where the material on record discloses that though there was a danger of breach of peace at any time, because of the happening of subsequent events, the danger of a breach of the peace has disappeared, the Court can drop the proceedings (say, under s. 107) and discharge the person proceeded against. [11]

7. Sub-sec. (2) : History of.—

1. Prior to the substitution of sub-sec. (2) by the Amendment Act of 1955, the sub-section made a distinction between the two types of security proceedings as to the procedure to be followed therein. While the summons procedure was to be followed in respect of proceedings for security to keep the peace, the warrant procedure was to be followed in respect of proceedings for good behaviour.

II. The amendment of 1955 abolished this distinction between the two types of security proceedings and prescribed that in both cases, the summons procedure for conducting trial and recording evidence should be followed, as nearly as may be practicable.

III. The *new* Code reproduces the post-1955 text of this sub-section, without any change, except substituting 'trial' for 'trials'. The summons procedure is to be followed whether the security proceeding is for keeping the peace or for maintaining good behaviour.

8. 'As nearly as may be practicable'.—

1. These words make it clear that the sub-section does not intend to do away with the distinction between 'inquiry' and 'trial' for all purposes; the inquiry in security proceedings is to be treated as a trial in a summons case for the two specified purposes, as far as practicable. [12]
2. Theses specified purposes are—

(a) conducting trial;

(b) recording evidence.

3. The relevant stages in the summons procedure, in the *new* Code are—

(a) Substance of accusation to be stated to the accused, without framing a charge; accused to be asked whether he would plead guilty or not guilty [s. 251].

(b) If the accused pleads guilty, the plea should be recorded in the words of the accused and the Magistrate may, in his discretion, convict him thereon [s. 252].

(c) If the Magistrate does not convict the accused on his plea of guilty or where he pleads not guilty, the Court is to hear the prosecution as well as the accused and hear the evidence adduced by both parties [s. 254], and the Magistrate has the power to cause further evidence to produced [254(1)]. The Magistrate shall then acquit or convict the accused on such evidence.

4. It follows that the procedure under s s. 112-116 should be as follows :

(i) The first stage is to give the person concerned an opportunity of showing cause—

(a) by reading over the order under s. 111, where he is present in Court; or (b) where he not so present, to issue summons or warrant for his appearance, with a copy of the order under s. 111 for service upon him.

(ii) If such person expresses his willingness to furnish security, an order under s. 117 may be made on the basis of his statement. [13]

(iii) If the person shows cause, and the Magistrate is satisfied therefrom that there was no apprehension of breach of the peace, the Magistrate may drop the proceedings against him without entering upon any further inquiry.

(iv) But if, after perusing the cause shown, the Magistrate is not so satisfied, he should start the inquiry by taking evidence. [14]

9. Where the person does not show cause. —

1. The object of the notice, serving a copy of the order under s. 111, is to give the person proceeded against an opportunity to show cause against the preliminary order, and to meet the allegations made against him. But s. 116(1) enjoins the Magistrate to hold an inquiry into the truth of such allegations as soon as such person appears or is brought before him. Hence, even if he simply appears and does not show cause, the Magistrate should hold the inquiry and take evidence, instead of forthwith making an order to execute a bond, under s. 117. [15]

2. Failure to show cause should be distinguished from admission (see next caption).

10. Whether inquiry is to proceed even where the person concerned expresses his willingness to furnish security.—

1. Where the Magistrate, after explaining the substance of the accusation made against him, asks the person to show cause why he should not be bound over under s. 109, and in answer thereto he says that he is prepared to execute a bond [16] , [17] or that he has no cause to show, [18] there has been a substantial compliance with the summons procedure as laid down in s s. 251-252, so that the Magistrate shall be competent thereupon to make an order under s. 117. [19] No further inquiry need be made in such a case before making an order under s. 117(1) or enforcing such order under s. 122.
2. But whether an admission can be taken as analogous to a ‘plea of guilty’ [s s. 251-252] will depend upon the circumstances of each case. [20] Thus—

A. No admission is to be construed as a plea of guilty nor can the inquiry be dispensed with in the following circumstances :

(a) Where the admission is not unequivocal, [21] *e.g.* —

(i) Where he expresses his willingness to furnish security after denying all allegations made against him. [22]

(ii) Where he merely says that he is 'of bad character and has been to jail', it cannot be held that he is a habitual thief, to attract s. 109. [23]

(b) Where it is not apparent that he has made the admission or expressed consent to furnish security after understanding the allegations made against him or what the inquiry was about.

(c) A statement of the lawyer for the person proceeded against cannot be taken to be an admission for this purpose. [24]

B. On the other hand, no inquiry is necessary where the statement of the person proceeded against, whether made voluntarily or in answer to Court question, [25] amounts to an admission that the information against him is correct and that there is an apprehension of breach of the peace or disturbance of public tranquillity. [26]

3. But, in order to constitute a valid admission, under s. 252,s. 251 [*old* s. 242] must first be complied with, namely, that the particulars of the offence with which he is charged should be stated to him by the Magistrate. Of course, in a security proceeding there is no 'offence' with which the person is charged, and the place of accusation is taken by the order under s. 111, which must have already been read over to the person under s. 112, or supplied to him bodily with the summons or warrant, under s. 114. Nevertheless, it seems that when the inquiry under s. 116(1) starts, the Magistrate must, in order to ascertain whether he admits the allegations contained in the order under s. 111 or would defend, himself explain to the person, in the manner laid down in s. 251. the substance of the allegations, *i.e.* of the information received against him, which is recorded in the order under s. 111. Otherwise the admission may be said to have been made by him without understanding the allegations made against him. Hence, merely asking the person—'are you willing to execute the bond required or you wish further inquiry' [27] would not be a sufficient compliance with the summons procedure, to dispense with the inquiry.

4. Again, the inquiry cannot be dispensed with on the basis of the admission of the person proceeded against unless his admission is recorded in his own words, [28] as nearly as possible, as required by s. 252 [*old* s. 243].

5. Further, where the statement of the person does not constitute an admission of *all* the allegations made against him or the Magistrate is not satisfied that it constitutes a 'plea of guilty' in terms of s. 252, the Magistrate cannot make any order under s s. 117-118, without going through the requirements of Chap. XX relating to a summons trial, *e.g.* examining the witnesses for the prosecution and the person proceeded against. [29]

6. The inquiry cannot be dispensed with merely because the person against whom the order under s. 111 has been made does not show cause by putting in a written statement, as may happen in the case of a *Rule nisi.* [30]

11. Power to drop proceedings.—

See under s. 118,*post.*

12. Absence of complainant [s. 256].—

Since it is in the interest of the State to maintain public peace and tranquillity, and the State has the right to

conduct the case against the person against whom an order under s. 111 has been issued, [31] and such person is not an 'accused', nor a private informant or 'complainant', the person cannot be discharged nor the proceedings dropped, on the analogy of s. 256(1) [*old* s. 247], if the informant does not appear or is dead on the date fixed for hearing under s. 116(2). [32]

13. Applicability of other provisions of the Code.—

1. Though the consensus of opinion is that, while sub-sec. (2) of s. 116 specifically refers to the procedure in a summons case, so that there is nothing to exclude the application of those general provisions in Chaps. XXIII and XXIV [*old* Chaps. XXIV-XXV] which are applicable to all inquiries and trials, [33] a controversy has arisen as to such provisions of these two Chapters which use the word 'accused'.

It would be convenient to deal with these provisions in their serial order.

A. General provisions in old Chaps. XXIV-XXV.—

(a) No question as to the applicability of *old* s. 340 would any longer arise, because both the sub-sections of that section have been expressly made applicable to proceedings under the present Chapter, by *new* ss. 303 and 315(2), *post.*

Hence the Opposite Party under s. 116 is entitled to be defended by a lawyer of his choice and also to examine himself as a witness, if he so desires.

(b) As regards s. 313 [*old* s. 342]—

(i) One view is that though a security proceeding is conducted like a trial, and the position of the person proceeded against is similar to that of an accused, he is, in fact, not an accused. On this principle, The Calcutta High Court has been holding that s. 313 [*old* s. 342] is not applicable to such inquiry and that the person proceeded against need not be examined in such inquiry. [34]

(ii) But several other High Courts have [35] held that s. 313 [*old* s. 342] is expressly attracted by the words in s. 116(2)—'as nearly as practicable..... evidence in summons cases', inasmuch as examination of the accused under s. 313 is a part of the procedure relating to recording of evidence in summons cases, so that the Court is competent to examine the Opposite Party if it is considered necessary. [36]

The better view seems to be that an order under Chap. VIII cannot be challenged as illegal or without

jurisdiction merely because the person proceeded against has not been examined under s. 342; on the other hand, where the Magistrate considers it necessary to examine such person and does so examine him, his order cannot be challenged on that ground.

(c) As regards s. 309 [*old* s. 344], relating to adjournment and remand of the accused, it was held in a Patna case that this provision should be applicable to a proceeding under s. 116, even though sub-sec. (2) of s. 309 [*old* sub-sec.(1A) of s. 344] uses the word 'accused'.

This view has been shaken by the Supreme Court decision in *Madhu Limaye's* case, [37] where it has been held that—

(i) S. 309 [*old* s. 344] deals with the ordinary adjournment of a case and allows a person to be admitted to bail or the Court to remand him if he is in custody. But the question of security proceedings to take a bond does not arise if a person is already in detention and has not been released at the time when the security proceedings are initiated. [38]

(ii) When the person is not under detention but has been brought before the Court under process issued under s. 113, the Magistrate must, when the person appears, immediately commence the inquiry under s. 116(1)- (2). [39] He cannot simply adjourn the case after obtaining an interim bond under s. 116(3), which can be demanded only after the inquiry has commenced and the Magistrate is *prima facie* satisfied as to the truth of the allegations made against the person and the need for an interim bond in view of the immediate apprehension of breach of the peace. [40]

(iii) The scope for an adjournment in an inquiry under s. 116 will, therefore, arise only if after the inquiry is commenced, it cannot be finished in a day. There is no question of remand; the only thing that the Magistrate can do is to obtain an interim bond before releasing him pending the inquiry. [41] Where there is no case for an interim bond, the person should be released unconditionally pending the inquiry.

(d) S. 278 [*old* s. 360] is *not* applicable [42] to an inquiry under s. 116(2) which is to follow the summons procedure, so that the evidence is to be recorded under s. 274 and ss. 275-276 which relate to the warrant procedure.

B. Provisions outside old Chaps. XXIV-XXV.—

1. As regards provisions *outside* new Chaps. XXIII-XXIV, it has been held that the following provisions which use the word 'accused; are *not* applicable to the inquiry under s. 116—

Section 256 [*old* s. 247], providing for the acquittal of the accused for nonappearance of the complainant on the date of hearing. [43]

2. The applicability of provisions outside s s. 112-116 has also been eliminated by the observation of the Supreme Court in *Madhu Limaye's* case [44] that after an order under s. 111 has been drawn

up, the Magistrate has no option to apply any other provision. He must proceed under ss.112-116, strictly according to the provisions therein, Thus—

As regards s. 88 [*old* s. 91; pp. 339-342], [45] it has been held that though it may be applicable in a case under s. 107 prior to the stage of s. 111,[46] no bond for appearance under s. 88 can be demanded after the person against whom an order has been made under s. 111 is present in Court or appears under a summons [47] or is brought under arrest. [48]

(a) *After order under* s. 111. The reason is that after an order under s. 111 is made, it is incumbent upon the Magistrate to proceed under s. 112 and the following sections; he has no discretion in the matter. Hence, if the person is present in Court or he is brought in Court under a summons or warrant of arrest, he must straight away proceed to make an inquiry under s. 116(2) as to the truth of the information upon which the order under s. 111 has been made. [49]

It is only after a *prima facie* case has been made, satisfying the Magistrate as to the truth of the information, that he can make an order for an interim bond under s. 116(3), for maintaining the peace. No question of taking an interim bail for ensuring the appearance of such person can, therefore, arise once the Magistrate, after an order under s. 111 has been made, has set in motion his inquiry under s. 116(3). [50]

There should not be any time lag between the appearance of the person before the Magistrate [s. 116(1) and the commencement of the inquiry under s. 116(2). [51] Hence, the Magistrate shall have neither any scope nor jurisdiction to release such person on bail after the order under s. 111 has been made. [52] Whether such person shall have to enter into an interim bond or shall have to be discharged as a free citizen will follow the result of the inquiry under s. 116(2)- (3). [53]

Where the order requiring bond complies with the requirements of s. 116(3), but wrongly refers to s. 88 [*old* s. 91], it may be read as one under s. 116(3). [54]

(b) *Prior to order under s. 111.*— Even *prior* to the stage under s. 111, the scope for applying s. 88 is narrow because of the observation of the Supreme Court that s. 88 has no applicability where the person is not free and has been brought to Court under arrest and is already in custody. [55] Together with this is to be considered the proposition that though, on receipt of an information under s. 107, the Magistrate may call for an inquiry by the Police or another Magistrate for determining whether he should make a preliminary order under s. 111, there is no provision for examining the person against whom the information has been laid at that stage, *i.e.* , to decide whether he should issue an order under s. 111 against such person. [56]

The only scope left, therefore, to make an order under s. 88 is where such person is present in Court when the Police or a private complainant lays information before the Magistrate under s. 107 (*i.e.* at the pre- s. 111 stage), and the Magistrate seeks to obtain a bond from him under s. 88 in order to insure his appearance on the date when he proposes to make his order under s. 111. It is evident that it would be difficult to justify such order inasmuch as a preliminary order under s. 111 is to be made on ‘information’ and not upon any inquiry in the presence of the person to be proceeded against, so that his presence is not required on the date when that

order is to be made. [57]

14. Recording of evidence under s. 116(2).—

1. Since the summons procedure is to apply, s. 254 [*old* s. 244] is attracted. Hence, the Magistrate cannot close the inquiry without examining and recording the evidence of all the witnesses named in the Police list [58] or in the list of opposite party. [59]

2. The mode of recording is given in s. 274 [*old* s. 355], *viz* — to make a memorandum of the substance of the evidence of each witness, as it proceeds.

15. Applicability of provisions of the Evidence Act to inquiry under s. 116(2).—

By reason of the reference to the procedure for a summons trial 'as nearly as may be applicable', the following provisions of the *Evidence Act* have been held applicable to the inquiry under s. 116(2) :

Section 154 (power of Court to allow cross-examination of party's own witness when hostile). [60]

16. De novo hearing, if any, on succession or transfer of Magistrate.—

1. Prior to the substitution of the Proviso to *old* s. 350(1) by the 1955 amendment, the Proviso did not apply to *inquiries,* and in a trial the accused had a right to demand that the witnesses be resummoned and re-heard, when the Magistrate who originally heard the witnesses was succeeded by another or the case was transferred to another Magistrate. [61]

2. The foregoing anomaly between an inquiry and trial was removed by the 1955 amendment and that position has been retained by the *new* Code in s. 326, which corresponds to *old* s. 350. In the result, in a security proceeding as in a trial—

   (a) Whether on succession of Magistrate or transfer of the case, there will be no right to *de novo* hearing and the person proceeded against shall have *no right* to have any witness re-summoned and re-heard.

   (b) Whether any witness need be re-summoned and re-examined or cross-examined has been left to the *discretion* of the Magistrate, to determine it 'in the interests of justice'. [62]

Thus, the Magistrate may exercise his discretion to re-summon a witness—

Where the demeanour of the witness would be material in appreciating his evidence, but not otherwise.

3. But s. 326(1) enables a Magistrate to decide a case 'on the *evidence* recorded by his predecessor'. It does not give him any power to pronounce a judgment without hearing arguments [63] on such evidence, or to sign or deliver the judgment written by his predecessor. [64]

17. Scope of the inquiry under s. 116(2).—

1. As sub-sec. (1) says the object of the inquiry under s. 116 is to inquire into the truth of the 'information upon which action has been taken', *i.e.* , the allegations recorded in the order under s. 111. But it has been held that the inquiry need not be strictly limited by the precise terms of the order under s. 112. [65]

2. Where the proceeding under s. 107 relates to immovable property, it cannot be said that the Court should not investigate into the title of the parties, even though such inquiry would be out of place in a proceeding under s. 145—where the proceedings are mainly concerned with the maintenance of possession of a person dispossessed within two months of the preliminary order. But in a proceeding under s. 107, the Court has to find out who is the aggressor and who is on the right side. [66]

18. Onus.—

1. Though the person against whom the information is received is asked to show cause, under s s. 107-110, the onus of proof to establish the circumstances justifying an order demanding security is upon the prosecution. [67]

2. Hence, where the evidence on both sides is weak or evenly balanced, the person must be discharged, on the finding that the need for security for keeping the peace or maintaining good behaviour has not been proved. [68]

19. What evidence is admissible.—

1. It has already been stated that though for the purposes of the preliminary order under s. 111, any kind of credible information would suffice, nothing but *legal* evidence [69] can be admitted at the inquiry under s. 116(2), excepting as to 'general repute' to which s. 116(4) relates [and which will be treated separately, under sub-sec. (4), *post*].
2. Hence, the following would *not* be admissible at the inquiry under s. 116(2)—

(i) Hearsay evidence, [70] or the statements of persons not called as witnesses, [71] or things which the witnesses heard from other people. [72]

(ii) A mere report or suspicion of a Police Officer [73] or the report of a subordinate Magistrate. [74]

(iii) Extra-judicial knowledge of the Magistrate [75] or facts outside the record. [76]

Where he has acquired any personal knowledge, the proper course for him would be to get the case transferred to another Magistrate, and examine himself as a witness in the proceeding. [77]

Even where he has made any local inquiry for the purpose of instituting the proceedings, evidence under s. 116(2) cannot be dispensed with and the final order should be based on such evidence and not the results of the local inquiry. [78]

(iv) Evidence of general repute is inadmissible in proceedings under s s. 107-109[79] [See under sub-sec. (4), *below*].

20. Evidence as to past offences.—

(A)

1. Evidence as to past offences, and criminal prosecutions (whether ending in conviction or acquittal) is substantive evidence in a proceeding under s. 110, to prove that the person is a habitual offender or a dangerous or desperate person. [80]

2. But such evidence, unless supplemented by evidence of misconduct during the recent past, *e.g.* , within a year or so prior to the institution of the proceeding, would not justify an order [81] under s. 110, and, where the previous trial ended in discharge or acquittal, the evidence of misconduct must relate to the period subsequent to such discharge or acquittal. [82] Similarly, where the person had been previously bound drawn or imprisoned for failure to give security, the evidence in a fresh proceeding should relate to the period subsequent to the period for which he had been bound down in the previous proceeding. [83]

3. In Short, previous convictions or security proceedings against the person would be evidence to indicate the character of the person, [84] but such evidence alone would not justify an order under s. 110 in the absence of evidence relating to his conduct in the recent past, [85] to show that even after his conviction and release, he is inclined to pursue his former course of life, to the detriment of the community. [86] In the absence of such conduct, a person who has served his sentence of imprisonment should be given some time for reformation. [87]

(B) In a proceeding under s. 107, on the other hand, the existence of past convictions or offences is *not* substantive evidence. Nevertheless, it would be evidence under *s. 157 of the Evidence Act* to corroborate the evidence of the prosecution witnesses as to the disposition of the person to use violence which makes it likely that he would commit a breach of the peace or disturb the public tranquillity in future. Such past offence may be the subject of a criminal trial, pending at the time of the proceeding under s. 107, read with s. 116(2). [88]

21. Evidence as to subsequent conduct.—

The jurisdiction of the Magistrate, in a proceeding under s. 107,[89] depends upon the initial allegations; if the initial allegations were not sufficient to give the Magistrate Jurisdiction, evidence as to subsequent conduct would be inadmissible. [90] But if after the initiation of valid proceedings, any overt act has been committed by the person, evidence as to such subsequent conduct may be admitted, as would lead to an inference of apprehension of breach of the peace; provided the person is given an opportunity of meeting the allegation regarding such subsequent act, by way of supplementary order under s. 111 or otherwise. [91]

22. Evidence at joint inquiry.—

In case of a joint inquiry against more persons than one, there must be definite evidence against each one of them separately, warranting the relevant order (*e.g.* in a proceeding under s. 107), —that there was a danger of breach of the peace from each one of them. [92]

23. Evidentiary value of finding under s. 116(2).—

1. If the finding under s. 116(2) is that there is no apprehension of breach of the peace to justify an order demanding security [s. 117], the Magistrate is to release the person against whom the inquiry was made after passing an order of *discharge* , under s. 118.

2. An order of discharge, unless set aside on revision [s. 397], bars a second proceeding on the *same* information; but the Magistrate may initiate further proceedings on fresh information or fresh police report. [93]

3. But a finding that an incident of violence in a proceeding under s. 107 has not been proved would not bar a trial of the Opposite Party for the offence involved, say, of assault. [94] The rule of 'issue estoppel' does not apply in this case, because the issues in the two proceedings are different. The primary issue which the Court is called upon to determine in a proceeding under s. 107 is whether there was any apprehension of a breach of the peace which necessitated the passing of the order requiring the respondent to give security; there is no trial for any offence. The issue at the trial is whether the respondent is guilty of and punishable for the offence which arises out of that incident involving a breach of the peace. Hence, the rejection of any evidence at the proceeding under s. 116(2) does not preclude the conviction for the offence involved at the subsequent trial, upon the same evidence.

24. Scope of sub-sec. (3): Interim Bond.—

1. The object of this sub-section is to empower the Magistrate to take an interim bond from the Opposite Party where the circumstances are such that unless such person is immediately bound over, and before the Magistrate could complete his inquiry into the allegations against such person, he would be able to perpetrate that act which causes an apprehension of breach of the peace. [95] [See under s. 108,*ante*].

2. Since there can be no apprehension from a person who is already in detention, an interim bond cannot be asked from a person in detention before he is released. [96]

3. A condition for asking for an interim bond is that the Magistrate must record the reasons (in writing) for making such order. [97]

25. Basis of the order for interim bond.—

1. The basis of the order under sub-sec. (93) is the existence of an emergency for the prevention of a breach of the peace. [1] The stage at which it can be made is explained in sub-sec. (3), which is 'after the commencement of the inquiry' under sub-sec. (1) and 'before its completion'. [2]

2. This sub-section postulates 'the commencement of the inquiry', which means a trial according to the summons procedure into the allegations made against the Opposite Party, and enables the Magistrate to call for an interim bond in case he is unable to *complete* [3] the inquiry before the breach of the peace or public tranquillity is about to be committed. He cannot, therefore, make an order under this sub-section without entering upon the inquiry and without being *prima facie* satisfied about the truth of the information against such person. [4] This power was not given to the Magistrate to postpone the case and hear nobody and yet to ask the person to furnish a bond for good conduct. [5]

3. Hence, an *ex parte* interim order issued by the Magistrate on receipt of a report from the Police would be quashed on revision. [6]

4. A composite order passed under Sections 111 and 116(3) *Cr.P.C.* at a time when the preliminary order was yet to be served upon or made known to the opposite party and not before the opposite party appeared in pursuance of the preliminary order is illegal.[7]

26. No ex parte order.—

1. Under the *old* Code it was held that the basis of the order for an interim bond [under old s. 117(3)] being the existence of an emergency, there was noting to debar the Magistrate from making an *ex parte* order, requiring an interim bond, in the absence of the person affected by such order,—once he was satisfied as to the emergency. [8]

II. But the foregoing view is *no longer tenable* in view of the language of *new* sub-sec. (3) of s. 116, read with sub-sec. (1), and the pronouncement of the Supreme Court in *Madhu Limaye's* case, [9] just referred to, which was made even before the change in the text of sub-sec. (3) has been made by the *new* Code.

No interim order for furnishing the interim bond can be passed *ex parte* before the person against whom the preliminary order under *s. 111 Cr.P.C.* had been made had appeared or brought before the Magistrate.[10]

This is because enquiry under s. 116(1) *Cr.P.C.* commences. Only when the opposite party appears on receiving summons or is brought before the Magistrate by virtue of warrant issued under *s. 113 Cr.P.C.* [11]

So, no order for execution of interim bond can be made unless summons is issued against the opposite party directing him to show cause or he appears or brought before the Magistrate. [12]

27. 'Considers that immediate measures are necessary'.—

1. Though this is a subjective condition, the function is *quasi* -judicial and the fact that he has to record his reasons in writing postulates the application of his judicial mind. [13]

2. Though there is no bar to his acting on the same information [14] for the purpose of act ing under s s. 111 and 116(3), the question of an emergency necessitating *immediate* measures to maintain the peace, by way of calling for an interim bond is a separate question, [15] and the records must show that he applied his mind to this separate question. [16]

3. It follows that where the Magistrate acts on a Police report, he cannot call for an interim bond without questioning the Police Officer [17] to be satisfied about the urgency or binding over the person immediately. The affidavits, if any, filed by the person while showing cause, should also be taken into consideration. [18]

4. For the same reason, where he proceeds on a private complaint, he cannot make the order under s. 116(3), before examining the complainant or some witnesses for the prosecution. [19] in *prima facie* [20] support of the complaint; and the opposite party being, present, opportunity should be given to him to cross-examine the witnesses who are so examined; and to explain what he has got to say on the allegation. [21] But he need not start recording the evidence.

5. For the same reason, an interim order under s. 116(3) cannot be based entirely on the Magistrate's observations during a local inspection held under s. 310 [*old* s. 539B], the purpose of which is to appreciate the evidence and not to take the place of evidence taken in Court; or on statements taken from persons present at the local inspection, to cross-examine whom the person affected by the order had no opportunity. [22]

6. But no inquiry need be made for making an interim order where the person concerned appears and shows cause but does *not* specifically deny the allegations made against him on the basis of which the order under s. 111 was made. [23]

7. On the other hand, expedition is the very basis of an order under s. 116(3). Hence, where he finds no reason to reject an application from a private complainant for such order, and the Magistrate considers it necessary to obtain a report from the Police, he cannot frustrate the object of the provision by giving three month's time to the Police to report.

8. An order for directing execution of interim bond without making enquiry to test the correctness of the allegations against the opposite party is illegal. [24]

9. But no detailed evidence is required to be taken. [25]

10. The Magistrate has to take further evidence in such enquiry. The expression 'further evidence' may even relate to the evidence other than that relating to information recorded under *s. 111 Cr.P.C.* so that the Magistrate in his enquiry is not confined to the subject matter of the notice issued under *s. 111 Cr.P.C.* but may take any other evidence which may enable him to decide that the opposite party should be required to execute the bond for keeping the peace.[26]

11. The Magistrate may take subsequent event into consideration to justify the initiation of the proceeding and passing final order. Even subsequent acquittal of the opposite party in a criminal trial in a specific criminal charge may not be sufficient not to proceed further because the apprehension of the breach of peace may continue. [27]

12. But when the materials on record disclose though at one stage, there was apprehension of the breach of peace but because of subsequent event the same has disappeared, the Magistrate is justified in discharging the opposite party proceeded against. [28]

28. Order under s. 116(3) cannot go beyond preliminary order under s. 111.—

1. Since the preliminary order under s. 111 is in the nature of the charge which the person proceeded against has to meet, the ambit of all subsequent proceedings should be measured by that of the order under s.111 including the interim order under s. 116(3). [29]

2. It follows that in the inquiry under s. 116(1) after the commencement of which only such interim order can be made, must be directed towards the allegations on the basis of which the order under s. 111 was made. [30]

3. The Magistrate cannot travel beyond the allegations on the basis of which the order under s. 111 had been made; if he wants to rely on *any subsequent incident* for the purpose of making the interim order, he can do so only after a fresh order is issued under s. 111, thereby giving to the person to be affected an opportunity to show cause on such subsequent allegations. [31]

4. Proviso (b), further, makes it clear that if the direction to execute interim bond imposes more onerous terms than those contained in the preliminary order under s. 111, as regards the amount of bond or as to sureties or their liability, the direction under s. 116(3) shall be illegal and liable to be quashed. [32]

29. For reasons to be recorded in writing.—

1. The object of requiring the Magistrate to record his reasons in his order under s. 116(3) is to let a superior Court know what facts during the inquiry under s. 116(1) influenced the Magistrate to make the interim order. [33] He must state the reasons for which he thought there was likelihood of breach of the peace being committed by the person proceeded against during the pendency of the inquiry itself, which should be averted by demanding interim bond.

2. Though the reasons given need not be elaborate or detailed, the order in writing must show *ex facie* that the reasons urged for issuing an interim order were considered and the Magistrate was satisfied, [34] in other words, the order must show that the case of emergency was separately considered. [35] A mere narration of the cases of the respective parties or reference to the Police report would not suffice. [36]

3. Hence, where the interim order under s. 116(3) does not state the reasons at all, it is liable to be quashed, in revision. [37] , [38]

4. So, the Magistrate should enquire and *prima facie* satisfy himself regarding the information and give reasons for ordering interim bond. [39]

30. Power to detain until bond is executed or the inquiry is concluded.—

1 Once the order demanding interim security is made, the person who fails to execute the bond by the time specified in the Magistrate's order renders himself liable to be detained in custody until the completion of the inquiry under sub-sec. (2) or until it is act ually executed.

2. It is, therefore, necessary to determine what is 'execution' of the bond and when it is duly completed. It has been held [40] that the mere writing out and signing of the bond or bonds is not enough for 'execution'; it would further require presentation to the Magistrate and his acceptance of the bond on being satisfied as to the fitness of the surety, as would appear from s. 191. Hence, even when the bond is duly signed and presented to the Magistrate he may keep the person proceeded against in custody and is not bound to release him until he is satisfied as to the sufficiency of the security, after making inquiry under s. 121. [41]

31. Sub-sec. (4) : Evidence of general repute admissible for purposes of s. 110.—

1. This sub-section provides, as an exception to the rule of legal evidence (see *ante*), that evidence as to general repute would be admissible to prove, where the inquiry relates to a proceeding under s. 110, that the person proceeded against is a habitual offender [Cls. (a)-(f)] or is a person of desperate and dangerous character [Cl. (g) of s. 110].
2. 'General reputation' means the reputation which the person bears in the place where he lives. Hence, the following facts may establish the general repute of being a habitual offender—

   (i) that the neighbours or fellow-townsmen of such persons regard him as a man of desperate or dangerous character or a habitual offender, he can be proceeded against under s. 117, read with s. 110; [42]

   (ii) That he had been arrested several times though acquitted on trial; or that his house had been searched several times though not leading to any incriminating result. [43]

3. Since this clause lays down an extraordinary rule of evidence the Magistrate should consider the evidence carefully, and the mere enumeration of the number of witnesses speaking against the person would not be a sufficient consideration of the issue. [44] The fact that the witnesses speaking in favour of the person are members of his caste or walk of life would not suffice to discredit them; in fact, they are more competent to give evidence as to what such person is reputed to be. [45]
4. 'General reputation' is, however, to be distinguished from 'hearsay evidence', which cannot be evidence of 'general reputation'.

   (a) General reputation is the collective opinion of the persons living in the locality or members of the community to which the person in question belongs. They are examined to prove the general repute, and they speak from their personal knowledge and belief. [46]

   (b) But it is hearsay where the witnesses do not speak from their own knowledge and do not know the man, but have merely *heard* from others about his reputation. [47] Such evidence is *not* admissible to prove 'general repute'. [48] Mere *rumour* is hearsay. [49] Hence, the belief of some persons that an individual has done certain acts because there are rumours to that effect in the locality, is *not* evidence of general repute under the present provision. [50]

5. While instances of several prosecutions, even though ending in acquittal, is admissible as evidence of general repute, [51] evidence that he was *suspected* by the Police is not admissible as proof of general repute. [52]
6. For the same reason, evidence of 'general repute' is to be proved by witnesses having personal knowledge [53] and supported by particular facts, as distinguished from vague, general statements. [54]

7. Where evidence is laid as to 'general repute' of the person proceeded against, the Court is to weigh the following considerations—

   (i) The number, respectability, [55] of the prosecution [56] as well as defence, [57] witnesses, and their means of knowing the facts. [58]

   (ii) The *weight* of the evidence is to be considered as against mere number of witnesses. [59]

   (iii) The movements, constant companions, way of earning livelihood and antecedents of the person. [60]

8. Where the witnesses speaking in favour of the person are competent, and credible, the Magistrate cannot brush aside their evidence in the absence of overwhelming evidence on the side of the prosecution. [61]

9. As s. 116(4) explicitly says, the extraordinary mode of evidence, namely, 'general repute' would be available only for proving the requisites of the several causes of s. 110, and not for proving the requisites of s. 109; [62] or s s. 107-108. [63]

32. 'Or otherwise'.—

These words being wide, there has been some difference of opinion as to their meaning. According to the Bombay [64] High Court, they are wide enough to include event hearsay evidence.

But the consensus of opinion is that these words are to be construed *ejusdem generis* with 'evidence of general repute', and would not include hearsay; [65] these words have been added to indicate that any evidence which is admissible under *s. 30 of the Evidence Act* , if the person would have been tried on a charge of being a habitual offender, would be admissible under s. 116(4), even though it might not be evidence as to his 'general repute'. [66]

33. Sub-sec. (5) : Joint inquiry.—

1. The general rule, under s. 116(2) is that the case against each person proceeded against should be treated separately without being prejudiced by the evidence on the case against any other. [67] Sub-section (5) lays down an exception to that general rule, if the conditions in sub-sec. (5) are present.
2. Under sub-sec. (5), which was introduced in the Code of 1898, joint inquiry may be made, at the option of the Magistrate, if the condition specified in the section is present, *viz.* , that the persons were 'associated together' in the matter under inquiry,— even though under a joint inquiry, there is a danger of one accused being prejudiced by the evidence against a co-accused. [68] Hence, if the joint association of several persons in the commission of an offence specified in s. 110 is established, there is no bar to a joint inquiry under the present section. [69]

   Hence, joint inquiry against members of a gang formed for habitual cheating would be valid even though all of them might not be participating in each of the acts alleged against them. [70]

3. In order to permit a joint trial under this provision—

   (i) The persons must be proved to be associated together, like a gang [71] for their *criminal act* ivities for the purpose of committing the wrongful act or breach of the peace or the offence, which is relevant for the section [s s. 107-110] to which the proceeding relates.

   (ii) It follows that such persons must be ranged on the same side and must not be *hostile* to each other. [72] Where two contending parties are about to bring about a breach of the peace, it cannot be said that they were 'associated together' to commit a breach of the peace; hence, if they are proceeded against jointly, the inquiry would be illegal. [73]

4. The condition precedent for the application of s. 116(5) is that there was an association amongst the several persons. Where, therefore, it is *alleged* (say, in the Police report) that the persons proceeded against are associates and that it is the association amongst them which makes them dangerous to the community, there is nothing to bar a joint inquiry. [74]

5. But, as in a trial, [75] the question whether the persons had been 'associated together' and whether there should be a joint inquiry, has to be decided before starting the inquiry and on the basis of the accusation made,— not on the facts which are eventually proved on the evidence. [76]

   It follows that there cannot be any joint trial where there was no *accusation* of joint act ivity at the beginning of the inquiry; conversely, if on such accusation, a joint inquiry had been started, it is not to be scrapped if it transpires on the evidence that the persons had not been associated together for the activity in question. [77]

6. When it is alleged in the police report that the persons proceeded against are associates and it is association among themselves which makes them dangerous, there is nothing to bar a joint enquiry. [78]

7. When a person against whom joint enquiry is held, there is no allegation that he has joined with others, the enquiry of that person with others is not maintainable and joint enquiry is vitiated. [79]

8. Joint enquiry may be held in respect of the members of the same group but not against rival groups. [80]

9. Even when the joint enquiry is held, there must be a specific finding against each person of act s which render them liable along with others. So the order of the joint enquiry cannot be sustained. [81]

34. New sub-sec. (6); Termination of the proceeding by lapse of time.—

1. This sub-section has been added on the recommendation of the Joint Committee, [82] in order to save the person concerned from being detained without trial for an unusually long period, owing to delay in completion of the proceedings. The Committee observed—

   'Obviously, the provisions are not intended to be used for keeping persons in detention without trial for long periods. The object of the provisions is to prevent breach of the peace and unless the proceedings are completed within a reasonable time, recourse to drastic powers under these provisions would not be justified. Similar considerations would apply also to proceedings relating to bonds for good behaviour."

2. The *new* sub-section, therefore, provides that—

I.

(a) If the inquiry under this section is not completed within a period of 6 months from the date of its commencement, such inquiry shall automatically stand terminated on the expiry of that period.

(b) An exception to the foregoing provision is that where a Magistrate, for *special reasons* , considers that the proceedings should continue beyond 6 months, he may so direct, provided he records those reasons in his order, and that order is made before expiry of the 6 months. [83] Once an extension has been given for special reasons, a further extension should not be granted in the absence of fresh materials. [84] If any extension is given without special reasons, the aggrieved party may apply, under sub-sec. (7), to have that order of extension cancelled. [85]

The period of an extension cannot be for an indefinite time and, at any rate, beyond another 6 months. [86]

(c) The petitioner surrendered before the sub-divisional Magistrate on 05.11.1999. Even though enquiry commenced on 05.11.1999, it continued after 19.05.2000 *i.e.,* after expiry of the period of six months. So, the appellant opposite party prayed before the Magistrate to terminate the proceedings but the Magistrate rejected the prayer. The High Court in appeal held that the Magistrate was not justified in refusing the prayer as no special reasons have been given by the Magistrate to continue the proceedings beyond six months. So, the High Court held that the enquiry against the appellant had automatically terminated. [87]

II. Where the person concerned is in *detention* , the 6 months limit shall be an absolute limit being computed from the date of his detention and the Magistrate shall have no power to extend the proceedings beyond that period for any reason whatsoever, and the person, if not released earlier, must be released immediately on the expiry of the period of 6 months of his date of detention.

3. This *new* sub-section, thus *supersedes* the view taken in some cases [88] that where the preliminary order did not fix any date for commencement of the security, the Magistrate could make his final order at any time after the preliminary order even though the period of one year referred to in s. 107(1) had itself expired.

35. Date of commencement.—

The period of six months is to be computed from the date on which the inquiry starts [89] under sub-sec. (1), after appearance [90] of all the persons concerned. (See also under s. 116(3),*ante* and the Proviso to s. 117,*post*).

But where the person concerned is under detention, the period of six months for the termination of the proceedings shall be computed from the date when he had been put under detention [Proviso to sub-sec. (6)].

Sub-sec. (7): Order continuing proceedings beyond six months may be vacated by Sessions Judge.—This *new* sub-section controls the power of the Magistrate under sub-sec. (6) [*above*] to save the proceeding from automatic termination after the lapse of six months from the date of commencement of the inquiry under sub-sec. (1), and provides that the Sessions Judge may, on the application of the aggrieved party, vacate such order of continuation if he is satisfied that (a) it is not based on any special reason which the Magistrate was to record under sub-sec. (6); or (b) the Magistrate's direction in this behalf was perverse. [91]

36. Revision.—

1. Revision lies against an order made under s. 116 [See further under s. 117,*post*].
2. Revision would lie for non-compliance with the requirements of s. 116(2), read with the summons procedure, *e.g.* —

   Where the Magistrate refuses to examine all the witnesses for the prosecution or the defence, as required by s. 254(1) [*old* s. 244]. [92]

3. An order under s. 116(6) directing continuance of the proceedings, or rejecting an application under s. 116(7)[93] may be set aside where it is perverse, [94] or the starting point of the inquiry as computed by the Magistrate was wrong. [95]
4. As regards an order under s. 116(3), calling for an interim bond, s. 397(2) of the *new* Code, barring revision from 'interlocutory orders' has opened a new perspective.

   1. The result of cases under the *old* Code was as follows :

      (A) An order for interim bond under s. 116(3) would be set aside—

         (i) Where such order has been passed without drawing up a preliminary order under s. 111,[96] or such order is illegal, [97] or without complying with the requirements of sub-sec. (1) of s. 116,*i.e.* , reading over the order under s. 111,[1] or serving it upon the person concerned by summons or warrant [2] and before such person appears in Court in pursuance of the summons or warrant [3] , or in his absence. [4]

         (ii) Where it has been made without recording reasons [5] why this emergency measure has been taken.

         (iii) Where the order under s. 116(3) is made merely on the police report received initially, without separately considering the question of emergency and the need for taking immediate measures. [6]

      B. On the other hand, the local Magistrate being responsible for maintaining the peace or being cognizant of the local situation, the Court of revision will *not* interfere—

Where the Magistrate has directed his consideration to the question of emergency [7] and has satisfied himself by making some kind of inquiry [8] to verify the Police report or other information received. [9]

II. Under the *new* Code, in view of s. 397(2), it has been held that an order requiring an interim bond under s. 116(3) is an interlocutory order, no revision will lie against it, [10] except where it is *without* jurisdiction to render it a nullity, [11] in which case, s. 401 or 482 may be applied. [12]

5. Section 123(2),*post* cannot be attracted to an order under s. 116(3), for 'detention' does not constitute 'imprisonment'. [13]

6. Application under *Art. 226 of the Constitution* may also lie to quash an order made without jurisdiction. [14]

37. Appeal to Supreme Court.—

Appeal lies to the Supreme Court, by special leave under Art. 136, from an order requiring an interim bond under s. 116(3). [15]

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58 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 16, 18) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 see *post* , under sub-sec. (3).

59 Rep. of the Joint Committee on Cl. 116 (p. xii).

60 *Chandra v. Jogendra,* AIR 1965 Tri. 20 .

61 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](paras 48-49) : (1970) 3 SCC 746 [

LNIND 1970 SC 501] :
1971 Crlj 1720 .

62 *Madhu Limaye v. S.D.M.,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](paras 48-49) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

63 *Madhu Limaye v. S.D.M.,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](paras 48-49) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

64 *Madhu Limaye v. S.D.M.,*
AIR 1971 SC 2486 [
LNIND 1970 SC 501](paras 48-49) :
(1970) 3 SCC 746 [
LNIND 1970 SC 501] :
1971 Crlj 1720 .

65 *Madhu Limaye v. Ved Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448](para 18) :
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 overruling *Vasudeo v. State of U.P.,*
AIR 1958 All 578 [
LNIND 1957 ALL 216].

66 *Madhu Limaye v. Ved Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448](para 18) :
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 overruling *Vasudeo Bishnupada v. State of WB.,*
(1977) Crlj 1344 (paras 6, 12) Cal (DB); *Zahir v. Ganga,,*
AIR 1963 All 4 [
LNIND 1962 ALL 12](para 24) DB; *State of U.P.* ,
AIR 1958 All 578 [
LNIND 1957 ALL 216].

67 *Het Ram v. State of Rajasthan,* 2007 Crlj NOC 503Raj .

68 Cf. *State v. Santokh,*
AIR 1960 Punj 31 .

69 Cf. *State v. Santokh,*
AIR 1960 Punj 31 .

70 Cf. *Raghunandan,*
(1904) 32 Cal 80 (83).

71 Cf. *Raghunandan,* (1904) 32 Cal 80 (83).

72 *Nagendra,* (1923) 51 Cal 402 (417).

73 *Hashemali,* (1918) 19 Crlj 329 (Bom) .

74 *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](paras 48-49) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

75 Opinion to the contrary, in cases such as *Karbalai.* , AIR 1940 Nag 75 , is no longer good law.

76 *Emp v. Rasulbux,* AIR 1942 Sind 132 133 .

77 *Mul Chand,* (1914) 37 All 30 .

78 *Mul Chand,* (1914) 37 All 30 .

79 *Mul Chand,* (1914) 37 All 30 .

80 *Keramuddin v. Emp.,* (1914) 41 Cal 806 .

81 *Mul Chand,* (1914) 37 All 30 .

82 *Motilal v. Jesinghbhai,* (1988) Crlj 255 (para 7).

83 *Govind v. Emp.,* (1914) 15 Crlj 363 .

84 *Annegowda v. State of Mysore,* (1970) 76 Crlj 292 (Mys) .

85 *Ganga* *Singh*
(1912) 13 Crlj 772 .

86 *Annegowda* *v.* *State* *of* *Mysore,*
(1970) 76 Crlj 292 (Mys) .

87 *Emp.* *v.* *Rasulbux,*
AIR 1942 Sind 122 .

88 *Emp.* *v.* *Rasulbux,*
AIR 1942 Sind 122 .

89 *Srinivasalu,* in re.,
AIR 1942 Mad 242 [
LNIND 1941 MAD 322].

90 *Matuki* *v.* *State* *of* *Bihar,*
AIR 1963 Pat 313 .

91 *Pitambar* *v.* *State,*
(1970) 76 Crlj 641 (Or) .

92 *Pitambar* *v.* *State,*
(1970) 76 Crlj 641 (Or) .

93 *Matuki* *v.* *State* *of* *Bihar,*
AIR 1963 Pat 313 ; *Pitambar v. State,*
(1970) 76 Crlj 641 (Or) .

1 *Srinivasalu,* in re.,
AIR 1942 Mad 242 [
LNIND 1941 MAD 322]; *Matuki v. State of Bihar,*
AIR 1963 Pat 313 ; *Pitambar v. State,*
(1970) 76 Crlj 641 (Or.) .

2 *Ramnarain* *v.* *State* *of* *Bihar,*
AIR 1972 SC 2225 2226 : (1972) 2 SCC 532 :
1972 Crlj 1444 .

3 *Ramnarain* *v.* *State* *of* *Bihar,*
AIR 1972 SC 2225 2226 : (1972) 2 SCC 532 :
1972 Crlj 1444 .

4 *Shiblal* *v.* *State* *of* *Bihar,*
AIR 1968 Pat 369 372 .

5 *Shiblal* *v.* *State* *of* *Bihar,*
AIR 1968 Pat 369 372 .

6 *Shiblal* *v.* *State* *of* *Bihar,* AIR 1968 Pat 369 372 ; *Pir Ali v. Emp.,* AIR 1920 Pat 550 .

7 *Srinivasalu,* in re, AIR 1942 Mad 242 [*LNIND 1941 MAD 322*].

8 *Shiblal* *v.* *State* *of* *Bihar,* AIR 1968 Pat 369 372 .

9 *Shiblal* *v.* *State* *of* *Bihar,* AIR 1968 Pat 369 372 .

10 *Shiblal* *v.* *State* *of* *Bihar,* AIR 1968 Pat 369 372 .

11 *Ramnarain* *v.* *State* *of* *Bihar,* AIR 1972 SC 2225 2226 : (1972) 2 SCC 532 : 1972 Crlj 1444 .

12 *Kalicharan* *v.* *State,* (1954) 58 CWN 1035 .

13 *Yasin* *v.* *State,* AIR 1969 Guj 267 [*LNIND 1968 GUJ 99*](see next caption).

14 *Ramasrey* *v.* *State* *of* *Bihar,* AIR 1969 Pat 369 (paras 4-5).

15 *Kali* *Pershad,* (1868) 9 WR 16 (Cri) .

16 *Yasin* *v.* *State,* AIR 1969 Guj 267 [*LNIND 1968 GUJ 99*][see next caption].

17 *Dukhi* *v.* *Emp.,* AIR 1937 Oudh 289 [Contrary view in *Bipin v. State,* (1962) 2 Crlj 537 , overlooks ss. 251-252 read with s. 117(2)].

18 *State v. Pandya,* AIR1955 NUC, 5322 (Bom) DB.

19 *Dukhi* *v.* *Emp.,* AIR 1937 Oudh 289 [Contrary view in *Bipin v. State,* (1962) 2 Crlj 537 , overlooks ss. 251-252 read with s. 117(2)].

20 *Abdul* *v.* *State,* AIR 1952 Bhopal 45 .

21 *Dharma,* AIR 1955 NUC 3098 (MB) .

22 *Bhagirath* *v.* *State,* AIR 1955 NUC 486 (Raj) .

23 *Emp.* *v.* *Kaka,* (1901) 3 Bom LR 269 .

24 *Venkatasami,* (1907) 30 Mad 330.

25 *Emp.* *v.* *Kishan,* AIR 1928 All 270 .

26 *Bhup Narain* *v.* *State,* AIR 1954 All 29 [*LNIND 1953 ALL 152*].

27 *Palaniappa,* (1911) 34 Mad 139.

28 *Bhup Narain* *v.* *State,* AIR 1954 All 29 [*LNIND 1953 ALL 152*].

29 Cf. *Kaushalya,* AIR 1966 SC 22 [*LNIND 1965 SC 169*]: (1966) 1 SCR 229 : 1966 Crlj 66 .

30 *Emp.* *v.* *Abdul Kadir,* (1886) 9 All 452 .

31 *Laxmi Narayan,* (1932) 54 All 1036 .

32 *State* *v.* *Bhimaiah,* AIR 1955 NUC 922 (Hyd) DB.

33 *Vasudeo* *v.* *State of U.P.,* AIR 1958 All 578 583 [*LNIND 1957 ALL 216*].

34 *Kartick* *v.* *Pannalal,* AIR 1958 Cal 140 (para 5).

35 *Emp.* *v.* *Rasulbux,* AIR 1942 Sind 122 126 ; *Kusuma v. Govind,* AIR 1965 Raj 40 [*LNIND 1964 RAJ 105*].

36 *Kusuma* *v.* *Govind,* AIR 1965 Raj 40 [*LNIND 1964 RAJ 105*].

37 *Madhu Limaye* *v.* *Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](Paras 18-19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 ; *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 43) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

38 *Madhu Limaye* *v.* *Ved Murti,* AIR1971 SC 2481 (Paras 18 -19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

39 *Madhu Limaye* *v.* *Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](Paras 18-19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

40 *Madhu Limaye* *v.* *Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](Paras 18-19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 ; *Madhu Limaye v. S.D..M.* , AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 43) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

41 Contrary view in *Vasudeo* *v.* *State of U.P.,* AIR 1958 All 578 [*LNIND 1957 ALL 216*]and *Yusuf v. D.M.,* AIR 1959 All 346 [*LNIND 1958 ALL 193*](para 4), no longer good law.

42 *Legal Remembrancer* *v.* *Jafer,* (1924) 52 Cal 668 .

43 *Asrafali* *v.* *Nasir,* (1926) 31 CWN 388 .

44 *Madhu Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 43) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

45 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised to *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB.

46 *Madhu Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 43) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

47 *Madhu Limaye* *v.* *S.D.M.,* AIR 1971 SC 2486 [*LNIND 1970 SC 501*](para 43) : (1970) 3 SCC 746 [*LNIND 1970 SC 501*] : 1971 Crlj 1720 .

48 *Madhu Limaye* *v.* *Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 18-19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

49 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised in *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB .

50 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised in *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB .

51 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised in *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB .

52 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised in *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB .

53 The resultant of the Supreme Court decisions as to the applicability of s. 88 to security proceedings under Chap. VIII has been fully summarised in *Velu v. State of Kerala,* (1973) KLJ (663) : (1973) MLJ 543 (Cri) DB .

54 *Govinder* *v.* *Bachubhai,* AIR 1972 SC 528 : (1972) 4 SCC 643 : 1972 Crlj 316 .

55 *Madhu* *Limaye* *v.* *Ved* *Murti,,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](paras 18-19) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715 .

56 *Chandra* *Mani* *v.* *Sangai,* AIR 1969 Mani 12 .

57 Cf. *Madhu* *Limaye* *v.* *Ved* *Murti,* AIR 1971 SC 2479 (para 6-7) : (1972) 4 SCC 219 : 1971 Crlj 1712 .

58 *Tejaram* *v.* *Bhairan,* AIR 1955 NUC 5030 (Raj) DB .

59 Cf. *Kuldip v. State of J&K,* 1962 J&K 23 (24).

60 *Emp.* *v.* *Radhey,* AIR 1944 Oudh 296 .

61 Cf. *Kalicharan* *v.* *State,* (1954) 58 CWN 1035 ; *Harballav v. State,,* AIR 1954 Pat 242 , no longer good law.

62 *Sushil* , AIR 1960 Pat 160 .

63 *Ram* *Raj* *v.* *State,* AIR 1969 Cal 481 [*LNIND 1969 CAL 70*](para 31).

64 *Hajari* *v.* *Ramasis,* AIR 1970 Pat 89 (para 9); *Ramautar v. Harihar,* (1969) Crlj 1315 (Pat) ; Cf. *Surendra v. State of A.P.,* AIR 1954 SC 194 [*LNIND 1953 SC 99*]: 1954 Crlj 475 : 1954 SCR 330 ; *Sunil v. Ajit,* AIR 1969 Cal 492 [*LNIND 1967 CAL 164*](para 17).

65 *Dy. Legal Remembrance* r v. *Kadir,* (1912) 17 CWN 331 .

66 *Shamrao v. Emp.,* AIR 1947 Nag 706 .

67 *Abdul Kadir,* (1886) 9 All 452 .

68 *Rahman v. Emp.,* (1912) 14 Crlj 407 (All) .

69 *Bachai v. Emp.,* (1914) 15 Crlj 705 (All) .

70 *Isri Pershad,* (1895) 23 Cal 621 (628).

71 *Emp. v. Balua,* (1883) 6 All 132 (136).

72 *Isri Pershad,* (1895) 23 Cal 621 (628).

73 *Muzaffar v. Emp.,* AIR 1942 Pesh 84 .

74 *R. v. Jivanji,* 6 BHC (Cri) 1.

75 *Rati Lal v. State,* AIR 1956 Bom 385 [*LNIND 1956 BOM 17*].

76 *Emp. v. Brijnandan,* (1914) 37 All 33 .

77 *Alimuddin,* (1902) 2 Cal 392 .

78 *Ram Pargat,* (1925) 26 Crlj 1149 .

79 *Emp. v. Bidhyapathi,* (1903) 25 All 273 .

80 *Thirunavukkarasu* *v.* *State,* [AIR 1959 Mad 339 *LNIND 1958 MAD 133*].

81 *Wahid* *v.* *Emp.,* (1907) 11 CWN 789.

82 *Lala* *v.* *Emp.,* (1913) 14 Crlj 603 (Punj).

83 *Ram Deo* *v.* *Emp.,* (1915) 19 CWN 233.

84 *Emp.* *v.* *Ramlal,* (1929) 51 All 275.

85 *Emp.* *v.* *Nepal,* (1909) 13 CWN 318.

86 *Valad Hussein,* (1885) 10 Bom 174; *Haidar Ali,* (1886) 12 Cal 520.

87 *Emp.* *v.* *Abdul,* (1915) 43 Cal 1128.

88 *Rangaswami*, in re., [AIR 1943 Mad 394 *LNIND 1942 MAD 242*].

89 *Shiblal* *v.* *State of Bihar,* AIR 1962 Pat 369 372.

90 *Shiblal* *v.* *State of Bihar,* AIR 1962 Pat 369 372.

91 *Shiblal* *v.* *State of Bihar,* AIR 1962 Pat 369 372.

92 *Shambhu,* (1916) 38 All 468.

93 *Imam,* (1900) 27 Cal 662.

94 *State of A.P.* *v.* *Kokkilgada,* [AIR 1970 SC 771 *LNIND 1968 SC 365* (1969) 1 SCC 161](para 12) : [

LNIND 1968 SC 365] :
1970 Crlj 759 .

95 *Madhu Limaye v. Ved Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448]:
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 .

96 *Madhu Limaye v. Ved Murti,* AIR1971 SC 2481 :
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 .

97 *Courplay v. State of Mysore,*
(1961) Crlj 536 (Mys) .

1 *Nair v. State of Kerala,*
(1978) Crlj 107 (para 3) Ker.

2 These words were substituted for the word 'pending' by a *Lok Sabha* amendment, in pursuance of observations of the Supreme Court in *Madhu Limaye's* case [AIR1971 SC 2481].

3 *Madhu Limaye v. Ved Murti,*
AIR 1971 SC 2481 [
LNIND 1970 SC 448](Paras 16-18) :
(1970) 3 SCC 739 [
LNIND 1970 SC 501] :
1971 Crlj 1715 . Cf. *Govinder v. Bachubhai,*
AIR 1972 SC 528 (para 8).

4 *Uchhaba v. Kunja,*
(1978) Crlj 124 (Or.) DB ; *Gopal v. Ex. Magistrate,*
(1978) Crlj 857 (MP) DB.

5 *Uchhaba v. Kunja,*
(1978) Crlj 124 (Or.) DB ; *Gopal v. Ex. Magistrate,*
(1978) Crlj 857 (MP) DB.

6 *Perumal v. State,*
(1985) Crlj 266 (Mad) .

7 *Ajit Khanna v. Shantilata Panchal,*
1997 Crlj 4015 (Cal).

8 *Uchhaba v. Kunja,*
(1978) Crlj 124 (Or.) DB ; *Gopal v. Ex. Magistrate,*
(1978) Crlj 857 (MP) DB.

9 *Madhu Limaye v. Ved Murti,* [AIR 1971 SC 2481 : *LNIND 1970 SC 448* : (1970) 3 SCC 739 : *LNIND 1970 SC 501* : 1971 Crlj 1715] (Paras 16-18). Cf. *Govinder v. Bachubhai,* AIR 1972 SC 528 (para 8).

10 *Piara* v *State,* 1994 Crlj NOC 124 (P&H).

11 *Muhammed Kutty v. State of Kerala,* 2007 Crlj 3016 Ker DB .

12 *Christalin v. State,* 1992 Crlj 3608 Bom .

13 *Musharraf v. State,* [AIR 1969 Delhi 12 : *LNIND 1968 DEL 70*].

14 *Thirunavukkarasu,* AIR 1959 Mad 839 842 ; *Amin v. State,,* AIR 1962 Pat 51 ; *Upendra v. State,* AIR 1966 Or. 75 .

15 *Hurmat v. State,* (1953) 54 Crlj 916 (Pat) .

16 *Hurmat v. State,* (1953) 54 Crlj 916 (Pat) .

17 *Madhu Limaye v. Ved Murti,* [AIR 1971 SC 2481 : *LNIND 1970 SC 448* : (1970) 3 SCC 739 : *LNIND 1970 SC 501* : 1971 Crlj 1715] (para 13). [The Supreme Court, thus, overrules the view that the interim order may be made on the basis of the Police report or entries in the Station diary, without any corroboration; and affirms the view taken in cases such as *Bachal v. Emp.,* AIR 1942 Sind 77 78 ; *Gajendra v. Emp.,* AIR 1950 Cal 200 (para 4)].

18 *Hurmat v. State,* (1953) 54 Crlj 916 (Pat) .

19 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 4) Gau.

20 *Madhu Limaye v. Ved Murti,* [AIR 1971 SC 2481 : *LNIND 1970 SC 448* : (1970) 3 SCC 739 : [(para 13).

LNIND 1970 SC 501] : 1971 Crlj 1715 . [The Supreme Court, thus, overrules the view that the interim order may be made on the basis of the Police report or entries in the Station diary, without any corroboration; and affirms the view taken in cases such as *Bachal v. Emp.*, AIR 1942 Sind. 77 78 ; *Gajendra v. Emp.*, AIR 1950 Cal 200 (para 4)].

21 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 4) Gau.

22 *Palaparti v. Palaparti,* (1975) Crlj 1129 (AP) .

23 *Shyam Lal v. Ramballabh,* AIR 1968 Pat 295 ; Cf. *Govinder v. Bachubhai,* AIR 1972 SC 528 : (1972) 4 SCC 643 : 1972 Crlj 316 ; *Moolesh v. Imamuddin,* (1967) 71 CWN 851 (853).

24 *Perumal v. State,* 1985 Crlj 226 : 1985 MLJ (Cri) 22 : 1984 MLW (Cri) 173.

25 *Matilal v. Jesinghbhai,* 1988 Crlj 255 .

26 *Matuki v. State of Bihar,* AIR 1963 Pat 313 .

27 *Shib Lal v. State of Bihar,* AIR 1968 Pat 369 ; *Ramnarain v. State of Bihar,* AIR 1972 SC 2225 [LNIND 1972 SC 332]: (1972) 2 SCC 532 [LNIND 1972 SC 332] : 1972 Crlj 1444 .

28 *Ramnarayan v. State of Bihar,* AIR 1972 SC 2225 [LNIND 1972 SC 332]: (1972) 2 SCC 532 [LNIND 1972 SC 332] : 1972 Crlj 1444 .

29 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 4) Gau.

30 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 4) Gau.

31 *Abdul v. Amanat,* (1974) 80 Crlj 1092 (para 4) Gau.

32 *Nair v. State of Kerala,* (1978) Crlj 107 (para 4) Ker.

33 *Jagdish v. State,* AIR 1957 Pat 106 .

34 *Sundar v. Chenulu,* AIR 1970 Or. 184 (para 18); *Ramsaran v. Ramakant,* (1962) 2 Cri_J 575 (para 17) Pat; *Courplay v. State of Mysore,* (1961) Cri_J 536 (Mys).

35 *Jagdish v. State,* AIR 1957 Pat 106 .

36 *Abdul v. Amanat,* (1974) 80 Cri_J 1092 (para 4) Gau.

37 *Abdul v. Amanat,* (1974) 80 Cri_J 1092 (para 4) Gau.

38 *Sundar v. Chenulu,* AIR 1970 Or. 184 (para 18); *Ramsaran v. Ramakant,* (1962) 2 Cri_J 575 (para 17) Pat; *Courplay v. State of Mysore,* (1961) Cri_J 536 (Mys).

39 *E.K. Nair v. State* , 1978 Cri_J 109.

40 *State of U.P. v. Laxminarayan,* AIR 1962 All 137 140 .

41 *State of U.P. v. Laxminarayan,* AIR 1962 All 137 140 .

42 *Angnu,* (1922) 45 All 109 .

43 *Ohid v. R.,* AIR 1950 All 177 [*LNIND 1949 ALL 131*].

44 *Ohid v. R.,* AIR 1950 All 177 [*LNIND 1949 ALL 131*].

45 *Ohid v. R.,* AIR 1950 All 177 [*LNIND 1949 ALL 131*].

46 *Firangi v. Emp.,* AIR 1933 Pat 189 .

47 *Firangi* *v.* *Emp.,* AIR 1933 Pat 189 .

48 *Firangi* *v.* *Emp.,* AIR 1933 Pat 189 .

49 *Angnu,* (1922) 45 All 109 .

50 *Kirpa* *Sindhu,* (1918) 19 Crlj 905 (Mad) .

51 *Ohid* *v.* *R.,* AIR 1950 All 177 [*LNIND 1949 ALL 131*].

52 *Chandi,* (1918) 19 Crlj 841 (Oudh) ; *Jabruddin,* (1919) 20 Crlj 689 (All) .

53 *Angnoo* *Singh,* (1922) 45 All 109 .

54 *Abdool,* (1916) 43 Cal 1128 .

55 *Ranga Reddi,* (1919) 43 Mad 450.

56 *Tulak,* (1900) 2 Bom LR 57 (58).

57 *Ramlagan,* (1924) 25 Crlj 985 ; *Rahu,* (1920) 43 All 186 (190).

58 *Tulak,* (1900) 2 Boom LR 57 (58).

59 *Babu* *Pershad,* (1911) 13 Crlj 9 (All) .

60 *Tulak,* (1900) 2 Bom LR 57 (58).

61 *Jhandu* *v.* *Emp.,* AIR 1914 Lah 555 .

62 *Kalai* *v.* *Emp.,*
(1901) 29 Cal 779 .

63 *Emp.* *v.* *Bidhyapati,*
(1903) 25 All 273 .

64 *Raoji,*
(1903) 6 Bom LR 34 .

65 *Sarju,*
(1918) 41 All 231 (234); *Nepal* , 13 CWN 318.

66 *Sarju,*
(1918) 41 All 231 (234); *Nepal* , 13 CWN 318.

67 *Jai* *Sao,*
(1921) 65 IC 484 (Pat) .

68 *Sheo* *Sahai,*
(1919) 20 Crlj 750 (All) .

69 *Jai* *Sao,*
(1921) 65 IC 484 (Pat) .

70 *Kalu,*
(1909) 37 Cal 91 .

71 *Ismail,*
AIR 1924 All 195 ; *Ram v. Emp.,*
AIR 1947 Oudh 86 .

72 *Har* *Dutt,*
(1916) 17 Crlj 165 (All) .

73 *R.* *v.* *Laxminarayan,*
AIR 1951 Nag 306 .

74 *Parbati* *v.* *Emp.,*
AIR 1934 Cal 482 ; *Jharua v. State,*
AIR 1959 Pat 219 [case under s. 110].

75 *Babulal* *v.* *Emp.,*
AIR 1938 PC 130 .

76 *Ohid* *v.* *R.,*
AIR 1950 Cal 177 [
LNIND 1949 CAL 90](paras 9,11) [case under s. 110].

77 *Ohid* *v.* *R.*, AIR 1950 Cal 177 [LNIND 1949 CAL 90](paras 9,11) [case under s. 110].

78 *Jharna* *v.* *State*, AIR 1956 Pat 219 .

79 *Kripasindh* u v. *Baid,* 1951 Ori 277.

80 *Thaimalaiyandi* *v.* *State* *of* *T.N.*, 1984 Crlj 1079 : 1983 MLJ (Cri) 119 : 1983 MLW (Cri) 313.

81 *Sohan* *Sahu* v *Emperor*, AIR 1943 Pat 417 .

82 Rep. of the Joint Committee on the Bill of 1970, p. xii (on Cl. 116).

83 *Nasiru* *v.* *State* *of* *Haryana*, (1978) Crlj 603 (P&H).

84 *Krishnadeo* *v.* *State* *of* *Bihar*, (1985) Crlj 1763 (paras 6, 8) Pat (DB).

85 *Krishnadeo* *v.* *State* *of* *Bihar*, (1985) Crlj 1763 (paras 6, 8) Pat (DB).

86 *Ramdeo* *v.* *State* *of* *Bihar*, (1985) Crlj 436 (para 6) Pat.

87 *Muhammed* *Kutty* *v.* *State* *of* *Kerala*, 2007 Crlj 3016 Ker DB .

88 *State* *v.* *Basantilal*, AIR 1955 NUC 3331 (MB) .

89 *Madhu* *v.* *Ved* *Murti*, AIR 1971 SC 2481 [LNIND 1970 SC 448]; *Sona v. State,* (981) Crlj 39.

90 *Haruni* *v.* *State* *of* *Bihar*, (1977) Crlj 74 NUC Pat; *Dwarka v. State of Maharashtra,* (1977) Crlj 120 (Bom) DB ; *contra Paresh v. Ahitosh,* (1978) Crlj 1171 (Cal) DB.

91 *Dwarka v. State of Maharathtra,* (1977) Crlj 120 (para 21) Bom.

92 *Tejram v. Bhairon,* AIR 1955 NUC 5030 (Raj) .

93 *Har Dutt,* (1916) 17 Crlj 165 (All) .

94 *Ram v. Emp.,* AIR 1947 Oudh 86 .

95 *Prafulla v. Ajit,* (1978) Crlj 316 .

96 *Shravan v. Supdt.,* AIR 1957 All 189 [LNIND 1956 ALL 144]; *Balraj v. Union of India,* AIR 1967 Delhi 31 34 [LNIND 1966 DEL 119].

97 *Purshottam v. State,* AIR 1970 Pat 293 .

1 *Malla* , AIR 1966 J&K 29.

2 *Balraj v. Union of India,* 1967 Delhi 31 (34).

3 *Chatra v. Sewa,* AIR 1955 NUC 3773 (MB) .

4 *Bhuriya v. State,* AIR 1955 NUC 499 (Raj) .

5 *Sundar v. Chenulu,* AIR 1970 Or. 184 (para 18); *Courplay v. State of Mysore,* (1961) Crlj 536 (Mys) .

6 *Vrajlal v. Parmar,* AIR 1955 NUC 4108 (Sau) .

7 *Swamikannu,* in re., AIR 1955 NUC 210 (Mad) .

8 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [LNIND 1970 SC 448](para 13).

9 *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*](para 13).

10 *Bhima v. State,* (1975) Crlj 1923 (paras 16-17) Or. (DB); *Nair v. State of Kerala,* (1978) Crlj 107 (Ker) .

11 *Bhima v. State,* (1975) Crlj 1923 (paras 16-17) Or. (DB); *Nair v. State of Kerala,* (1978) Crlj 107 (Ker)

12 *Bhima v. State,* (1975) Crlj 1923 (paras 16-17) Or. (DB); *Nair v. State of Kerala,* (1978) Crlj 107 (Ker)

13 *Gur Dayal v. State,* ILR (1976) II Del 330 .

14 Cf. *Uchhaba v. Kunja,* (1978) Crlj 125 (para 5) Or.

15 Cf. *Govinder v. Bachubhai,* AIR 1972 SC 528 : (1972) 4 SCC 643 : 1972 Crlj 316 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 117
Order to give security.

If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Provided that—

(a) no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under Section 111;

(b) the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive;

(c) when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

1. Contents of the order.—

1. The final order under s. 117 will contain the following directions and conditions:

(a) That the opposite party shall execute a bond for keeping the peace or maintaining good behaviour (as the case may be), according to the nature of the preliminary order under s. 111, read with any of the s s. 107-110.

(b) That the bond shall be with or without sureties as the Magistrate determined. But in the case of a *minor* opposite party, the bond must be with sureties, and will be executed only by such sureties [(Prov. (c)].

(c) The amount of the bond shall be determined according to the circumstances of the case, shall not be excessive and shall not be larger than what was specified in the preliminary order under s. 111 [Provs. (a)-(b)].

(d) The period for which the security is to subsist shall not exceed—

(i) One year, in the case of an order under s s. 107-109;

(ii) Three years, in case of an order under s. 110;

and shall not exceed the period less than the aforesaid maximum as may have been specified in the order under s. 111 [Prov. (a)].

2. The order should specify a date by which the security is to be furnished, [16] giving sufficient time to the person to furnish security.

3. The order should not specify any period of imprisonment in default of executing the bond, because the penalty for not furnishing the security required is laid down in s. 122. [17]

2. It is proved.—

No order under this section can be made unless the Magistrate is satisfied as to the truth of the allegations [18] against the suspected person; or where they are several persons, against each of them individually. [19]

3. Proviso (a) : Period of security.—

This Proviso requires that the contents of the final order should be in terms of the preliminary order against which the person to be bound was asked to show cause. Thus, if the preliminary order asked him to show cause why he should not furnish security for keeping the peace for a period of six months, the final order under s. 117 cannot demand a bond for keeping the peace for one year. [20]

4. Commencement of the period.—

1. Though this is not provided for in the Proviso, it follows from the principle just discussed that where the preliminary order fixed a date from which the security was to be operative, a final order under s. 117 cannot be passed if that period has in the meantime expired.

The bond to be executed by the person called upon to furnish security under *s. 107 Cr.P.C.* is a period not more than one year. This one year commencing from the date when the Magistrate takes cognizance and commence the proceedings under *s. 107 Cr.P.C.* . This one year is the maximum which cannot be and should not be from the date of service of notice or warrant nor can it be from the first appearance of the opposite party.[21]

2. But where the preliminary order did not fix date for commencement of the security, the final order can be passed at any time thereafter, [22] unless the proceedings have terminated at the end of 6 months from the date of commencement of the inquiry under s. 116(1),[23] —by *operation of the new sub-sec. (6) to s. 116*, provided of course, it is proved at the inquiry that it is still necessary to bind down the person.

3. Similarly, the mere fact that more time than the period for which security had been demanded by the preliminary order under s. 111 has elapsed by the time the inquiry is completed, will be no ground for dropping the proceeding [24] or discharging the person, unless of course a final order to bind him down has become unnecessary owing to the change in circumstances. [25]

4. Where the circumstances warrant the making of the order notwithstanding the expiry of the period specified by the preliminary order, a new date should be fixed by the final appellate or revisional order (as the case may be), from which the order to keep the peace or maintain good behaviour would be operative. [26]

5. Nature and amount of security.—

The security asked for in the final order should not be different in *nature* from that specified in the preliminary order. Thus, the Magistrate cannot make an order for a security in cash; [27] but the Court may, except in the case of a bond for good behaviour, permit such person to make a cash deposit *in lieu* of the bond [s. 445].

The amount of security required by the final order should not be in excess of that stated in the preliminary order under s. 111,[28] and even within that limit, it should not be excessive, having regard to the financial capacity of the person concerned, and the other circumstances of the case. [29]

Demanding excessive of bond, such as, Rs. 20,000 is bad. [30]

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16 *Baso Rai,* (1947) 48 Crlj 409 .

17 *Samad v. State,* AIR 1969 J & K 105 (para 18).

18 *Bipin* *v.* *State,* (1962) 2 Crlj 537 (Guj) .

19 *Jangi* *v.* *State,* AIR 1959 Pat 304 305 .

20 *Ram,* (1902) 26 Mad 471.

21 *Mihtya* *v.* *State* *of* *Rajasthan,* 1987 Crlj 1042 : 1987 RLW 49 : (1987) 1 RLR 145 .

22 *State* *v.* *Basantilal,* AIR 1955 NUC 3331 (MB) .

23 *Dhirendra* *v.* *Sarama,* (1983) Crlj 44 (Cal) DB ; *Dwarka v. State of Maharashtra,* (1977) Crlj 120 (Bom) ; *Nathan v. State of Bihar,* ILR (1976) Pat 338 .

24 *State* *v.* *Babulal,* AIR 1955 NUC 37 ; *Jangi v. State,* AIR 1959 Pat 304 [Contary view in *Babu Ram v. R.,* AIR 1949 All 21 [*LNIND 1948 ALL 11*], not good law].

25 *State* *v.* *Babulal,* AIR 1955 NUC 37 ; *Jangi v. State,* AIR 1959 Pat 304 [Contary view in *Babu Ram v. R.,* AIR 1949 All 21 [*LNIND 1948 ALL 11*], not good law].

26 *State* *v.* *Babulal,* AIR 1955 NUC 37 ; *Jangi v. State,* AIR 1959 Pat 304 [Contary view in *Babu Ram v. R.,* AIR 1949 All 21 [*LNIND 1948 ALL 11*], not good law].

27 *Emp.* *v.* *Kalachand,* (1879) 6 Cal 14 .

28 *Ram,* (1902) 26 Mad 471.

29 *Raza* *Ali,* (1900) 23 All 80 .

30 *Kailash Singh v. State of Bihar,* 1983 Crlj NOC 228Pat .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 118
Discharge of person informed against.

If, on an inquiry under Section 116, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

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1. Scope of s. 118.—

This section reproduces *old* s. 119. It provides for the discharge of the person against whom an order under s. 111 had been made, when inquiry made under s. 116 results in his favour.

2. 'Discharge'.—

This word is used in this section not in the sense of 'acquittal' or 'discharge' as they appear in s. 300 [*old* s. 403]. [31] In the present section it only means discharge from *custody* [32] or permission to depart. [33]

3. Dropping of proceedings before inquiry under s. 116.—

1. While s. 118 requires the Magistrate to 'discharge' the Opposite party where, *after the inquiry* under s. 116 is held, he finds that there is no sufficient evidence to proceed against such person for keeping the

peace or for maintaining good behaviour,—there is nothing to prevent the Magistrate from 'dropping' the proceedings at any stage prior the appearance of the party where the inquiry is to commence under s. 116[34] , to which stage s s. 117-118 have no application,—on any proper ground for not continuing the proceedings, *e.g.* , on the ground that another proceeding, under s. 107 is already pending against the same party. [35]

2. Such 'dropping of proceedings' should be distinguished from an order of 'discharge' which can be passed only under s. 118, on the basis of the inquiry made under s. 116(2), An order of 'discharge; cannot, therefore, be made at any stage earlier than that, *e.g.* , before directing the person to appear. [36]

3. The inherent power to drop the proceedings can be exercised even after an order under s. 111 has been passed, if the Magistrate is satisfied that there is no longer any apprehension of breach of the peace, [37] owing to circumstances such as the following—

(i) Lapse of long period of time, during which nothing untoward has happened. [38]

(ii) When the parties, after their appearance propose, in writing, that there was no danger of committing any breach of the peace and that they would settle their differences by recourse to the Civil Court. [39]

(iii) When the Opposite Parties, after their appearance, pray for dropping the proceedings on the undertaking that there was no likelihood of any breach of the peace being committed by them, and the Police, on whose report the case had been started, support them. [40]

(iv) The Court may take account of *subsequent* events. [41] Where the danger of breach of peace arose because of the happening of certain event, *e.g.,* a religious festival, and the tension subsides after the passing off of that event, the proceedings should be dropped. [42]

But where, notwithstanding the passing of that occasion, the tension between the parties and danger of breach of the peace still continues, the proceedings cannot be dropped. [43]

4. But once the Opposite Party has appeared, the Magistrate must proceed to inquire into the truth of the information, according to s. 116(1). [44] Subsequent to such appearance, therefore, the Magistrate cannot dropt he proceedings except on the finding, to be recorded, that there is no longer any apprehension of breach of the peace. [45]

5. The following are, therefore, *not* good grounds for dropping the proceedings;

(i) That the case was one which should be dealt with under s. 145, not s. 107. [46] In such a case, as there was an apprehension of breach of the peace, the Magistrate could not drop the proceedings under s. 107, but could convert it into one under s. 145. [47]

(ii) Default of the complainant. [48]

(iii) A mere assurance of the party proceeded against that he would maintain peace, without verifying it by some inquiry. [49]

(iv) Upon a reconsideration of the materials already on the record, without entering into the inquiry under s. 116. [50]

6. After the proceedings have been dropped by a Magistrate, his successor-in-office cannot revive those proceedings in the absence of fresh materials before him to show that there was in fact an apprehension of breach of the peace from the same persons. [51]

7. It is the jurisdiction and duty of the Magistrate to determine whether the proceedings should continue or be dropped under the foregoing circumstances, and the Police have no power to withdraw any proceedings, which have been initiated on Police report or other information. [52] Section 321 [*old* s. 494] provides only for withdrawal of a 'prosecution' and is not applicable to a proceeding under s. 107. [53]

8. Nevertheless, if a Police officer, in a *bona fide* but mistaken belief as to his power to withdraw, moves the Magistrate to drop the proceedings, he cannot be held guilty of contempt of Court. [54]

9. It seems that a private informant or complainant has no *locus standi* to oppose the report of the Police to urge the Magistrate to drop the proceedings though he can bring any irregularity in the order of the Magistrate to the notice of the Revisional Court, [55] with a view to getting the order set aside. (See under 'Revision', *post*).

4. Whether fresh proceeding lies after discharge.—

1. It is not *settled* that neither the provision in s. 300 [*old* s. 403], nor the principle of 'issue estoppel' applies to proceedings under Chap. VIII inasmuch as they do not constitute a prosecution or trial for an offence and do not end in conviction or acquittal [56] . For the same reason, Art. 20(2) would not be attracted. [57]
2. From the foregoing proposition the following conclusions would emerge—

(i) There is no bar to draw up fresh proceedings under s. 107,[58] founded on fresh incidents, [59] or a fresh report based on the previous facts [60] after the discharge of a previous proceeding against the same person or persons, under s. 118,[61] even though it would not be proper to vex a party repeatedly on the same facts.

(ii) The only issue for determination in a proceeding under this Chapter being whether there was any apprehension of breach of the peace or public tranquillity,—

(a) There is no bar to a prosecution for an offence arising out of the same incidents which were not considered sufficient in a proceeding under Chap. VIII, and resulted in a discharge under s. 118; [62] and even the evidence recorded in the proceeding under Chap. VIII relating to such incidents is admissible in such subsequent trial. [63]

(b) A subsequent prosecution is permissible on the same incidents also where an order demanding security under s. 107[64] or 110 [65] had previously been made on the same incidents, under s. 117 and even if he had been imprisoned for failure to furnish such security. [66] , [67]

(c) Conversely, dismissal of a complaint or even after the acquittal of a person in a prosecution for an offence, a security proceeding under this Chapter, *e.g.,* under s. 107 or 110 would lie on the same incidents. Even though they were held to be not proved or insufficient for sustaining a conviction, the same may be admissible and sufficient for binding such person for keeping the peace, [68] , [69] and may be corroborative of the evidence of witnesses at the security

proceeding as to the disposition of such person to use violence. [70] , [71] Of course, events subsequent to such acquittal would be material in the subsequent proceeding under s. 107 to determine whether his disposition is continuing. [72] , [73]

(d) Proceedings under s. 107 are maintainable simultaneously with a prosecution founded on the same incidents, because the scope of the two proceedings is different. [74] , [75]

(e) Even in a proceeding under s. 110, the evidence relating to an incident on which he had been acquitted, a previous trial cannot be excluded. Though the fact of acquittal may diminish the weight of evidence relating to such incident, it would not be inadmissible to prove the disposition and reputation of the person to commit such crime, *e.g.,* theft, even though the evidence has been insufficient to secure a conviction at a criminal trial. [76]

But where a Magistrate had discharged two of the alleged associates in a proceeding under s. 110 on the ground that the charge against them of being habitual thieves or the like had not been established by the evidence of 'general repute', a Revisional Court should not quash the order of discharge and direct the person to furnish security, without applying his judicial mind to the evidence on record as to 'general repute'. [77]

5. Revision.—

1. Revision lies against an order of discharge [78] made under s. 118, at the instance of the State, [79] on the following grounds, *inter alia,* —

   Where the Magistrate rejected the evidence of the witnesses against the person solely on the ground that they were police witnesses, because, in the circumstances of the case, no independent witness could be expected to witness the acts complained of. [80]

2. Even though the dropping of proceedings under this Chapter is a matter between the State and the person proceeded against, a private party or complainant may move in revision challenging the legality of the order withdrawing the proceedings [81] or where it was dropped without examining all the witnesses for the prosecution. [82]

   At any rate, even if the private complainant may have no *loucs standi* in revision, the High Court can interfere under s. 401(1) [*old* s. 439], on receipt of the relevant information from the complainant, under the expression 'otherwise comes to its knowledge'. [83]

3. But the High Court would *not* interfere with a finding of fact that there was nothing to proceed against the person, unless the Magistrate has exceeded his power. [84]

6. Whether proceeding under s. 110 could be drawn upon an information which might have led to a prosecution on a definite offence.—

Though there is some difference of judicial opinion on this point, the following conclusions may be drawn;

(a) There is no bar in s. 110, itself against a proceeding under s. 110 being drawn up against a person on the ground that a prosecution might lie [85] on the same allegation or has, in fact, been launched, because the object of the two proceedings is different.

(b) But where a prosecution has act ually been instituted, it would not be proper to pursue a proceeding under s. 110 simultaneously, because the evidence in such proceeding might prejudice the accused at the trial. [86]

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31 *Muthia* in re., (1911) 36 Mad 315.

32 *Muthia* in re., (1911) 36 Mad 315.

33 *Muthia* in re., (1911) 36 Mad 315.

34 Cf. *Santa v. Lakhanlal,* AIR 1968 Pat 326 ; *Iswar v. Sagamal,* (1965) 2 Crlj 840 .

35 *Rupdeo v. Natha Singh,* AIR 1970 Pat 134 .

36 *Rupdeo v. Natha Singh,* AIR 1970 Pat 134 .

37 *Asghar v. State,* AIR 1964 All 391 [*LNIND 1963 ALL 88*].

38 *Ramnarayan v. State of Bihar,* AIR 1972 SC 2225 2276 : (1972) 2 SCC 532 : 1972 Crlj 1444 .

39 *Asghar v. State,* AIR 1964 All 391 [*LNIND 1963 ALL 88*].

40 *Ittaman* *v.* *State,* AIR 1953 TC 24 .

41 *Ramnarayan* *v.* *State* *of* *Bihar,* AIR 1972 SC 2225 2276 : (1972) 2 SCC 532 : 1972 Crlj 1444 .

42 *Zulfikar* *v.* *Emp.,* AIR 1927 Pat 231 .

43 *Surya* *Kanta* *v.* *Emp.,* (1904) 31 Cal 350 .

44 *Santa* *v.* *Lakanlal,* AIR 1968 Pat 326 (para 4); *Harishankar v. Arjun,* (1971) 37 Cut LT 800 (801).

45 *Santa* *v.* *Lakanlal,* AIR 1968 Pat 326 (para 4); *Harishankar v. Arjun,* (1971) 37 Cut LT 800 (801).

46 *Chandra* *v.* *.7* *ogendra,* AIR 1965 Tri 20 .

47 *Chandra* *v.* *.7* *ogendra,* AIR 1965 Tri 20 .

48 *Kunju* *v.* *Sanku,* AIR 1954 TC 139 .

49 *Preetam* *v.* *State,* (1963) AWR 709 .

50 *Iswar* *v.* *Sagamal,* (1965) 2 Crlj 840 .

51 *Ajodhiya* *v.* *Sitaram,* AIR 1949 All 350 [*LNIND 1948 ALL 34*]

52 *Satyendra* *v.* *Supdt.,* AIR 1963 Cal 336 [*LNIND 1962 CAL 28*].

53 *Satyendra* *v.* *Supdt.,* AIR 1963 Cal 336 [*LNIND 1962 CAL 28*].

54 *Satyendra* *v.* *Supdt.,* [AIR 1963 Cal 336 *LNIND 1962 CAL 28*].

55 *Chatha* *v.* *State,* AIR 1953 TC 24 .

56 *State of A.P. v. Kokkilagada,* (1969) I SCC 160 (para 15).

57 *Thirunavukkarasu* *v.* *State,* [AIR 1959 Mad 339 *LNIND 1958 MAD 133*](paras 6-7)

58 *Kartick* *v.* *Panna* *Lal,* AIR 1956 Cal 140 (para 4a).

59 *Kartick* *v.* *Panna* *Lal,* AIR 1956 Cal 140 (para 4a).

60 *Muthia,* in re., (1913) 36 Mad 315.

61 *Muthia* , in re., (1913) 36 Mad 315.

62 *State of A.P. v. Kakkilagada,* (1969) I SCC 160 (para 15).

63 *State of A.P. v. Kakkilagada,* (1969) I SCC 160 (para 15).

64 *Thirunavukkarasu* *v.* *State,* [AIR 1959 Mad 339 *LNIND 1958 MAD 133*](paras 6-7)

65 *Kasem,* (1919) 47 Cal 154 .

66 *Thirunavukkarasu* *v.* *State,* [AIR 1959 Mad 339 *LNIND 1958 MAD 133*](paras 6-7); *Mathai v. State,* AIR 1952 TC 556 .

67 *Mathai* *v.* *State,* AIR 1952 TC 556 .

68 *Thirunavukkarasu* *v.* *State,* [AIR 1959 Mad 339 *LNIND 1958 MAD 133*](paras 6-7).

69 *Jagnarain* *v.* *Mukhiaram,* (1973) BLJR 72 ; *Rajkaran,* (1909) 32 All 55 . Contrary view in the following cases *not* tenable if neither *Art. 20(2) of the Constitution* nor s. 300 or the principle of *autrefois acquit* or 'issue estoppel' are attracted to a proceeding under Chap. VIII- *Konda,* 41 Mad 246; *Rajendra,* 17 CWN 238; *Alep,* (1906) 11 CWN 413 ; *Islamuddin,* (1939) 20 Lah 53; *Jai Singh,* (1930) 6 Luck 36 .

70 *Thirunavukkarasu* *v.* *State,* AIR 1959 Mad 339 [LNIND 1958 MAD 133](paras 6-7).

71 *Rajkaran,* (1909) 32 All 55 .

72 *Thirunavukkarasu* *v.* *State,* AIR 1959 Mad 339 [LNIND 1958 MAD 133](paras 6-7).

73 *Rajkaran,* (1909) 32 All 55 .

74 *Thirunavukkarasu* *v.* *State,* AIR 1959 Mad 339 [LNIND 1958 MAD 133](paras 6-7).

75 *Rajkaran,* (1909) 32 All 55 .

76 *Thirunavukkarasu* *v.* *State,* AIR 1959 Mad 339 [LNIND 1958 MAD 133](paras 6-7).

77 *Ohid* *v.* *R.,* AIR 1950 All 170 (para 7).

78 *State of Mysore* *v.* *Koti,* AIR 1965 Mys 265 ; *State v. Keshava,* AIR 1953 TC 231 .

79 *State of Mysore* *v.* *Koti,* AIR 1965 Mys 265 .

80 *State of Mysore* *v.* *Koti,* AIR 1965 Mys 265

81 *Santa* *v.* *Lakhanlal,* AIR 1968 Pat 326 ; *Tejaram v. Bhairon,* AIR1955 NUC 5030 (Raj).

82 *Tejaram v. Bhairon,* AIR1955 NUC 5030 (Raj).

83 *Chatha v. State,* AIR 1953 TC 24 .

84 *Emp. v. Gyan Singh,* AIR 1934 All 24 .

85 *Sundar,* AIR 1933 All 676 ; *Ram lal v. Emp.,* AIR 1942 Oudh 246 247 .

86 *Umbica,* (1877) 1 CLR 268 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 119
Commencement of period for which security is required.

(1) If any person, in respect of whom an order requiring security is made under Section 106 or Section 117, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

1. Scope of s. 119.—

This section corresponds to s. 120 of the *old* code. [87]

87 Cf. *Abdul Sattar,* AIR 1938 Oudh 195 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 120
Contents of bond.

The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

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1. Scope of s. 120.—

1. This section reproduces *old* s. 121 without any change.

2. The first part of the section merely says what is already clear from s s. 107-110 that the bond which is required by a final order under s. 117 may require the person bound either to keep the peace or to maintain good behaviour, according to the particular section (from s s. 106-110) under which the preliminary order under s. 111 had been passed.

3. The second part of the present section states the grounds which would constitute a breach of a bond so as to attract s. 446 [*old* s. 514], entailing its forfeiture, and s. 447 [*old* s. 514A], requiring execution of a fresh bond.

2. A. Ground for breach of bond for good behaviour.—

1. This section lays down that if the person who has executed a bond to be of good behviour under this Chapter commits, during the term of the bond, an offence *punishable with imprisonment* (*e.g.,* under s. 325, I.P.C. [88] or attempts to commit or abets the commission of such offence, it would constitute a breach of the bond,— *wherever* such commission, attempt or abetment takes place. [89]

2. The only condition for breach is that the offence should be punishable with imprisonment,—it need *not* [90] be the same offence or any offence analogous to the offence in respect of which the proceeding had been drawn up, under s s. 108-110. [91] It would also include a case where a person has been convicted of an offence punishable with imprisonment under a special Act, such as the Gambling Act . [92]

3. But the word used in the present section is ‘commission’,—not ‘conviction’ or ‘prosecution’. Hence, breach or forfeiture of the bond is not dependent on conviction or even prosecution for the offence punishable with imprisonment. [1] Such commission, abetment *etc.* may be proved by other evidence in the proceeding under the present section, [2] *e.g.* , by calling for evidence recorded against an absconder under s. 299 [*old* s. 512]. [3] Such evidence must be taken in the presence of the surety to show that forfeiture had been incurred, [4] and he should have an opportunity of cross-examining the witnesses whose evidence is relied upon while using the Rules under s. 446(1),*post* . [5]

4. On the other hand, so far as a bond for maintaining good behaviour is concerned, this section is exhaustive of the ground for breach or forfeiture, [6] so that such bond cannot be forfeited on any ground other than the commission, attempt or abetment of commission of an offence punishable with imprisonment. Hence, there cannot be any breach of a bond for maintaining good behaviour on the following ground—

   That the person bound has been found in suspicious circumstances without a means of livelihood. [7]

3. B. Ground for breach of bond for keeping the peace.—

1. The terms of bond for keeping the peace which a person is required to execute under s. 106 or s. 107 (see Form no. 12 of the 2 nd Sch., *post*) are—

   (i) that he will not commit a breach of the peace; or

   (ii) that he will not do any act *that may probably* occasion a breach of the peace.

2. Since s. 120 does not lay down the grounds for a breach of such bond, a breach and forfeiture of such bond can be caused only if the person bound is proved to have committed either of the above mentioned act s, *e.g.,* commission of an offence which may probably cause a breach of the peace, *subsequent* [8] to the execution of the bond. [9]

3. Hence, it has been held that there cannot be any forfeiture of a bond to keep the peace where the act committed by the person may not probably cause a breach of the peace though it may be *possible,* [10] *e.g.* —

   (i) Where he has subsequently been convicted of theft, wrongful confinement or extortion. [11]

   (ii) Where he has subsequently committed abduction. [12]

(iii) The mere filing of a suit in respect of the order demanding execution of the bond. [13]

4. On the other hand, the act ual commission of any offence or a conviction therefore is *not* necessary for forfeiture of a bond for keeping the peace. [14] Nor is it necessary that breach of the peace has actually taken place as a result of the act alleged; the test is the *probability* of a breach of the peace being caused by such act, *e.g.,* an offence under s. 392[15] or 396, [16] I.P.C.

5. But there cannot be forfeiture of a bond for keeping the peace executed by a person who on a trial for an offence involving breach of the peace, has been *acquitted* of the charge. [17] In such a case the sureties on such bond shall also not be liable. [18]

4. Consequences of breach of bond.—

1. The effect of an order of cancellation of the bond under s. 123(9) [*old* s. 125] is to release the person from his obligations under the bond, *i.e.* , to keep the peace or to maintain good behaviour (as the case may be).

2. While cancellation of the bond takes place by order of the Court, a 'breach of the bond' takes place by act of the person bound, by way of a violation of the terms of the bond.

3. The consequence of a breach of the bond is its forfeiture [19] under s. 446 [*old* s. 514], as a result of which the person bound by such bond shall be liable to pay the penalty specified in the bond; and initiate fresh proceedings under Chap. VIII, if necessary. [20] But for such breach, *e.g.,* by the commission of an offence during the term of a bond for keeping the peace under s. 107, the person bound cannot be sent to jail for the un-expired period of the bond. There is no provision in the Code for such order of imprisonment for breach or forfeiture of the bond. [21]

5. Conditions for forfeiture of bond.—

The conditions for forfeiture of a bond for keeping the peace or for good behaviour under the present Chapter are—

(i) There must have been a 'breach' of the terms of the bond in any of the ways stated earlier.

(ii) Before a person is asked to pay the penalty specified in the bond for forfeiture, the Court must (a) record the grounds of such forfeiture, as proved to his satisfaction, and (b) issue a notice upon the person liable to pay the penalty, to show cause why it should not be paid. After such notice, the party to be affected must have an opportunity to cross-examine the witnesses upon whose evidence the notice had been issued. [22] The proceedings for forfeiture and penalty under s. 446 [*old* s. 514] are liable to be quashed where no such notice or opportunity to cross-examine has been given. [23]

(iii) The onus is upon the State to prove the facts leading to the forfeiture, but sub-sec. (5), which had been originally inserted as sub-sec. (7) to *old* s. 514 by the *Amending Act* of 1923, changes the onus where the cause of forfeiture is conviction of an offence, the commission of which constitutes a breach of the bond. In such a case, a production of the judgment of conviction would be presumptive evidence even against the surety though he was not a party to the trial where the principal has been convicted.

88 *R.* *v.* *Sher* *Singh,* AIR 1914 Lah 563 (DB) .

89 *Emp.* *v.* *Deva* *Singh,* (1910) 11 Crlj 287 .

90 *Ghulam* , AIR 1936 Pesh 16 (1913) 14 Crlj 575 . [The contrary view suggested in *Udham Singh,* is not sound].

91 *R.* *v.* *Sher* *Singh,* AIR 1914 Lah 563 (DB) .

92 *Emp.* *v.* *Abdul,* (1902) 3 Crlj 91 .

1 *State* *v.* *Mathai,* (1957) Crlj 164 .

2 *Sheo* *Jangal,* AIR 1928 All 232 .

3 *Mansur,* (1922) 24 Crlj 588 (Pesh) .

4 *Harchandra,* (1897) 25 Cal 440 .

5 *Harchnadra,* (1897) 25 Cal 440 .

6 *Jalal,* (1909) 5 PR 1910 .

7 *Bahadur,* AIR 1932 All 58 .

8 *Ahmad* *v.* *Emp.,* AIR 1914 Lah 393 .

9 *Bal Govind v. State,* AIR 1955 NUC 3265 (Pat) .

10 *Ahmad,* (1914) 15 Crlj 605 .

11 *Haran,* (1872) 18 WR 63 .

12 *Ahmad,* (1914) 15 Crlj 605 .

13 *Sital,* (1919) 1 Lah 319.

14 *Ananthachari v. Ananthachari,* (1881) 2 Mad 169 (173).

15 *Svarajuhe,* in re., AIR 1919 Mad 770 .

16 *Sher Md. v. Emp.,* AIR 1941 Pesh 63 .

17 *Bhagwan v. State,* AIR 1967 All 580 [LNIND 1966 ALL 117](para 32) DB.

18 *Bhagwan v. State,* AIR 1967 All 580 [LNIND 1966 ALL 117](para 32) DB.

19 *Jagdeo,* (1926) 28 All 629 ; *Ratan v. State,* AIR 1955 NUC 516 .

20 *Jagdeo,* (1926) 28 All 629 ; *Ratan v. State,* AIR 1955 NUC 516 .

21 *Jagdeo,* (1926) 28 All 629 ; *Ratan v. State,* AIR 1955 NUC 516 .

22 *Ghulam Mehdi v. State of Rajasthan,* AIR 1960 SC 1185 : 1960 Crlj 1527.

23 *Ghulam Mehdi v. State of Rajasthan,* AIR 1960 SC 1185 : 1960 Crlj 1527.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 121
Power to reject sureties.

(1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond :

Provided **that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.**

(2) Such Magistrate shall, before holding the inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall, in making the inquiry, record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any), that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing :

Provided **that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.**

1. Scope of s. 121.—

This section reproduces verbatim *old* s. 122 as it stood after the amendment of 1923, which introduced the procedure to be followed by the Magistrate before refusing to accept or rejecting a surety, who is offered under this Chapter.

2. Grounds for refusal or rejection of surety.—

1. The section does not elaborate the grounds for the refusal to accept a surety or to subsequently reject him beyond that he is 'an unfit person for the purposes of the bond'. Hence, the elucidation of this expression is to be derived from judicial decisions which, naturally, are divergent on several points.
2. Since the function of accepting or rejecting a surety is to be exercised judicially, and in accordance with the procedure laid down, the grounds for acceptance or rejection must not be arbitrary, but consonant with 'the purposes of the bond'. The Court must, herefore, test the fitness of a surety, according to the circumstances of each case [24] from the following points of view—

(a) Whether the surety is in a position to influence [25] the person bound over, to keep the peace or maintain good behaviour, as the case may be. Though there are cases where it had been held that this is not [26] a valid consideration, the better view is in the affirmative. [27]

(b) Subject to the foregoing consideration, it must next be seen whether, in case of a failure of the surety to restrain the person bound, *i.e.* , in the case of forfeiture of the bond, the surety would be in a position to pay the sums due on the bond. [28]

A. From the foregoing principles, it has been held that the following *are* good grounds for refusing to accept or reject a surety :

(i) That he is not solvent, or, in particular, does not possess sufficient movable, [29] or immovable [30] property. [31]

(ii) That he is a person of bad character, [32] though a conviction on a single occasion may not suffice for rejection. [33] On the other hand, the respectability [34] and social status of the surety would be a relevant consideration for his acceptance.

B. The following have been held *not* to be good grounds for refusal or rejection of a surety, if there are other circumstances which make them suitable :

(a) That he is related to or a caste-fellow of the person to be bound, [35] except where the person is so notorious that a relation, such as a brother, would not be able to keep him under control. [36]

(b) That he was a witness for the person to be bound in another proceeding, [37] even though that proceeding too was a security proceeding [38] and which resulted in an order requiring security, notwithstanding the evidence of the witness. [39]

(c) That he was already a surety for another person. [40]

3. Even though the ability to control the person to be bound may be a relevant consideration, it would be beyond the jurisdiction of the Magistrate—

(i) to call upon the surety to state in writing what influence he has over the person; [41]

(ii) to attach a condition to the surety bond that he should be able to control the person. [42]

3. Procedure to be followed for refusing to accept or to reject a surety.—

1. Though the determination as to whether a surety who is offered under this Chapter is in the discretion of the Magistrate, [43] such discretion must be exercised—

(a) judicially, not arbitrarily, [44] and

(b) in accordance with the procedure laid down in this section. [45]

(i) He must make a inquiry before refusing to accept or rejecting a surety who has previously been accepted. No inquiry is required by the section where the Magistrate accepts a surety, on being satisfied from the materials before him that he is a fit person. [46]

The Magistrate cannot, therefore, refuse or reject a surety, without holding an inquiry—

(a) Merely on his personal knowledge; [47]

(b) Merely on private information [48] or report of the Police. [49]

(ii) Such inquiry must be held by the Magistrate himself or by a Magistrate subordinate to him [Prov. to sub-sec. (1)].

The function cannot be delegated to the Police. [50]

4. Appeal.—

Appeal lies from an order refusing to accept or rejecting a surety under s. 121 [s. 373(ii), *post*].

24 *Asirudddi,*
(1914) 41 Cal 764 (770).

25 *Zikri,*
(1911) 12 Crlj 472 ; *Emp v. Toni,* (1895) AWN 143.

26 *Adam* *v.* *Emp.,*
(1911) 35 Cal 400 ; *Joylal,*
AIR 1928 Pat 374 .

27 *Jalil,*
(1908) 13 CWN 80 ; *Rameshwar,*
AIR 1923 Oudh 165 ; *Narain v. Emp.,*
AIR 1946 All 333 337 FB.

28 *Adam* *v.* *Emp.,*
(1911) 35 Cal 400 ; *Joylal,*
AIR 1928 Pat 374 .

29 *Adam* *v.* *Emp.,*
(1911) 35 Cal 400 ; *Joylal,*
AIR 1928 Pat 374 .

30 *Emp.* *v.* *Jan* *Md.,*
(1910) 11 Crlj 417 ; *Nasuruddi,*
(1916) 17 Crlj 97 ; *Purna,*
(1916) 17 Crlj 91 .

31 *Emp.* *v.* *Jan* *Md.,*
(1910) 11 Crlj 417 ; *Nasuruddi,*
(1916) 17 Crlj 97 ; *Purna,*
(1916) 17 Crlj 91 .

32 *Emp.* *v.* *Din.* *Md.,*
(1910) 11 Crlj 198 .

33 *Budhu,*
(1920) 25 CWN 140 .

34 *Emp.* *v.* *Din.* *Md.,*
(1910) 11 Crlj 198 .

35 *Abdul,* (1906) 10 CWN 1027 ; *Mahala v. Emp.,* AIR 1914 Lah 492 .

36 *Asiruddi,* (1914) 41 Cal 764 .

37 *Shib* *Singh,* (1902) 25 All 131 .

38 *Shib* *Singh,* (1902) 25 All 131 .

39 *Bairagi* *v.* *Emp.,* (1914) 15 Crlj 727 .

40 *Ghisa* , AIR 1924 Oudh 132 2 .

41 *Kalu,* (1909) 27 Cal 91 .

42 *Jesa,* (1919) 44 Bom 385.

43 *Budhu,* (1920) 25 CWN 140 .

44 *Budhu,* (1920) 25 CWN 140 .

45 *Piru,* (1914) 15 Crlj 378 .

46 *Legal* *Remembrancer* *v.* *Azizar,* (1937) 41 CWN 415 (416).

47 *Piru,* (1914) 15 Crlj 378 .

48 *Ela* *Baksh,* (1909) 14 CWN 709 ; *Sheopal,* AIR 1922 Oudh 227 .

49 *Ramdhani,* (1935) 36 Crlj 1473 .

50 *Mahala* *v.* *Emp.,* AIR 1914 Lah 492 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 122
Imprisonment in default of security.

(1)

(a) If any person ordered to give security under section 106 or section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(b) If any person after having executed a [51] [bond, with or without sureties] for keeping the peace in pursuance of an order of a Magistrate under section 117, is proved, to the satisfaction of such Magistrate or his successor-in-office, to have committed breach of the bond, such Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard may pass such order on the case as it thinks fit:

Provided **that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.**

(4) If security has been required in the course of the same proceeding from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned, shall not exceed the period for which he was ordered to give security.

(5) A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (4) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.

(6) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

(7) Imprisonment for failure to give security for keeping the peace shall be simple.

(8) Imprisonment for failure to give security for good behaviour shall where the proceedings have been taken under section 108, be simple, and, where the proceedings have been taken under section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.

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1. Scope of s. 122.—

This section corresponds to *old* s. 123, with the following changes :

(i) Cl. (b) of sub-sec. (1) [52] adds a *new* ground for ordering imprisonment, namely, breach of the bond executed under s. 117,*ante.*

(ii) Under sub-sec. (2) and (4), the jurisdiction has been vested exclusively in the Sessions Judge.

(iii) Sub-sec (3) now expressly requires the Sessions Judge to give an opportunity of being heard to the person concerned before passing an order under sub-secs. (2)-(3).

2. Legislative changes .—

The *Code of Criminal Procedure* (Amendment) Act, 2005 has substituted the words "bond with or without sureties" for the words "bond without sureties" to remove the discrepancy between s. 107(1) and s. 122(b) of the Code. This has come into force with effect from 23.06.2006.

3. The object of s. 122.—

1. The object of sub-sec. (1)(a) is not to *punish* the person who has been ordered to furnish security, but to compel him to furnish the security. Hence, the section provides that the detention shall cease—

   (i) as soon as the period for which the security was required expires; or

   (ii) earlier, if and when he furnishes the security in compliance with the order under s. 117, [sub-sec. (1)(a)]. [53] The moment such security is furnished, he should be released. [54]

2. The object of sub-sec. (1)(b) [added by the *new* Code] is, however, to punish the person for breach of the terms of the bond, by arrest and imprisonment—which would be in addition to forfeiture under s. 446,*post* , or any other punishment for the breach under any other law in force.

4. Sub-sec. (2): Reference to the Court of Session.—

1. Though sub-sec. (2) does not explicitly refer to s. 106 or s. 110, it is evident that the scope of this sub-section is confined to cases under s. 110 because it is only s s. 106 and 110 which authorise demanding a security exceeding one year. The conditions for making a reference to the Court of Session, therefore, are—

   (i) The order made by the Magistrate act ually demands security for more than one year;

   (ii) Such order must have been made either under s. 106 or under s. 110;

   (iii) The person ordered defaults in giving security as demanded.

If these conditions are present, it would be *obligatory* for the Magistrate to refer the case to the Court of Sessions for the purpose of dealing with defaulter by awarding imprisonment, after the Magistrate makes an interim order of arrest and detention (pending orders of the Sessions Judge).

2. A reference under this section is necessary *not* for the purpose of *making* an order to give security for a period exceeding one year but only when the person fails to give the security. [55]

3. For the same reason, if the person ordered gives the security, no reference is necessary merely because the security exceeds one year. [56]

4. On the other hand, where the order requires security for a period exceeding one year, and the person defaults, the Magistrate shall have no power to order imprisonment for such default, without making reference to the Court of Session. [57] , [58] Of course, while making such reference, the Magistrate may detain the person for an interim period pending the orders of the Sessions Judge. But such interim detention pending reference to the Court of Session should be distinguished from imprisonment for

default of security; the Magistrate has no jurisdiction to make such order of imprisonment, in a case coming under sub-sec. (2), or to send the proceeding to the Court of Session for *confirmation* of such order of imprisonment made by himself.

5. Termination of the reference.—

The reference to the Sessions Judge may terminate in any of the following ways—

(i) By disposal by the Sessions Judge himself [sub-sec. (3)], or by an Additional or Assistant Sessions Judge, on transfer [sub-sec. (5)].

(ii) By the defaulter offering the security to the Magistrate or the Jailor [sub-sec. (6)]—which he can do even while the reference is pending before the Sessions Judge. [59] In such a case the Magistrate or the Jailor must report to the Court or the Magistrate (as the case may be).

6. Sub-secs. (7)-(8) : Kind of imprisonment that may be ordered in default of security.—

1. Sub-sections (7)-(8) provide whether the imprisonment that may be awarded for failure to give security should be simple or rigorous, according to the nature of the security that was ordered:

   I. *Security for keeping the peace.*— Where the bond was required for keeping the peace, under s. 106 or s. 107, the imprisonment in default cannot [60] be rigorous it must be simple [sub-sec. (7)].

   II. *Security for good behaviour under s.* 108.—Where the bond was required for good behaviour under s. 108, it must be simple [sub-sec. (8)]. Order for rigorous imprisonment in this case would, therefore, be illegal. [61]

   III. *Security for good behaviour, under s. 109 or s. 110.*— 1. Where the security was ordered under s. 109 or 110, it is left to the discretion of the Magistrate, to direct in each case, whether the imprisonment shall be simple or rigorous. [62]

2. Since it is a Judicial discretion, the Magistrate must weigh the circumstances of each case and record his reasons where he directs rigorous imprisonment. [63]

3. The ordinary rule is that it should be simple because the object of the section is preventive, *not* punitive, [64] and rigorous imprisonment may be ordered only in special circumstances, *e.g.* , previous conviction. [65]

7. Appeal.—

The Proviso to s. 373,*post,* bars appeal to the Court of Session in respect of proceedings laid before a Sessions Judge under s. 122(2), (4). The remedy in such cases lies under sub- sec. (9) of s. 123,*below.*

8. Constitutional remedy.—

A writ of *habeas corpus* would issue under Art. 32 or 226[66] to obtain release of a person who has been imprisoned without complying with the requirements of s s. 111-117. [67]

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51 Substituted for 'bond without sureties' by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 15 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

52 By a *Lok Sabha* amendment, Cl. (1) was numbered (1)(a), and Cl. (1)(b) was inserted.

53 *Ramji,* in re., AIR 1936 Nag 265 .

54 *Samad v. State,* AIR 1969 J&K 105 (para 18).

55 *State v. Wahid,* AIR 1957 Pat 563 .

56 *Ishri Pershad v. Emp.,* (1896) 23 Cal 621 (627).

57 *Mahala v. Emp.,* AIR 1914 Lah 492 .

58 *Emp. v. Ali,* AIR 1944 Kar 440 .

59 *Emp. v. Akbar,* (1928) 29 Crlj 236 .

60 *Uttam,* (1925) 26 Crlj 430 (All) .

61 *Emp. v. Sarupanand,* AIR 1941 Oudh 98 .

62 *Bhagwandin v. State,* AIR 1955 NUC 4874 (M.B).

63 *Gandharp,*
(1920) 42 All 563 .

64 *Gandharp,*
(1920) 42 All 563 .

65 *Rangi,*
AIR 1936 Nag 265 .

66 *Shravan* *v.* *Supdt.,*
AIR 1957 All 189 [
LNIND 1956 ALL 144]; *Balraj v. Union of India,*
AIR 1967 Delhi 31 [
LNIND 1966 DEL 119].

67 *Shravan* *v.* *Supdt.,*
AIR 1957 All 189 [
LNIND 1956 ALL 144]; *Balraj v. Union of India,*
AIR 1967 Delhi 31 [
LNIND 1966 DEL 119].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 123
Power to release persons imprisoned for failing to give security.

(1) Whenever [68] [the District Magistrate in the case of an order passed by an Executive Magistrate under Section 117, or the Chief Judicial Magistrate in any other case] is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the High Court or Court of Session, or, where the order was made by any other Court, [69] [the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117 or the Chief Judicial Magistrate in any other case,] may make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such persons accepts :

Provided **that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.**

(4) The State Government may prescribe the conditions upon which a conditional discharge may be made.

(5) If any condition upon which any person has been discharged is, in the opinion of [70] [the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief Judicial Magistrate in any other case] by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.

(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before [71] [the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief Judicial Magistrate in any other case.]

(7) Unless such person gives security in accordance with the terms of the original order for the unexpired portion of the terms for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), [72] [the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief Judicial Magistrate in any other case] may remand such person to prison to undergo such unexpired portion.

(8) A person remanded to prison under sub-section (7) shall, subject to the provisions of Section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

(9) The High Court or Court of Session may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by any order made by it, and [73] [the District Magistrate, in the case of an order passed by an Executive Magistrate under Section 117, or the Chief Judicial Magistrate in any other case] may make such cancellation where such bond was executed under his order or under the order of any Court in his district.

(10) Any surety for the peaceable conduct or good behaviour of another person ordered to executive a bond under this Chapter may at any time apply to the Court making such order to cancel the bond and on such application being made, the Court shall issue a summons or warrant, as it thinks fit, requiring the person for whom such surety is bound to appear or to be brought before it.

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1. Scope of s. 123.—

This section is an amalgam of several provisions of the *old* Code:

(i) Sub-secs. (1)-(6) correspond to sub-secs (1)-(6) of *old* s. 124, with changes consequent upon the separation of the Judiciary from the Executive.

(ii) Sub-sec. (7) corresponds to the second para. of *old* s. 124(6), with verbal changes.

(iii) Sub-sec. (8) corresponds to the third para of *old* s. 124.

(iv) Sub- sec. (9) corresponds to *old* s. 125, with drafting changes.

(v) Sub-sec. (10) combines the two sub-secs. of *old* s. 126, after vesting the power in the High Court or the Court of Session, instead of in the Magistrates, by necessary verbal changes.

2. Amendment by Act 45 of 1978.—

The amendments made in sub-secs. (1), (2), (6), (7), (9) remove an anomaly. Under s. 122(1), a person who has been ordered to give security under s s. 106, 117 fails to give security, he may be imprisoned. Section 123(1) empowered only the Chief Judicial Magistrate to release such person from imprisonment. But the power to demand security under s. 107(1) belongs to an Executive Magistrate and he is the Magistrate who can make an order under s s. 111, 117, in a case coming under s. 107. Hence, the amendment provides that where the order under s. 117 has been passed by an *Executive* Magistrate, the power to release, under s. 123(1), shall belong to the *District Magistrate.*

3. Sub-secs. (1) and (9).—

(a) While sub-sec. (1) relates to case of imprisonment for failure to give security, sub- sec. (9) relates to the cancellation of the bond itself, whether or not the person is undergoing any imprisonment. (b) The ground for exercise of the power under sub-sec. (1) is that the security is no longer *necessary* , sub- sec. (9) is not limited by any such consideration. [74] (c) Under sub- sec. (9), the Chief Judicial Magistrate cannot exercise the power where the bond was required by an order the High Court or a Sessions Court, but the language of sub-sec. (1) is not similarly circumscribed. (d) An order of discharge made by the Chief Judicial Magistrate under sub-sec. (1) can be cancelled by the Chief Judicial Magistrate, for breach of a condition imposed under sub-sec. (3), in which case, sub-secs. (5)-(8) may come into operation. Obviously, these provisions are not applicable to an order made under sub- sec. (9).

4. Sub - sec. (9) : Cancellation of bond.—

1. This sub-section corresponds to *old* s. 125, with changes consequent upon the separation of the Judiciary from the Executive. The *new* sub-section (as amended in 1978) has three parts: (i) Cancellation by the High Court or Court of Session; (iii) Cancellation by the Chief Judicial Magistrate; (iii) Cancellation by the District Magistrate.

   (i) The High Court or Court of Session has the power to cancel any bond executed under their orders, respectively.

   (ii) The Chief Judicial Magistrate has the jurisdiction to cancel a bond which had been executed under his order or under the order of any *Judicial* Magistrate within his district.

   (iii) The District Magistrate may cancel a bond which had been executed by his order or by the order of an Executive Magistrate under s. 117.

5. What are sufficient reasons for cancellation.—

1. This sub- sec. (9) does not enumerate the circumstances in which the power of cancelling a bond after it has been executed can be exercised by the superior Courts specified, but leaves it to the discretion of the superior Courts by using the words ‘for sufficient reasons’, which are wide enough to include all relevant circumstances.
2. There are two possible categories of circumstances upon which such cancellation could be made—

(a) Circumstances *anterior* to execution, that is to say the Magistrate's order demanding execution of the bond was not legal or proper, *e.g.* , there was no ground for the view that a breach of the peace or any of the relevant offences was likely, so that the bond should not have been required, or that the order was void *ab initio* :

(b) Circumstances *subsequent* to the execution of the bond, which render the continuance of the bond unnecessary, *e.g.* , the apprehension of breach of the peace has since ceased.

There has been judicial controversy as to whether the power of cancellation conferred by the present provision can be exercised on the ground that the order was void *ab initio* :

A. In a group of cases it has been held that this power is available only on the ground of *subsequent* change in the circumstances, and could not be used as an appellate power to cancel a bond on the ground that the order demanding the bond was illegal or void *ab initio* . *ab initio.* [75]

B. In a larger group of cases, it has been held that the power being not circumscribed by any word of limitation, it can be used not only on the ground of subsequent changes but also on the ground that the bond should not have been demanded and taken. [76]

This latter and wider view seems to be preferable inasmuch as—

The language in s. 123(9) is not restricted in any manner.

6. Constitutional remedy.—

A writ of *habeas corpus* under Art. 226[77] or 32 may be available to obtain the release of a person imprisoned for failure to give security demanded under this Chapter, where the proceedings are illegal or not in strict compliance with the requirements of the relevant section, *e.g.* - where an interim order for security has been passed without complying with the requirements of s s. 111-116(1)[78] or where a person has been imprisoned or detained under s. 107 without complying with the requirements of s s. 111-116(3). [79]

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68 Substituted by Act No. 45 of 1978, S. 12(i), (w.e.f. 18-12-1978) for "the Chief Judicial Magistrate".

69 Substituted by Act No. 45 of 1978, S. 12(ii), (w.e.f. 18-12-1978) for "the Chief Judicial Magistrate".

70 Substituted by Act No. 45 of 1978, S. 12(ii), (w.e.f. 18-12-1978) for "the Chief Judicial Magistrate".

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73 Substituted by Act No. 45 of 1978, S. 12(ii), (w.e.f. 18-12-1978) for "the Chief Judicial Magistrate".

74 *Nabu Sardar,* (1906) 34 Cal 1 3FB.

75 *Nizamuddin* v *Ziaul,* (1922) 44 All 644 ; *Balwant,* (1923) 24 Crlj 204 (Oudh) ; *Durga v. Amar,* (1921) 23 Crlj 281 (Pat) .

76 N *abu v. Emp.,* (1906) 34 Cal 1 (FB) ; *Mare Gowd,* (1913) 37 Mad 125(FB) ; *Emp* . v . *Dalli,* (1915) 16 Crlj 515 (Nag) .

77 *Balraj v. Union of India,* AIR 1967 Delhi 31 [*LNIND 1966 DEL 119*].

78 *Balraj v. Union of India,* AIR 1967 Delhi 31 [*LNIND 1966 DEL 119*].

79 *Shravan v. Supdt.,* AIR 1957 All 189 193 [*LNIND 1956 ALL 144*].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER VIII
SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

S. 124
Security for unexpired period of bond.

(1) When a person for whose appearance a summons or warrant has been issued under the proviso to sub-section (3) of Section 121 or under sub-section (10) of Section 123, appears or is brought before the Magistrate or Court, the Magistrate or Court shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security.

(2) Every such order shall, for the purposes of Sections 120 to 123 (both inclusive), be deemed to be an order made under Section 106 or Section 117, as the case may be.

1. Scope of s. 124.—

This section corresponds to s. 126A of the *old* Code, split up into two sub-sections, and changes in sub-sec. (1) consequent upon those in s. 123,*ante.* When a Magistrate rejects a surety found to be an unfit person [s. 121(3)], or discharges him on his own application [s. 123(10)], he shall cancel the bond and make a fresh order under s. 106 or 117 (as the case may be), against the principal, and thereafter the provisions in s s. 120-123 shall apply.

2. Appeal.—

Appeal would lie against the fresh order calling for security when it is under s. 117 [s. 373(i)], but not when it is under s. 106.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IX
ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

S. 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

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

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

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate[1] [* * *], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct :

Provided **that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.**

[2]

Provided further **that the Magistrate may, during the**

pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct :

Provided also **that an application of the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of the notice of application to such person.]**

Explanation. **— For the purposes of this Chapter,—**

(a) "minor" means a person who, under the provisions of the Indian *Majority Act, 1875* (9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[3][(2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's[4] [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided **that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:**

Provided further **that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.**

Explanation. **—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.**

(4) No wife shall be entitled to receive an [4] [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] from her husband under this section if she is living in adultery, or if, without any

sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

STATE AMENDMENTS

Madhya Pradesh.—

(1) In its application to the State of Madhya Pradesh, in Section 125, sub-section (1), for the words "five hundred rupees" substitute "three thousand rupees".—Madhya Pradesh Act 10 of 1998, Section 3 (w.e.f. 29-5-1998). [Note.—This State amendment was made prior to the enactment of *Code of Criminal Procedure* (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees in the whole" have been omitted (*See* Section 2, Cr.P. Code (Amendment) Act, 2001 (w.e.f. 24-9-2001)—*Ed.*]

(2) In its application to the State of Madhya Pradesh, the following amendments were made in Section 125 by Madhya Pradesh Act 15 of 2004, S. 3 assented on 26-11-2004 by the President and Published in the M.P. Gazette (extr.) dated 6-12-2004.

(i) for the marginal heading, the following marginal heading shall be substituted, namely:— "Order for maintenance of wifes, children, parents and grand parents."

(ii) In sub-section (1),—

(a) After clause (d), the following clause shall be inserted, namely:— "

(e) his grand father, grand mother unable to maintain himself or herself.";

(b) In the existing para, for the words "a magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding three thousand rupees in the whole, as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct", the words "a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father, mother, grand father, grand mother at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct" shall be substituted;

(c) After the existing first proviso, the following proviso shall be inserted, namely:—

"*Provided further* that the relatives in clause (e) shall only be entitled to monthly allowance for maintenance if their sons or daughters are not alive and they are unable to maintain themselves."

Maharashtra.—In its application to the State of Maharashtra, *Section 125 of the Code of Criminal Procedure, 1973* , has been

amended as under :

(a) in sub-section (1),—

(i) for the words “not exceeding five hundred rupees” the words “not exceeding fifteen hundred rupees” shall be substituted;

(ii) before the existing proviso, the following proviso shall be inserted, namely:—

“*Provided* that, the Magistrate on an application or submission being made, supported by an affidavit by the person who has applied for the maintenance under this sub-section, for payment of *interim* maintenance, on being satisfied that, there is a *prima facie* ground for making such order, may direct the person against whom the application for maintenance has been made, to pay a reasonable amount by way of *interim* maintenance to the applicant, pending the final disposal of the maintenance application:

Provided further that, such order for payment of *interim* maintenance may, in an appropriate case, also be made by the Magistrate *ex-parte,* pending service of notice of the application, subject, however, to the condition that such an order shall be liable to be modified or even cancelled after the respondent is heard in the matter:

Provided also that, subject to the ceiling laid down under this sub-section, the amount of *interim* maintenance shall, as far as practicable, be not less than thirty per cent of the monthly income of the respondent”;

(iii) in the existing proviso, for the words “Provided that” the words “Provided also that” shall be substituted;

(b) after sub-section (2), the following sub-section shall be inserted, namely:—

“(2-A) Notwithstanding anything otherwise contained in sub-sections (1) and (2), where an application is made by the wife under Clause (*a*) of sub-section (1) for the maintenance allowance, the applicant may also seek relief that the order may be made for the payment of maintenance allowance in lump sum *in lieu* of the payment of monthly maintenance allowance, and the Magistrate may, after taking into consideration all the circumstances obtaining in the case including the factors like the age, physical condition, economic conditions and other liabilities and commitments of both the parties, pass an order that the respondent shall pay the maintenance allowance in lump sum *in lieu* of the monthly maintenance allowance, covering a specified period, not exceeding five years at a time, or for such period which may exceed five years, as may be mutually agreed to, by the parties.”

(c) in sub-section (3),—

(i) after the words “so ordered” the words, brackets, figures and letters “either under sub-section (1) or sub-section (2-A), as the case may be”, shall be inserted;

(ii) after the words “each month’s allowance” the words “or, as the case may be, the lump sum allowance to be paid *in lieu* of the monthly allowance” shall be inserted, [*vide* Maharashtra Act XXI of 1999, S. 2 (w.e.f. 20-4-1999)]. [These state amendments were made prior to the enactment &

Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001), Section 2 (w.e.f. 24-9-2001).

Rajasthan.—In its application to the State of Rajasthan, in Section 125, sub-section (1), for the words "five hundred" occurring after the words "at such monthly rate not exceeding" and before the words "rupees in the whole", substitute "two thousand five hundred".—Rajasthan Act 3 of 2001, Section 2.

Tripura.—In its application to the State of Tripura, in Section 125, sub-section (1), for the words "five hundred rupees", substitute "one thousand five hundred rupees".—Tripura Act 9 of 1999, Section 2 (w.e.f. 9-4-1999). [This State amendment was made prior to the enactment of *Code of Criminal Procedure* (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees in the whole" have been omitted (*See Section 2, Cr.P.C.* (Amendment) Act, 2001 (w.e.f. 24-9-2001)—*Ed.*]

Uttar Pradesh.—In its application to the State of Uttar Pradesh, in Section 125,—

(a) in sub-section (1), for the words "five hundred rupees", substitute "five thousand rupees";

(b) after sub-section (5), insert the following sub-section, namely:—

"(6) Where in a proceeding under this section its appears to the Magistrate that the person claiming maintenance is in need of immediate relief for his support and the necessary expenses of the proceeding, the Magistrate may, on his application, order the person against whom the maintenance is claimed, to pay to the person claiming the maintenance, during the pendency of the proceeding such monthly allowance [5] [* * *] and such expenses of the proceeding as the Magistrate consider reasonable and such order shall be enforceable as an order of maintenance."—Uttar Pradesh Act 36 of 2000, Section 2 (w.e.f. 13-8-2001).

West Bengal.—In its application to the State of West Bengal, sub-section (1) of Section 125 of the principal Act,—

(1) for the words "five hundred rupees", the words[6] [* * *] shall be substituted;

(2) after the existing proviso the following proviso shall be inserted :

"*Provided further* that where in any proceeding under this section it appears to the Magistrate that the wife referred to in Clause (*a*) or the minor child referred to in Clause (*b*) or the child (not being a married daughter) referred to in Clause (*c*) or the father or the mother referred to in Clause (*d*) is in need of immediate relief for her or its or his support and the necessary expenses of the proceedings, the Magistrate may, on the application of the wife or the minor child or the child (not being a married daughter) or the father or the mother, as the case may be, order the person against whom the allowance for maintenance is claimed, to pay to the petitioner, pending the conclusion of the proceeding, and monthly during the proceeding such allowance as, having regard to the income of such person, it may seem to the Magistrate to be reasonable."—West Bengal Act 25 of 1992, Section 4 (w.e.f. 2-8-1993). [This State amendment was made prior to the enactment of *Code of Criminal Procedure* (Amendment) Act, 2001 (Central Act 50 of 2001) by which the words "not exceeding five hundred rupees in the whole" have been omitted (*See Section 2, Crpc* (Amendment) Act, 2001 (w.e.f. 24-9-2001)—*Ed.*]

1. Scope of s. 125 .—Maintenance of wives, children and parents.—— Updated On 04-04-2019

This section corresponds to *old* s. 488(1) - (5), which has been transposed towards the beginning of the Code, with the following changes:

(i) While under the *old* Code, a District Magistrate and Sub-Divisional Magistrate also had concurrent jurisdiction with a Magistrate of the First class, under the *new* Code, the power to make an order under this section has been vested exclusively in a Magistrate of the First class, because the function is of a judicial character.[7]

(ii) In sub-sec. (1)—

(a) The cases of minor and major children have been separated, in Cls. (b), (c); and in Cl. (b), the words 'whether married or not' have been added, in the case of 'minor child', which expression has been explained in *Explanation* (*a*).[8] A major child, other than a married daughter, would be entitled to maintenance in case of inability to maintain itself only[9] if that is due to physical or mental abnormality or injury.[10]

(b) It is made clear, under Cl. (b), that a married daughter, if she or her husband is unable to maintain herself, would be entitled to maintenance from the father,[11] so long as she does not attain majority.[12] The Proviso is *new*.[13]

(c) In Cl. (a), a wife would be entitled to maintenance only if she is 'unable to maintain herself'.[14]

(d) *Expl.* (b) has been added[15] to include a divorced wife, so long as she does not remarry.

(e) A parent, who had no right to maintenance under the *old* section or according to the Commission's Report,[16] has been given such right, when unable to maintain himself, or herself, while the son has sufficient means.[17]

(iii) Sub-secs. (6)-(8) of s. 488 have been taken over to s. 126.

2. Legislative changes.—— Updated On 04-04-2019

The *Code of Criminal Procedure* (Amendment) Act, 2001 (Act 50 of 2001) has made some significant changes in s. 125 by specifically providing for interim order pending final hearing of the application and for expenses of the proceedings which the Magistrate can award in pending proceedings under *s. 125 Cr.P.C.* Another significant amendment is the deletion of the limit of maintenance which a Magistrate can award under *s. 125 Cr.P.C.*

The Statement of objects and Reasons of this Amendment is reproduced below:

"(1) It has been observed that an applicant under *s. 125 of the Code of Criminal Procedure, 1973* , has to wait several years for getting relief from the Court. It is, therefore, felt that the express provisions should be made in the said Code for interim maintenance allowance to the aggrieved person under s. 125 of the Code. Accordingly, it is proposed that during the pendency of the proceedings, the Magistrate may order payment of interim maintenance allowance and such expenses of the proceedings as the Magistrate considers reasonable for the aggrieved person. It is also proposed that order be made ordinarily within sixty days of the date of service of notice.

(2) The ceiling of rupees five hundred per month for the maintenance allowance was made in the year 1958 in s. 488 of the Code of Criminal Procedure , 1898. A ceiling of rupees five hundred was prescribed in *s. 125 of the Code of Criminal Procedure, 1973* on the lines of s. 488 of the Code of Criminal Procedure , 1898 which has since been repealed. In view of cost living index centrally rising retention of a maximum ceiling is not justified. If a ceiling is prescribed and retained, it would require periodic revision taking into account the inflation and the rise of cost of living as well as amendment of the provisions of the Act from time to time. This would necessarily be time consuming. Accordingly, it is proposed to amend s. 125 and make consequential changes in *s. 125 of the Code of Criminal Procedure* to remove the ceiling of maintenance allowance."

In a Special Leave Petition, the Supreme Court held that in view of the amendment of s.125 by the Parliament deleting the ceiling of maintenance allowance, the State Amendments are no longer valid, being inconsistent with the Amendment to s. 125 by Parliament in 2001. When the above SLP was taken up as Criminal Appeal, it was further ordered that all the State Amendments to s.125 by which a ceiling has been fixed to the amount of maintenance has become invalid and therefore where the Magistrate granted maintenance at Rs 4,000 per month, the same was proper.[18]

3. West Bengal Amendment.—— Updated On 04-04-2019

By virtue of the *Code of Criminal Procedure* West Bengal (Amendment) Act, 1992, for the words 'five hundred rupees' in sub-section (1) of s. 125, the words 'one thousand five hundred' has been substituted.

However, now that the Central Amendment of 2001 has deleted the ceiling limit, the West Bengal Amendment has been superseded. In West Bengal also, the Magistrate may award maintenance exceeding the limit of one thousand five hundred.

4. Ss.125-127.—— Updated On 04-04-2019

Chapter IX, containing, ss. 125-127 constitutes a self-contained code[19] as to proceedings for maintenance under the *Cr.P.C. s. 125* is the substantive provision. Sub-section (3) of that section

deals with enforcement of the order passed under sub-sec. (1).

Section 125 deals with the place where the order may be enforced.

Section 126 deals with the procedure to be followed in regard to proceedings under s. 125.

Section 127 deals with alteration of an order made under s. 125.

5. Object of s. 125 .—— Updated On 04-04-2019

1. The object of the present section is to provide a summary[20] remedy to save dependants from destitution and vagrancy,[21] and thus to serve a social purpose,[22] apart from and independent of the obligations of the parties under their personal law.[23] In other words, it applies to all parents, wives and children, irrespective of their religion or that of the Opposite Party.[24]

2. The right under the present section is a statutory and self-contained[25] right, which *cannot be defeated* by anything in the personal law of the parties.[26] But the question whether the applicant is the lawfully wed wife of the Respondent is to be determined according to their personal law.[27]

3. While the right to maintenance under the personal law as well as other matrimonial rights and obligations of the parties can be enforced only in the Civil Court in a properly framed suit,[28],[29] the statutory right conferred by the present section may be enforced by a summary proceeding before a Magistrate, irrespective of the personal rights as well as the connubial rights and obligations between the parties, provided the statutory conditions imposed by the present section are satisfied.

4. The object of this provision is to prevent vagrancy and destitution,[30] by means of a summary remedy before a Magistrate,[31] whose jurisdiction is preventive, rather than remedial or punitive.[32]

5. However the provision is not to be utilised for defeating the rights conferred by the legislature on destitute, children or parents who are victims of social injustice.[33]

6. But this statutory right does not cover the same ground as the *civil* liability of a person to maintain his dependants, under the personal law,[34] the broad provisions of which are :

   I. Under the *Hindu Adoptions and Maintenance Act, 1956* [s. 20(2)], a child can claim maintenance only so long as it remains a minor.

      Under the Muslim law, too, a father is not obliged to maintain a son beyond his puberty or a daughter after her marriage, unless disabled by infirmity or disease.[35]

   II. under s. 18(1) the *Hindu Adoptions and Maintenance Act, 1956* , a Hindu wife is entitled to maintenance from her husband during her life-time, but its scope is different from that of

s. 125 of the Cr.P.C. , and both can stand together.[36]

Any order of maintenance under *s. 125 Crpc* cannot foreclose the remedy of s. 18(2) of Hindu Adoption and Maintenance Act, 1956 and *vice versa*.

Under the Muslim Law, the wife becomes entitled to maintenance since her puberty.[37]

III. Under *s. 20(1) of the Hindu Adoptions and Maintenance Act, 1956* an aged or infirm parent, if unable to maintain himself or herself, is entitled to maintenance.

Muslim law also imposes an obligation to maintain needy parents, subject to certain exceptions.[38]

IV. Maintenance during *idaat* of a divorced wife, according to Muslim Personal Law (*Shariat*).[39]

6. Since the right conferred by the present section of the Code is independent of the right, if any, under the personal law, there is no bar against the Petitioner to pursue *both* the rights,[40] in competent forums, so long as he or she does not get effective remedy. The remedy in moving an application under *s. 125 of Crpc* for enhancement of the maintenance amount which the wife is already getting, does not prevent her from filing an application under *s. 24 of the Hindu Marriage Act, 1955* . The two provisions are separate and independent and their scope is different and the relief given under one provision cannot deprive a person from getting the same or similar relief under the other provision if he is otherwise entitled to it. Under *s. 125 Crpc* only wife and child are entitled to maintenance, but under *s. 24 of the Hindu Marriage Act, 1955* counsel's fees and litigation expenses can also be obtained.[41] Grant of maintenance pendente lite under *s. 24 of the Hindu Marriage Act, 1955* is not improper even if there is an order of maintenance in favour of the wife under *s. 125, Cr. P.C.* However, if the wife is given maintenance pendente lite, order under s. 125, of the Code may be kept in abeyance to survive it on ceasing of operation of the former order.[42]

Therefore, there is no inconsistency between the provisions of the present section and those of the *Hindu Adoptions and Maintenance Act*[43] or *s. 24 of the Hindu Marriage Act, 1955*,[44] because the present section is applicable to *all* persons, irrespective of their personal laws,[45] and the scope of the two laws is different.[46]

Similarly, in case of dismissal of husband's petition under any of the provisions of *s. 9* to *14* of the *Hindu Marriage Act*, no alimony can be granted under s. 25 of that Act to the wife, but maintenance can be claimed by her under *s. 125 Cr.P.C.*[47]

7. For the same reason, refusal of an application under s. 125 of the Code will not bar a civil suit for maintenance; nor even the existence of a civil decree bar an application under s. 125, though, of course, anything paid under the decree shall have to be taken account of by the Magistrate under the present section.[48] Any decision as to the status of the parties in the proceeding under s. 125 will not be decisive in a civil proceeding[49] between the parties, where they may legitimately agitate for their rights.

8. Again, where the conditions of s. 125 (1) of the Code are not established, a wife cannot maintain an application under s. 125 on the ground that she would be entitled to maintenance in terms of the Hindu Women's Right to Separate Residence and Maintenance Act, 1946, or the Hindu Adoptions & Maintenance Act, 1956.[50]

9. Being a measure of social justice to protect destitute persons, s. 125 should be liberally construed in favour of the applicant, where two interpretations of the text is possible.[51] Thus—

   The right of a divorcee wife to maintenance, newly conferred by the Code of 1973 will not be taken as barred by a pre-1974 consent decree dissolving the marriage or the payment of *mehar* money, the quantum of which is unreasonable having regard to the sum which would be due to the applicant under the statutory right of maintenance.[52]

10. Although Muslim Personal Law in India permits bigamy by a Muslim husband, yet the Muslim wife may claim maintenance against her husband under s. 125 for husband's contracting second marriage and by refusing to live with the husband.[53]

6. Sub-sec. (1) : Conditions for its application.—— Updated On 04-04-2019

In order to claim maintenance under s. 125(1),[54] all of the following conditions must be satisfied :

(a) An application is to be presented to a Magistrate of the First Class, who alone has the power to make an order under s. 125.[55]

(b) The applicant must be a person coming under any of the categories in Cls. (a)-(d) of sub-sec. (1).

(c) The applicant must be unable to maintain itself, herself or himself (as the case may be).

(d) The Opposite Party has sufficient means to maintain the applicant.

(e) The Opposite Party has refused or neglected to maintain the applicant.

7. Pleas in defence.—— Updated On 04-04-2019

A. An application under s. 125 may be defeated by the Opposite Party if he succeeds in showing that any of the foregoing conditions for such application have not been satisfied.

B. Besides, he can take pleas in defence which are special, in the case of particular categories of applicants, according to relationship, Thus—

(a) In the case of the wife applicant, her claim may be defeated by the husband proving that—

(i) she is not the 'wife' of the Opposite Party; or

(ii) she is living in adultery; or

(iii) she refuses to live with her husband without sufficient reason; or

(iv) they are living separately by mutual consent [sub-sec. (4), *post*].

(b) Where the applicant is a child, the Opposite Party may defeat the application by showing that—

(i) the applicant is a major, married daughter;

(ii) the applicant is a major son who is not unable to maintain himself owing to some physical or mental abnormality or injury;

(iii) the applicant is a minor married daughter whose husband is possessed to sufficient means to maintain her [Proviso to sub-sec. (1), *post*].

8. No limitation.—— Updated On 04-04-2019

1. The Code does not prescribe any period of limitation for making an application for maintenance under s. 125(1) ; hence, it cannot be rejected on the mere ground of delay in filing it.[56]

2. It is to be noted that the new provision for limitation in *new* s. 468, *post,* does not apply to an application under s. 125(1), because it does not relate to 'cognizance of an offence'.

3. But a limitation has been prescribed in the *new* Proviso 1 to s. 125(3), *post* for the issue of a warrant to recover the amount of maintenance due on an *order* made under s. 125(1).

9. 'Any person'.—— Updated On 04-04-2019

Where there are persons more than one who are liable for maintenance under sub-sec. (1), the applicant proceed against any one of them without bringing on record the others, because their liability is individual and independent.[57]

10. 'Having sufficient means'.—— Updated On 04-04-2019

1. A person cannot be held liable for refusal or neglect to maintain his dependants unless he had the means to maintain them.

2. The expression 'means' does not signify only visible means such as, real property or definite employment. If a man is healthy and able bodied, he must be held to be possessed of sufficient means no matter whether he is a professional beggar, or a minor or a monk.[58]

3. Once the person has capacity to earn, he cannot refuse or neglect to maintain his wife, child or parent.[59]

4. Insolvency of a person cannot be the ground to hold that he has no sufficient means.[60] An order of adjudication[61] or protection order[62] by itself does not absolve the husband to maintain the wife. Where some property is left out by the insolvency cause that may be gone into if he has sufficient means to meet his obligation under *s. 125 Cr.P.C.*

5. His indebtedness is also no ground.[63]

6. Even though the husband was blind his entering into marriage by itself is an indication that he has undertaken to maintain his wife. It is his first responsibility to maintain his wife and it has nothing to do with his capacity, physical disability and even though it is proved that the husband has no apparent source or means, he can be made liable to pay maintenance to his wife who is unable to maintain herself and whom the husband has refused and neglected to maintain.[64]

7. Moreover, collateral circumstances are also admissible to prove means i.e. when the husband has married a second time after turning his first wife away from the matrimonial home.[65]

8. When there was no dispute that the appellant had requisite income, the order of maintenance passed by the Trial Court, affirmed by revisional Court and the Court has not been disturbed by the Supreme Court even if the wife was earning some income which was not sufficient to maintain her.[66]

9. However, when the husband is old man and not able bodied and has no source of income, the wife would not be allowed maintenance from the husband.[67]

11. 'Refuses or neglects to maintain.—— Updated On 04-04-2019

1. The foundation[68] of an order under this section is that the opposite party has neglected or refused to maintain his wife, child,[69] or parent. 'Refuse' means a failure to maintain or a denial of the obligation to maintain after demand. 'Neglect', on the other hand, means a default or omission to maintain, in the

absence of a demand.[70] Failure to maintain properly may amount to negligence.[71] Thus, payment of occasional sums or presents cannot be pleaded as a complete defence to a child's or wife's claim to be adequately and regularly maintained according to the means and status of the father or husband.[72]

2. In the absence of evidence as to the neglect or refusal to maintain, an order under s. 125 cannot be sustained.[73] Neglect or refusal may, however, be implied from the conduct of the opposite party,[74] and need not be a formal refusal.[75]

3. Mere failure or omission to maintain may amount to neglect to maintain, *e.g.*, in the case of a child, who has no volition or will of his own.[76]

12. What constitutes refusal or neglect to maintain a wife.—— Updated On 04-04-2019

1. As has been just stated such refusal or neglect on the part of the husband may be proved not only by his express words but also by this conduct.

2. When the husband offers wife to maintain if she lives with him, then it requires to be ascertained by the Magistrate as to whether the said offer is genuine or not . But the plea of the wife that according to practice and usage in the locality husbands come to live with her is not acceptable.[77]

3. However, when the husband did not drop in for years to see his wife and on being confronted with the claim of maintenance sent a registered letter to the wife to join him it is not a genuine offer but a pretext, to defeat the claim of maintenance by the wife.[78]

4. If the husband gives a conditional offer to maintain his wife if she comes to live with him, the Magistrate can still grant maintenance to wife, if the wife had sufficient ground to live separately from her husband.[79]

5. In order to prove that the husband refused and neglected to maintain her, she is not required to prove elaborate evidence. It is sufficient to establish the circumstances from which *prima facie* case of her husband refusing and neglecting to maintain her can be established.[80]

6. The fact that the husband is living with another woman is a sufficient ground for the wife to live separately from her husband and to claim maintenance as it is presumed that the husband has refused or neglected to maintain her.[81]

7. When the husband is making it difficult for the wife to live with him, then he is refusing and neglecting to maintain her when she is forced to live elsewhere.[82]

8. When the husband has driven out the wife from the matrimonial home and is living with another wife, it is sufficient proof of the husband refusing and neglected to maintain his wife.[83]

9. When the allegations of cruel treatment to the wife had not been denied by the husband, the wife had sufficient justification to live separately from her husband and claim maintenance because it is presumed that the husband has refused and neglected to maintain the wife.[84]

10. In an opposition to the petition of the maintenance the husband alleged that there was mutual divorce and that after divorce the wife was leading an adulterous life with another person but the same has not been proved, it is clear case of the husband refusing and neglecting to maintain her as she had sufficient justification to live separately form her husband.[85]

10. Even a Muslim husband who can marry second time but he fails to take sufficient care to see that both the wives lived together peacefully but acquiesced the first wife to live separately, refuses and neglects to maintain the first wife and has to grant maintenance to the first wife.[86]

11. When the maintenance is claimed by the wife living separately from her husband alleging cruelty, ill-treatment and taking a second wife, even if second marriage had not been proved, the husband had not restored cordial conjugal relation with her. So, it is a case of refusal and neglect to maintain the wife entitling the wife to claim separate maintenance under *s. 125 Cr.P.C.* [87]

12. When due to impotency of the husband the wife is unable to lead a happy conjugal life and in spite of the fact that she waited to see if potency of her husband is restored but potency has not been restored, she is entitled to live separately and claim maintenance as the refusal and neglect to maintain is presumed.[88]

13. When the wife was willing to go to the place of work of the husband but she was not allowed to take there, the refusal and neglect to maintain is established.[89]

14. Refusal of giving medical treatment or aid during wife's illness amounts to refusal and neglecting the wife.[90]

13. Inability of the applicant to maintain herself, himself or itself.——

Updated On 04-04-2019

1. It is to be noted that the words 'unable to maintain herself' or the like has been *newly* inserted in each[91] of the sub-Cls. (a)-(d) of sub-sec. (1).

2.

   A. Under the *old* s. 488(1), in the absence of such words, it was held[92] that it was not incumbent on the wife applicant to prove that she was unable to maintain herself or her child, though, of course, in determining the amount of maintenance, the Court was entitled to take into consideration the separate income and means of the wife.[93]

   B. But the *new* Code has expressly made it a condition precedent[94], [95] to the maintainability of an application for maintenance that the applicant,—whether wife, child or parent, must be unable to maintain herself or himself,—in addition to the other condition that the Opposite Party has neglected or refused to maintain the applicant, having sufficient means to do so.

3. It follows that no order for maintenance can now be made in favour of a wife who has not alleged in her application or statement that she is unable to maintain herself.[96]

4. But the fact that the Petitioner has some separate income is not sufficient to throw out a Petition under s. 125 as not maintainable. It is to be decided at the hearing whether that separate income is sufficient for the maintenance of the Petitioner; if not, the application should be allowed, though in fixing the quantum of maintenance, the Court will take into consideration the separate income of the Petitioner along with other relevant circumstances.[97]

5. The expression unable to "maintain herself" does not include her potential earning or capacity to earn. Even if the wife is a MBA Graduate but she did not take any employment, for the sake of her family. If her husband neglects to maintain on the ground that she is highly qualified and capable of earning, the husband is liable to maintain such a wife who is unable to maintain herself having no separate income of her own.[1]

14. Inability to maintain: some illustrative cases.—— Updated On 04-04-2019

1. When the wife earns a paltry sum of Rs. 450/- by working as a labourer, she is held to be unable to maintain herself.[2]

2. When the wife earns Rs. 459/- per month as typist, it cannot be said that she is unable to maintain herself.[3]

3. When the husband pleaded that his wife was working as a weaver and getting Rs. 40/50 per day but fails to prove the same, the plea of the wife that she has no definite income and is unable to maintain herself the grant of maintenance to the wife is proper.[4]

4. The fact that the wife has separate income is no sufficient. It has to be established if such income as sufficient to maintain her. So, the Magistrate can award maintenance taking into account such separate income.[5]

5. Mere fact that the wife has qualification is not sufficient *ipso facto* to conclude that she is in a position to maintain herself.[6]

6. When the wife is a destitute and is no longer residing with her husband, it is the duty of the husband to maintain her and the child.[7]

7. The wife is not liable to plead specifically that she is unable to maintain herself. But the averment by her that she is surviving with difficulty is sufficient proof that she is unable to maintain herself.[8]

8. When the contention of the husband that the wife is in employment but the fact the wife is in employment is not proved by the husband, earning Rs.9000/- per month, is liable to pay the wife Rs.2000/- per month by way of maintenance.[9]

9. The plea of the husband that the wife executed a divorce deed and accepted Rs. 750/- and waived her right of maintenance is not believable. The deed was not signed by the wife but by her father. It is not believable that the wife would waive her right of future maintenance by getting paltry sum of Rs. 750/- which she also denied to have received. But she was earning some income. So, the award of maintenance of Rs. 200/- per month to her cannot be disturbed.[10]

10. When the personal income of the husband is insufficient, the wife can still claim maintenance under *s. 125 Cr.P.C.* The test is whether the wife is in position to maintain herself in the way she was used to in the place of her husband. The wife should be in a position to maintain a standard of living, neither luxurious nor penurious but what is consistent with the status of the family.[11]

15. Sub-sec. (1)(a) : Right of wife.—— Updated On 04-04-2019

1. The wife's right to maintenance, under this section, is subject to the following conditions—

   (a) The applicant must be the 'lawfully married wife' of the opposite party.

   (b) The husband has sufficient means to maintain her.

   (c) The husband neglects or refuses to maintain her.

   (d) She is unable to maintain herself.

(e) She is not disqualified under any of the other provisions mentioned in the next paragraph.

2. If the foregoing conditions are satisfied, a wife's claim for maintenance cannot be refused on extraneous grounds, *e.g.*, her insanity.[12]

3. Conversely, a wife would not be entitled to maintenance under s. 125 on any ground other than those mentioned in the section where the conditions of this section are not present, *e.g.*, the inability of the husband to perform his conjugal duties,[13] Circumstances may arise when the Court may consider that it would not be safe for the wife to live with her husband in which case she may be permitted to live separately and yet granted maintenance,[14] But the failure to discharge marital obligations other than the duty to maintain cannot be a ground for an application under the present section, *e.g.*

Importance of the husband.[15]

4. For the same reason, in a proceeding under this section, she cannot claim to be treated as a member of the family in the family residence, on failure of which she should be grant maintenance.[16]

5. Since 'inability to maintain herself' is now an express condition for a wife's claim to maintenance, the question, now, is not whether the wife has *some* earning[17] of her own but whether, in line with the Proviso to *s. 19(1) of the Hindu Adoptions and Maintenance Act, 1956*, she is unable to meet her physical needs,[18] in accordance with the status of the family,[19] from her own property or earnings, if any, or any other income accruing to her, say, from her earning son or daughter living with her.

6. under the present section, the wife would *not* be entitled to maintenance from the husband, in the following cases—

(i) Where she is living in adultery [sub-sec. (4)];

(ii) Where, without any sufficient reason, she refuses to live with the husband [sub-sec. (4)];

(iii) Where she is living separately from the husband by mutual consent [sub-sec. (4)];

(iv) If the wife, being divorced, has remarried [sub-sec. (1), *Expl*. (b)];

(v) If the wife is able to maintain herself [sub-sec. (1)(a)].

If any of the foregoing facts are established, the Magistrate cannot make any order for maintenance under sub-sec. (1), even though the husband has neglected or refused to maintain the wife.[20] Hence, where the husband alleges that the wife is living separately without sufficient reason, the Court cannot grant maintenance without determining the question on evidence as may be necessary.[21]

16. 'Wife'.—— Updated On 04-04-2019

1. In order to succeed in an application under s. 125(1)(a), the applicant must show that she is the wife of the Opposite Party, married according to law,[22] Hence, a mistress is not[23] [even though her children are entitled under Cls. (b) or (c)], but a *muta* wife is,[24] entitled to maintenance under this section.

2. For the same reason, second wife of a Hindu, married after the commencement of the *Hindu Marriage Act, 1955*, while a first wife was living, cannot claim maintenance under the present section,[25] because the second marriage during lifetime of the previous married wife is *void*.

3. The position would be the same where the applicant wife's marriage was a *nullity* under ss. 5 and 11 or 12 of the *Hindu Marriage Act*.[26],[27]

But the onus of providing—(a) the earlier marriage and (b) its subsistence at the time of the second marriage with the applicant, is upon the husband who pleads that the second marriage is a nullity because of bigamy.[28]

4. But under the *Divorce Act, 1869*, there is no provision for a declaration of nullity of a marriage by the Court on certain grounds. Hence, a wife has been entitled to maintenance if the husband has not obtained a decree of nullity on the relevant grounds.[29]

5. By reason of *Expl.* (b), a divorced wife is entitled to maintenance, irrespective of the mode of her divorce, *i.e.* whether by judicial decree or by mutual agreement,[30] even though she would not so be entitled where she is merely *living separately* by mutual consent.[31]

17. Proof of marriage.—— Updated On 04-04-2019

1. It is for the applicant to adduce evidence to establish the relationship upon which the claim to maintenance is founded,[32] except where the Opposite Party, in his written statement does not challenge that case of the Petitioner.[33]

2. But the nature of the proof of marriage required for a proceeding under s. 125 need not be so strong or conclusive as in a criminal proceeding for an offence under s. 494, I.P.C. [34]

3. The jurisdiction of the Magistrate under this section being preventive in nature, the Magistrate cannot usurp the jurisdiction in matrimonial disputes possessed by the Civil Court.[35] The object of the section being to afford a swift remedy, and the determination by the Magistrate as to the status of the parties being subject to a final determination of the Civil Court, when the husband denies that the applicant is not his wife, all that the Magistrate has to find, in a proceeding under the present section, is whether there was some marriage ceremony between the parties, whether they lived as husband and wife in the eyes of their neighbours, whether children were born out of the union.[36] If there was an affirmative evidence on these points, the Magistrate would not enter into complicated questions of law as to the validity of the marriage according to the sacraments or personal law and the like, which are questions for determination by the Civil Court.[37] Evidence on the foregoing points raises a presumption that the applicant was the wife of the respondent and was sufficient for an order under the present section.[38] If the husband wishes to impeach the validity of the marriage, he should bring a declaratory suit in the Civil Court where the whole question may be gone into, *e.g.,* where he contends—

> that the registration of marriage under the *Special Marriage Act, 1954*, was obtained under fraud or coercion practised upon him.[39]

4. This does not mean that the Magistrate can dispose of the application under s. 125 without taking evidence as to the factum of marriage,[40] *e.g.*, as to the performance of the religious rites which constitute a marriage under Hindu Law. (Or the custom where a customary marriage is accepted by the law.)[41] A woman whose marriage is void under the personal law applicable to her cannot claim maintenance under the present section.[42]

5. When the Magistrate has bee satisfied about the marital status which is purely a question of fact reached by him, the High Court was not justified to interfere with such pure question of fact in revision against the order of maintenance.[43]

   In a case under *s. 125 Cr.P.C.*, the Magistrate has to take *prima facie* view of the matter and it is not necessary for the Magistrate to go into matrimonial disparity between the parties in detail.[44]

   When the claimant has proved that she and the alleged husband lived as husband and wife, the plea of the husband that the marriage was not valid and that he underwent the ceremony under duress is not sufficient for the Magistrate to deny maintenance to the claimant wife.[45]

   But when prior to filing the petition under *s. 125 Cr.P.C.* the wife filed a complaint for bigamy against the husband alleging that during subsistence of her marriage with the husband, the husband married again but failed to prove her marriage as well as the second marriage, the Magistrate was justified in disentitling the applicant to obtain maintenance from her alleged husband.[46]

   The petitioner has alleged that after marriage with the opposite party she has come to know that the husband had an earlier marriage and that the marriage terminated by divorce. That is sufficient to establish her status as wife and she has no further obligation to prove about the validity of earlier divorce.[47]

   Section 125 proceeds on *de facto* marriage and not marriage *de jure*. Thus, validity of marriage will not be ground for refusal of maintenance if other requirements of *s. 125 Cr.P.C.* are fulfilled.[48]

   The husband though admitted cohabitation with the petitioner wife for long but took the plea that there was no valid marriage. The Trial Court came to the finding of the fact that there was valid marriage and maintenance was granted. It is a finding of fact not resulting in miscarriage of justice. The High Court did not wish to interfere.[49]

   The husband disputed marriage. But the Trial Court on considering the evidence accepted the validity of marriage and discarded the evidence adduced by the husband challenging the same. The High Court cannot interfere with such finding of fact.[50]

   The petitioner and the husband lived together as husband and wife for a considerable period and in the process she became pregnant. However, they underwent a marriage before the Panchayatdars. But that was not valid marriage. So, the wife is not entitled to maintenance but the child has been granted maintenance at Rs. 450/- per month.[51]

6. Under Mohammedan Law, a valid marriage may be proved not only by direct evidence, but may also be *presumed* from the conduct of parties, *e.g.*,—

(a) continued cohabitation as husband and wife;

(b) an acknowledgement by the man that

(i) the woman is his marriage wife, provided marriage between them is not unlawful; or

(ii) the children of the woman are his children.

7. For this purpose, a signed statement by the man in the school admission register that he is the father of the children, will suffice.[52]

8. Even where the claim of the mother fails because she cannot establish a valid marriage, her child would be entitled to maintenance, for Cls. (b)-(c) of sub-sec. (1) imposes upon a person the liability to maintain his illegitimate children.[53]

9. A Muslim husband's marriage with sister of his existing wife is irregular (*fasid*) and not void (*batil*). Therefore, until terminated in accordance with law, it continues to subsist. So, the wife and children of such marriage is entitled to maintenance under *s. 125 Cr.P.C.*[54]

18.

Section 24 of the Hindu Marriage Act **and petition under *s. 125 Cr.P.C.*** **—— Updated On 04-04-2019**

Even if alimony *pendente lite* is granted to the wife in a matrimonial proceeding under *s. 24 of the Hindu Marriage Act, 1955*, the Magistrate under *s. 125 Cr.P.C.* can even grant higher maintenance for wife and children.[55]

However, quantum of maintenance awarded under *s. 125 Cr.P.C.* is adjustable with the award of *alimony pendente lite* in the matrimonial proceedings. So, the Supreme Court having adjusted, the award to maintenance under *s. 125 Cr.P.C.* with the award of alimony *pendente lite* fixed the maintenance at the rate of Rs. 1000/- per month.[56]

But this adjustment would be made as long as the order of *alimony pendente lite* remains in force.[57]

As soon as it ceases to have effect, the whole award of maintenance under *s. 125 Cr.P.C.* has to be paid.[58]

When plea of adjustment was not raised both the orders shall remain in force. But when the matrimonial court awards permanent alimony under *s. 25 of the Hindu Marriage Act*, then the husband may apply for either setting aside the maintenance order under *s. 125 Cr.P.C.* or modifying the same by invoking *s. 127 Cr.P.C.*[59]

But it is clear that only because a proceeding for maintenance is pending in Matrimonial Court, the application under *s. 125 Cr.P.C.* cannot be held to be not maintainable.[60]

Even if the matrimonial court dismisses the *alimony pendent lite,* there is no bar to the Magistrate to award maintenance under *s. 125 Cr.P.C.*[61]

However, when any matrimonial proceeding under the *Hindu Marriage Act, 1955* is dismissed, the wife can maintain a petition under *s. 125 Cr.P.C.*[62]

19. Petition for nullity of marriage pending.—— Updated On 04-04-2019

Even if a petition for nullity of marriage under the *Hindu Marriage Act, 1955* is pending, this will be no ground for refusal of maintenance under *s. 125 Cr.P.C.* when in such petition no interim direction has been given.[63]

20. Effects of decree for restitution of conjugal rights.—— Updated On 04-04-2019

See under *Expl.* (c) to sub-sec. (1), *post.*

21. Right of divorced wife.—— Updated On 04-04-2019

See under *Expl.* (b) *below*.

22. Right of a child.—— Updated On 04-04-2019

1. The maintenance of a child has to be awarded as long as the child legitimate or illegitimate remains minor and unable to maintain itself. A major legitimate or illegitimate child not being a married daughter is entitled to maintenance only where such child is by reason of any physical or mental abnormality or injury is unable to maintain itself. So, the child, in the absence of any physical or mental abnormality or injury, cannot claim maintenance when he has attained majority.[64]

   The Supreme Court has also held that the application for maintenance of the children is maintainable till they attain majority. Once the children attain majority, the provisions of *s. 125 Cr.P.C.* would cease to apply.[65]

2. When the wife and daughter prayed for maintenance but the marriage of the mother was found to have been declared void, the wife would not get maintenance but the daughter would get maintenance.[66]

3. When the husband marries the petitioner second time when his former wife was living, the second wife would not get maintenance but her children being legitimate children in view of *s. 16 of the Hindu Marriage Act* is entitled to maintenance under *s. 125 Cr.P.C.*[67]

4. An adopted son is entitled to claim maintenance from the adoptive father.[68]

5. A daughter born during the pendency of the maintenance application as the wife pregnant by the husband when she left the matrimonial room is entitled to maintenance from the father.[69]

23. Child of muslim divorced wife.—— Updated On 04-04-2019

A muslim minor child even after the father divorced the mother is entitled to claim maintenance under *s. 125 Cr.P.C.* and the *Muslim Women (Protection of Rights on Divorce) Act, 1986* is no bar. It cannot be dismissed only because the petition is filed by maternal grand father in whose custody the child is presently living.[70]

It is clear that the muslim children staying with mother is entitled to claim maintenance from their father till they attain majority or in case of female till they get married and this right is unaffected by s. 3(1)(b) of the Muslim Woman (Rights on Divorce) Act, 1986.[71]

24. Illegitimate child.—— Updated On 04-04-2019

When an application for maintenance was made for illegitimate son and the result of DNA test concluded that the respondent was the putative father of the petitioner, the respondent is liable to maintain illegitimate son.[72]

An illegitimate child can claim maintenance only if the mother can prove that the child was that of putative father. Unless it is established that the mother was in exclusive keeping of the man and the relationship was virtual monogamy, it cannot be presumed that the child was that of the man.[73]

When the father disputed paternity in a matrimonial proceeding and applied for blood test, the Supreme Court refused it when it was satisfied that the application was merely to avoid payment of maintenance to the illegitimate son.[74]

When the mother's evidence is that the respondent was the putative father of the child and the said evidence was corroborated by other evidence, Trial Court's order awarding maintenance to the illegitimate child deserves to be upheld.[75] Even if the father denies paternity and assailed the order of granting maintenance to illegitimate child, the evidence of mother that she and the respondent testified that she and father of the child had sexual intercourse on a number of occasions and the child can only be born out of their relationship, the grant of maintenance to the illegitimate son is proper.[76]

25. Maintenance for major child.—— Updated On 04-04-2019

Only in special circumstances, the maintenance can be awarded to the major son on attaining majority when such son by reason of any physical or mental abnormality or injury is unable to maintain himself.[77]

26. Major Daughter.—— Updated On 04-04-2019

As the Hindu girl has right of maintenance from her parents even after she attained majority under s. 20(3) of the Hindu Adoption and Maintenance Act, 1956, the Supreme Court has approved the order of the Family Court affirmed by the High Court that the Family Court can grant maintenance to a major daughter under *s. 125 Cr.P.C.* even after attaining majority till her marriage, that if it is denied the parties would be forced to file another petition under s. 20(3) of the Act and that it would result in multiplicity of proceedings. So far as the muslim major daughter is concerned, it is held that as held by *Noor Khatoon's* case 1997 Crlj 3972 the two daughters though major are entitled to claim maintenance from their father until they get married.[78]

However, Orissa High Court has held that the maintenance as provided under *s. 125 Cr.P.C.* should be made available only to those who are unable to maintain themselves or have no sufficient means to maintain themselves. So, it is pointed out that the grant of maintenance to major unmarried daughter without making any enquiry and without arriving at the finding that she was unable to maintain herself is not proper. So, the High Court remanded the matter to the Trial Court to decide that the question before awarding maintenance under *s. 125 Cr.P.C.* to a major unmarried daughter.[79]

27. Dispute relating paternity.—— Updated On 04-04-2019

1. When a woman claims maintenance on behalf of a minor child born out of wedlock his alleged putative father, the onus is on her to show that the child, though born out of lawful wedlock, could *only* have been born to the alleged father, under the circumstances of an *exclusive* relationship.[80]

2. In such a case, the woman being a highly interested person, it would be improper for the Court to act merely on her own statement without some independent corroboration, direct or circumstantial,[81] that during the period when the wife could have conceived of the child, the wife and alleged father had access to each other.[82] The fact of improper association *after* the child was born would not be sufficient to corroborate her evidence.[83]

3. Under *s. 112 of the Evidence Act* a Child born in wedlock should be treated as the child of the person who was at the time of the birth, the husband of the mother unless it is shown that he had no access with the mother irrespective of the question whether at the time of conception the mother was the married woman or not.[84]

4. When the application for maintenance of the illegitimate child was prayed for and DNA test concluded that the respondent was the putative father of the illegitimate son, the respondent is liable to pay maintenance for the said illegitimate son.[85]

5. When the husband failed to prove that the child was not born to him and the child was born due to adultery by his wife, the husband is liable to pay maintenance to the child and the child cannot be denied the maintenance on the mere suspicion by the husband that the child was born due to adulteration of his wife.[86]

6. When wife sought for maintenance for herself and for her minor son but could not prove that there was valid marriage between them. The wife cannot get maintenance from the husband when she fails to prove valid marriage. But from the evidence on record, it is proved that parties stayed together for a considerable time from which it could be inferred that the child was fathered by the respondent. So the respondent being the father of the child is liable to maintain it.[87]

The father earlier admitted paternity in his reply. But subsequently he amended the reply by stating that the son was born during the course of adultery of the wife with another man. The previous reply was not withdrawn. No proof was given by the husband regarding the adulterous life of the wife during the subsistence of marriage. The plea of the father was rejected and it is held that the father is liable to maintain the child.[88]

28. Blood test.—— Updated On 04-04-2019

1. When the husband, disputing the paternity prayed for blood group test of the child to prove that he was not the father of the son, the prayer cannot be allowed as a matter of course, particularly when the said application is found only to delay in paying the maintenance of the child.[89]

   The following principles have to be borne in mind when the prayer for such blood group test is made in a maintenance case—

   (i) That courts in India cannot order blood test as a matter of course.

   (ii) Wherever such application is made for such prayer in order to have a roving inquiry, the prayer for blood test cannot be entertained.

   (iii) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under *s. 112 of the Evidence Act* .

   (iv) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

   (v) No one can be compelled to give sample of blood for analysis.[90]

2. Even when the father disputed paternity of the children but refused to give blood test, then the Magistrate did not commit any illegality by awarding maintenance to the children.[91]

3. Direction for DNA test to prove the paternity can only be given when the Trial Court is unable or it is possible to draw an adverse inference on the basis of the evidence adduced and the issue cannot be resolved with the DNA test. So, when the respondent disputed paternity of the child, then without examining other evidence to prove the paternity directing for DNA test by the Magistrate is not proper.[1]

29. Custody or Guardianship of child immaterial.—— Updated On 04-04-2019

1. As the section makes clear, the question whether the father has the custody of the child or not is immaterial for determining the liability of the father for maintaining the child in a proceeding under s. 125.[2] Hence, where the other conditions for maintainability of the application under s. 125(1) are satisfied, *viz.* that (a) the father has sufficient means (b) but is neglecting or refusing to maintain the child, and (c) the child has no separate income for his or her maintenance, the application of the mother on behalf of the child, for the latter's maintenance, cannot be defeated on the mere ground that the child was not living with the father but with the mother.[3]
2. Even where the 2nd Proviso to sub-sec. (3) operates against the mother, the child's claim cannot be defeated by any such offer of the father to take over the child to his custody.[4]

There was previously a judicial controversy on this point :

A. In some cases, it was held that where the father is willing to keep the child which is unjustifiably refused by the mother, who is living separately, who claims maintenance on behalf of the child, it cannot be held that the father is neglecting or refusing to maintain the child, and hence, the application should be dismissed.[5]

B. But the foregoing view becomes untenable once it is clear that the child has a right independent of the mother. This has been made clear by redrafting the section in the *new* Code, classifying the claimants into four separate categories. Hence, the correct position now is as follows :

(i) Once the condition of 'inability to maintain itself' under s. 125(1)(b) is satisfied, a child is entitled to maintenance from the father, wherever the child is.[6] Even if the mother's claim for her own maintenance is refused for any reason, *e.g.*, because of her refusal, without just cause, to live with her husband, the claim for the maintenance of the child cannot be defeated on that ground.[7] The father cannot claim his right to custody in the proceeding under the present section, and his very insistence that the child must live with him as a condition of his maintaining, it may constitute 'neglect or refusal' for the purposes of s. 125.[8] The father may bring a civil suit for establishing his right to custody of the child[9] but so far as the Criminal Court under the present section is concerned, it would not go into that question in the proceeding for maintenance.

(ii) Though the words 'neglects or refuses to maintain' in sub-sec. (1) are common to both wife and child, the provisions in sub-secs. (3)-(5) are applicable to the wife only and no such consideration is applicable to the case of a child who is a minor and has no free will or volition and is dependent on the volition of the parent in whose custody the child is for the time being. Hence, though an unreasonable refusal to stay with the husband may be a good ground for refusal to maintain a wife, this would not be a good ground for refusing maintenance to a child[10] even though they may remain with the mother against the will of the father, and though the father may be the 'natural guardian' of the child.[11]

(iii) This is particularly true of persons governed by the Mahomedan law under which the mother has the legal right to have the custody of a male child up to the age of seven and of a female child until the latter attains puberty.[12]

1. In view of s. 125(1)(d) parents unable to maintain themselves can get maintenance from their son or daughter having sufficient means. That an adult daughter has the same obligation as a son has been made clear by the Supreme Court.[13]

2. A parent can maintain an application under *s. 125 Cr.P.C.* against one son or one daughter without impleading other sons or daughters.[14]

3. When the father refused to live with one son and is able to save money from the allowance given by the other son, the father is not entitled to get maintenance from the son with whom he refused to live.[15]

4. The claim of maintenance by the parents is based on pious obligation of the son to maintain the parents and the son is duty bound to discharge such obligation. Since, the appellant son ignored his old parents, he had been rightly directed to maintain them.[16]

5. Mother can claim additional sum from one son. A mother has four sons, two of them work as coolies and had no means to maintain the mother, another son who is constable gives her Rs.400/- per month with which he is unable to maintain properly. The fourth son who is working as a mechanic is earning well. The mother has filed a petition claiming additional sum from the mechanic son. The son resists the claim pleading that as the mother is getting maintenance from one son, she had no right to claim further maintenance from him. Though the Trial Court accepted the plea of the son and dismissed her petition, the High Court in revision on being satisfied that the amount of Rs. 400/- per month is not sufficient to maintain the mother directed the mechanic son to pay her Rs. 700/- per month.[17]

6. When the mother claims maintenance from her son, the son cannot refuse to pay maintenance to her on the ground that the mother is not living with him but with her married daughter. Law does not compel the parents to necessarily live with the son in order to claim maintenance from him.[18]

31. Claim of step mother against her step son.—— Updated On 04-04-2019

There were conflicting decisions of different High Courts if the step mother can claim maintenance under *s. 125 Cr.P.C.* against the step son or daughter. The following High Courts have answered the question in the negative.[19]

Other High Courts have held that the provision being beneficial one, the expression ‘her mother’ cannot be given restrictive meaning and the step mother being unable to maintain herself can claim maintenance from the step son or daughter.[20] The Supreme Court has held that when the step mother has five sons and two daughters and all of them are majors and capable of maintaining their mother the step mother cannot claim any maintenance from the step son or daughter. The Supreme Court has, however, considered the dominant purposes behind the benevolent provisions of s. 125 Cr.P.C and has decided to give a liberal construction to s. 125 Cr.P.C to fulfil and achieve the intention of the legislature and has observed that the step mother may claim maintenance from the step son or daughter provided she is a childless widow or if not a widow her children or her husband is unable to maintain her.[21]

Mother includes adoptive mother.[22]

32. Expl. (b) to sub-sec. (1): Right of divorced wife.—— Updated On 04-04-2019

A. *Old law.* Under *old* s. 488, there was no such *Explanation*, so that a woman could maintain an application for maintenance only if she was the 'wife' of the Opposite Party at the time of the proceeding. Not only the existence but the *continuance* of marital relationship was the foundation of an order of maintenance,[23] so that the husband had no liability to maintain a divorced wife, whose right to maintenance ceased on the expiry of the period of *iddat.*[24]

B. *New law.*

1. The *Explanation* (b), added by the Code of 1973, supersedes the foregoing law and brings it in line with the provision in *s. 25 of the Hindu Marriage Act, 1955*, on the point.[25]
2. Under the present *Explanation*, the husband is liable to maintain his wife *even after* divorce,—whether such divorce has been obtained by her[26] or himself,—which liability ceases only on her remarriage; or on her living in adultery[27] [sub-sec. (4)]. A decree of divorce does not, therefore, *ipso facto*, put an end to the right of maintenance[28]. The ground upon which the decree of divorce took place, *e.g.*, desertion by the wife, is also immaterial for a claim to maintenance under *s. 125, Cr.P.C.*[29]

On a simple reading of Explanation (b) of *s. 125(1) Cr.P.C.* it becomes clear that every divorced wife, otherwise eligible is entitled to get the maintenance allowance from her ex-husband. No ex-husband can claim under s. 127(3)(b) of the Code absolution of the obligation under *s. 125 Cr.P.C.* towards the divorced wife except on a proof of payment of sum stipulated by the customary or personal law whose quantum is more or less sufficient to do his duty for maintenance allowed to the divorced wife.[30]

The Right of a divorced wife to receive maintenance flows from her status as divorced wife. Even if she did not comply with the decree for restitution of conjugal rights that would not stand in the way of the divorced wife to claim maintenance under *s. 125 Cr.P.C.* after divorce. This is because ex-wife has no obligation to be united with her ex-husband.[31]

So, the ex-husband cannot ask the ex-wife to live with him. She has no obligation to prove good grounds to live separately from her to claim maintenance under *s. 125 Cr.P.C.*[32]

Even when the marriage has been dissolved by mutual divorce, the divorced wife unable to maintain herself is entitled to apply under *s. 125 Cr.P.C.* till she remarries.[33]

The fact that the divorce granted to the husband was on valid ground has no effect on Explanation (b) to

s. 125 Cr.P.C. [34]

Even if the decree for divorce is on the ground of desertion by wife, there is no bar to application of Explanation (b) of s. 125 because divorce on any ground whatsoever entitles a divorced wife to claim maintenance from her ex-husband if she is unable to maintain herself.[35]

When the husband obtains the decree for divorce against the wife for his failure to comply with the earlier decree for restitution of conjugal rights, the wife after such divorce is entitled to apply for maintenance if she is unable to maintain herself.[36]

So, the woman after divorce can claim maintenance from her ex-husband if she cannot provide for herself and so long as she does not remarry. As it is a statutory right the plea cannot be raised by the ex-husband that after divorce the mutual rights, duties and obligations came to an end and the ex-wife could not thus claim maintenance.[37]

The fact that at the initial stage of compromise or at the conclusion of the suit for divorce, the wife did not claim maintenance, does not debar her from claiming maintenance at a subsequent stage when she is at that stage unable to maintain herself.[38]

33. Remarriage.—— Updated On 04-04-2019

As soon as the divorced woman re-marries, she looses her right.[39] The onus is on the husband to prove that the divorced wife has remarried.[40]

34. Divorced Muslim wife.—— Updated On 04-04-2019

Upto the date when the *Muslim Women (Protection of Rights on Divorce) Act, 1986* came into force with effect from 19.05.1986, the divorced Muslim wife could apply for maintenance from her ex-husband even if the personal law of Muslim did not confer upon a Muslim divorced wife maintenance for any period beyond the *iddat* period. In a series of decisions, the Supreme Court upheld such of maintenance of the Muslim divorced wife under *s. 125 Cr.P.C.* regardless of the personal laws of the Muslims.

In *Mohammed Ahmed v. Shah Bano* [41] the Supreme Court has held that a Muslim divorced woman unable to maintain herself no matter whether dower debt had been paid or not, could apply for maintenance under *s. 125 Cr.P.C.* not only upto the period of *iddat* but also upto the date of remarriage and if not remarried upto the date of her death.

However, when the Muslim wife filed the petition for maintenance prior to *Talaq* by the husband even if during the pendency of the petition of the wife the husband divorced her, Family Court was not justified in limiting the maintenance upto the date of *iddat* period after divorce. The Supreme Court modified the order and directed

that the maintenance awarded had to be paid by the husband till she remarries.[42]

35. Impact of *Muslim Women (Protection of Rights on Divorce) Act, 1986* .—— Updated On 04-04-2019

With the *Muslim Women (Protection of Rights on Divorce) Act, 1986* came into force, jurisdiction of the Magistrate to entertain an application for maintenance by the Muslim divorced wife ceased to exist except as provided in s. 5 of that Act which confers such jurisdiction to the Magistrate if both the ex-husband and divorced wife agree to abide by the decision of the Magistrate under *s. 125 Cr.P.C.* [43]

However, the right of a Muslim woman who has not yet been divorced by her husband remains unaffected by the provisions of the Muslim Women (Right on Divorce) Act, 1986. Such Muslim wife can continue to apply for maintenance if she is unable to maintain herself and has to live separately from her husband due to sufficient cause.[44]

However, when prior to passing of the above Act of 1986, the Magistrate has already awarded maintenance to a Muslim divorced wife, such award of maintenance continues in force and the duration of that order cannot be restricted upto the period of *iddat.* [45]

When the maintenance of the divorced Muslim wife has been awarded under *s. 125 Cr.P.C.* before 1986 Act came into force, pendency of the revison petition filed by the husband at the time when the 1986 Act came into force has to be decided under *s. 125 Cr.P.C.* This is because of s. 7 of 1986 Act does not attract revision petition.[46]

A Muslim husband challenged the right of the Muslim wife to file maintenance application under *s. 125 Cr.P.C.* when it is proved that when the wife was pregnant for five months on the date of marriage. The Supreme Court having found that the husband knew about that fact and still married the wife and brought up the child for four years, his marriage with the wife cannot be held to be invalid and the wife was entitled to claim maintenance from him.[47]

36. Valid divorce necessary.—— Updated On 04-04-2019

In order to establish that the Muslim divorced wife has no right to apply under *s. 125 Cr.P.C.* , it is necessary for the husband to prove that there was a valid divorce with the Muslim wife. When in the petition under *s. 125 Cr.P.C.* the husband took the plea that he had divorced the wife but no particulars had been given. Only in his evidence he mentioned that the date of Talaq was on 11.07.1987. The Supreme Court has held that the husband having failed to prove that he had given a valid talaq in presence of wife and after performing all formalities, the plea of the husband is not acceptable and the wife is entitled to maintenance under *s. 125 Cr. P.C.* [48]

Merely taking a plea in the written statement in a petition under *s. 125 Cr.P.C.* , it cannot be held that since the filing of the said written statement the husband is deemed to have given talaq to the wife, because talaq must be for a reasonable cause and shall be preceded by attempts at reconsideration. So, the High Court rejected the plea of divorce by the husband to disentitle the wife to apply under *s. 125 Cr.P.C.* [49]

When the family Court as the Muslim husband taking plea of divorce in the written statement has held that it amounts to declaration of divorce has set aside the maintenance order under *s. 125 Cr.P.C.* , the High Court has held that such finding is against the Supreme Court decision in *Shamin Ara v. State of U.P.,* and set aside the order of the Family Court.[50]

In order that 1986 Act would apply the husband has to prove that he has given *Talaq* to the wife. Even if the husband filed some written notes to prove divorce, he had failed to prove them. So the husband's plea that the wife is not entitled to maintenance under *s. 125 Cr.P.C.* is not tenable.[51]

When the husband failed to prove a valid divorce, the plea in the written statement of the husband that he had given divorce to the wife was not sufficient to limit the maintenance of the wife till the date the husband filing the written statement by the husband stating about such divorce.[52]

37. Quantum of maintenance.—— Updated On 04-04-2019

Prior to the date when by Amendment Act 50 of 2001, the maximum amount of Rs. 500/- fixed originally in s. 125 has been deleted, the Supreme Court held that subject to the maximum limit of Rs. 500/- per month each person was entitled to maintenance and the Magistrate had to decide quantum to be paid by the opposite party to the each of the claimant regard being had to all relevant circumstances.[53]

In order to determine the quantum, the Magistrate has to find out what is required by the wife, the standard of living which is neither luxurious nor penurious but is modestly consistent with the status of the family.[54]

The wife's separate income has to be taken into consideration but not the notional income.[55]

It is also relevant to consider the husband's income and his commitment, to determine the quantum.[56]

Income of the father of the husband cannot be taken into account.[57]

Even when the monthly income of the husband is Rs. 1000/- only but when there is no evidence for his capability to earn more, the award of maintenance to the wife at Rs. 75/- per month is not held to be excessive.[58]

When the husband is engaged in family business, the award of maintenance to the wife at Rs. 500/- and to children at Rs. 300/- per month is not excessive.[59]

As regards the quantum of maintenance for the children, it has to be considered their need to get education, nourishment and healthy atmosphere, medical assistance and money required for marriage. So, when the father has yearly income of one lakh rupees, the monthly maintenance at Rs.2000/- per month for each children is proper.[60]

When the husband does not disclose his income and the wife alleges that his monthly income is Rs. 3000/- per month, grant of maintenance to each child at Rs.200/- per month is proper.[61]

The husband is able bodied youngman, a regular rickshaw pullar and casual labourer. The wife's claim that the husband works in CESC earning Rs.3500/- per month has not been proved. However, the Trial Court considering the nature of evidence awarded Rs. 300/- to wife and Rs.200/- each to two children, when the husband did not disclose his monthly income. It is held that such award of maintenance cannot be interfered with by the High Court in revision.[62]

When the husband was an army officer having sufficient means, the award of maintenance at Rs. 500/- per month for wife which was at the relevant time maximum amount to be awarded has been upheld by the Supreme Court.[63]

The Magistrate has the power to award monthly maintenance. But he cannot direct annual payment of maintenance partly by cash and partly in kind and also providing for residence of the applicant.[64]

The Court cannot award maintenance to the applicant at a rate more than that claimed by her.[65] The husband pleaded that his wife was in employment and could maintain herself. But he has failed to prove that plea. Husband is earning Rs.9000/- per month and has married again. So, the award of maintenance at Rs. 2000/- per month to the wife was not excessive.[66]

Directions have been given to the husband to pay an amount of Rs.800/- per month to the wife from the date of the petition. Even if the petitioner has some ailments, such direction given which are consistent with the materials available about the needs of the claimant and the income of the petitioner husband must be upheld.[67]

When the grant of maintenance to wife and daughter was found to be grossly improper, the High Court accepting that the husband was earning Rs. 3500/- per month enhanced it to Rs. 1500/- per month.[68]

To determine the income of the husband, the Court can consider the income tax returns and assessment orders of the I.T. officer to determine the income and after such determination, the Court can award maintenance which shall not exceed one-third of his income.[69]

When the husband earns Rs. 100/- per day as driver, direction of Rs. 800/- per month to wife and Rs. 700/- to the minor son is grossly insufficient to keep body and mind together.[70]

The wife is having cultivable land and living in the respondent's uncle's home. The Respondent being the cashier of SBI is getting Rs. 18, 508.98 as gross salary and take home salary is Rs. 9831.76. The Family Court awarded Rs. 2000/- to the wife and Rs. 1000/- to the daughter. High Court reduced the wife's maintenance to Rs. 850/- per month. However, the Supreme Court enhanced it to Rs. 1000/- per month payable from the date the Amendment Act of 2001 came into force.[71]

The husband being a driver expresses his inability to pay income as his take home salary was Rs. 2171/- per month. But he was making excessive contribution to G.P.F. He was also repaying the loan from G.P.F. account. These deductions cannot be taken into account to assess his take home salary. His take home salary was taken as Rs. 4000/- per month and the wife was granted monthly maintenance of Rs. 1000/- per month. The High Court did not interfere.[72]

The husband was earning Rs. 15, 140/- per month as gross salary. His take home salary after deduction of contributory G.P.F. would come to Rs. 11,000/- to Rs. 12,000/-Maintenance being one-fourth of net salary has been approved.[73]

The husband is a Coolie earning Rs. 2500/- per month. The maintenance awarded to the wife at Rs. 1000/- per month is proper.[74] Where the husband was earning Rs. 10,000/- per month as salary, being a constable in the police force and also had source of income from agricultural properties, grant of maintenance at the rate of Rs. 1500/- per month in favour of wife was held to be proper and was held payable from the date of application.[75]

38. Nature of jurisdiction.—— Updated On 04-04-2019

Section 125 Cr.P.C. provides a speedy and summary remedy by way of a summary procedure so that women, children or parents needing financial remedy gets justice expeditiously.[76]

The relief given under this section is essentially of civil in nature and the provision of *s. 126 Cr.P.C.* is a self contained code providing a summary procedure for compelling a man to mention his wife, child or parent.[77]

The proceeding is not a trial of an offence.[78] But even though it is essentially civil in nature yet the provisions of *C.P.C.* will not apply.[79]

The Magistrate cannot enter into complicated question of law[80] and has to take into consideration, the personal law applicable to parties.[81]

For the purposes of revision and appeal to the Supreme Court, it is deemed to be a criminal proceeding.[82]

With the establishment of Family Court in the area under the *Family Courts Act*, 1985, *s. 7 of the Family Courts Act* has conferred the jurisdiction to such Family Court, to entertain petition relating maintenance under Chapter-IX of the Code (s. 125 to 128). So, the application has to be filed before the Family Court under *s. 125 Cr.P.C.* and the Family Court shall dispose of such application in a summary manner.

39. Amendment of application lies.—— Updated On 04-04-2019

The proceeding under *s. 125 Cr.P.C.* is not strictly a criminal proceeding. Rather it is more in the nature of a civil proceeding. Amendment to the petition is therefore not prohibited and permissible in law as long as it does not change the nature of the proceeding nor does it cause prejudice to the opposite party.[83]

40. Interim maintenance.—— Updated On 04-04-2019

Specific provision for interim maintenance and cost of proceedings have been made in *s. 125 Cr.P.C.* by adding a second proviso to sub-section (1) of s. 125 by the Amendment Act 50 of 2001 which has come into force with effect from 24.09.2001. Such interim maintenance may be allowed from the date of application.[84]

Even before this express provision was made, the Supreme Court observed that *s. 125 Cr.P.C.* conferred on implied power upon the Magistrate allow interim maintenance pending final decision in the matter.[85]

Even if the husband pleaded before the High Court challenging the interim maintenance on the ground that the wife was living in adultery and the child born to her was illegitimate, it did not interfere with the interim maintenance granted to the wife and the child.[86]

The interim maintenance is provisional and subject to final determination of the Court.[87] Even where the interim maintenance has been granted and finally the application for maintenance has been dismissed, the applicant cannot be directed to refund to the opposite party the whole interim maintenance paid to the applicant.[88]

No evidence is required to be adduced to obtain interim application and even on the basis of affidavit interim maintenance can be awarded.[89]

When the interim maintenance of Rs. 300/- per month was granted by the Magistrate on 20-11-1998, even before the Amendment Act of 2001 came into force, the Supreme Court upheld it on the ground that even if no express provision was there, there was no bar to the Magistrate to grant interim maintenance pending the hearing of the petition under

s. 125 Cr.P.C. [90]

The appellant minor son of the first respondent husband living with the mother was awarded Rs. 500/- per month as interim maintenance. However, before the Supreme Court the father agreed to pay Rs. 3500/- per month subject to final determination in the pending proceeding. So, the Supreme Court accordingly increased interim maintenance to Rs. 3500/- per month.[91]

41. Jurisdiction of Magistrate to order maintenance in terms of agreement or compromise.—— Updated On 04-04-2019

1. Under the general law, the enforcement of an agreement between the parties, whether out of Court or embodied in a petition of compromise filed in Court, is to be effected by a civil proceeding.[92]
2. But since the object of the present section of the Code is to provide a means of livelihood to indigent dependents, and that object would be defeated if the Criminal Court refuses to make a proper order under s. 125 on the mere ground that the parties have made an agreement, the following propositions have been laid down by way of adjustment of the jurisdictions of the Civil and Criminal Courts:

(i) The jurisdiction of a Magistrate under the present section being confined only to the fixation of a rate of maintenance, where a compromise contains terms *outside* the purview of s. 125, such as separate maintenance, and the terms as to maintenance are inseparable from those other terms, the enforcement of such compromise must be left to the Civil Court,[93] by means of a suit to enforce a compromise, and no application under s. 128 [*old* s. 490] will lie.[94]

(ii) But where the term as to the rate of maintenance is independent of the terms of the compromise, the Magistrate may accept that portion of the compromise and make an order in terms thereof,[95] provided the compromise is not otherwise inconsistent with the provisions of the present section.[96]

(iii) But the Court is not bound to act upon a compromise or agreement, which is in contravention of the provisions of s. 125, *e.g.*—

(a) Where it is an agreement to pay maintenance to a 'mistress'.[97]

(b) Where it would deprive a child who is entitled to maintenance under the section,[98] or where it is adverse to the interest of the child.[99]

(iv) Where the Magistrate makes an order in terms of a lawful compromise, the Magistrate is also competent to enforce the payment of the maintenance [s. 128][1] and also to alter the amount so ordered, in view of changed circumstances, under s. 127.[2]

(v) The marriage between the husband and the wife has been dissolved by mutual consent. The said agreement also contained a stipulation that the wife had relinquished her claim of maintenance. The said stipulation being opposed to public policy, if the divorced wife becomes unable to maintain herself, she can claim maintenance under *s. 125 Cr.P.C.* [3]

But the provisions of the Code for enforcement or alteration of an order made on a compromise cannot be availed of unless such order is made in terms of s. 125.[4] Thus, it would be a proper order under s. 125 where the Magistrate writes—"Petition of compromise filed. Order in terms of compromise",[5] but not so if he writes—'Petition of compromise filed. Rule discharged',[6] because in the latter case, it remains an agreement between the parties and does not become incorporated in an order of the Court.

42. Settlement petition how to be dealt with.—— Updated On 04-04-2019

When a petition is filed before a Court hearing a petition under *s. 125 Cr.P.C.* and the parties file a petition settling the maintenance allowance, the Court cannot dismiss such petition unless the parties seek the dismissal of the original petition under *s. 125 Cr.P.C.* The Court in such a case can pass order in terms of the settlement arrived at. If, however, the settlement cannot be recorded, the Magistrate should dispose of such application on hearing the evidence of the parties.[7]

43. Agreement for consolidated amount of maintenance and subsequent application under *s. 125 Cr.P.C.* —— Updated On 04-04-2019

In an application under *s. 125 Cr.P.C.*, there was an agreement between the parties under which the wife received Rs.7500/- in lieu of maintenance and agreed that she would not claim any further maintenance from her husband. That agreement took place on 14.11.1975. After a lapse of years, the wife again filed an application for maintenance herself. The petition was dismissed by the Trial Court on the ground that after having accepting a consolidated sum by way of maintenance and agreeing not to apply for maintenance petition again, she cannot maintain a fresh application under *s. 125 Cr.P.C.* The Court of revision and the High Court upheld the order.[8]

44. Interim maintenance not to be enhanced *suo motu* .—— Updated On 04-04-2019

The Family Court has no jurisdiction to enhance the interim maintenance *suo motu*.[9]

45. Duration of maintenance order.—— Updated On 04-04-2019

An order of maintenance passed under *s. 125 Cr.P.C.* subsists as long as it is not varied or cancelled in terms of sub-sections (4) and (5) of *s. 127 Cr.P.C.*[10]

46. Sub-sec. (2) : Date from which order of maintenance can be given effect.—— Updated On 04-04-2019

This section makes it clear that an order of maintenance under sub-sec. (1) cannot be given retrospective effect from any date anterior to the date of the application under sub-sec. (1)[11]. Subject thereto, the Magistrate has

the discretion[12] to direct, in the light of the circumstances, that the maintenance fixed by him shall be payable from the date of his order or from the date of the application under the present section.[13]

But to award maintenance from the date of the application, no reasons are required to be assigned. The Trial Court has necessarily to go into materials on record in order to decide whether she was unable to maintain herself from the date of application and consequently no separate reasons are required to be given for directing the maintenance to be paid from the date of application.[14]

However, ordinarily maintenance under s *s. 125 Cr.P.C.* may be awarded from the date of application. But when the interim maintenance has been awarded the final order may be passed from the date of the order.[15]

When the wife had some mental illness, the husband did not pay any maintenance to the wife from the date of application to the date of order. The order directing payment of maintenance from the date of application and not from the date of order should not be interfered with in revision.[16]

When the Trial Court awarded maintenance of Rs.800/- per month from the date of application, even if the husband has some ailments direction given being consistent with the materials on record cannot be interfered within revision.[17]

The Supreme Court has made it clear that for awarding maintenance from the date of the application, an express order is necessary but it is not necessary to record any special reasons. No such requirement can be read in *s. 125(1) Cr.P.C.* In the absence of any such special requirement, the High Court was not justified in holding that in a normal rule maintenance is to be granted from the date of the order and not from the date of application.[18]

So, it is clear that the maintenance can be awarded from the date of the application or at the discretion of the Court from the date of the order.[19]

In order to award maintenance from the date of the order, the Court has to assign reason. When the Family Court does not assign any reason, the Revisional Court is competent to take into account the effect of not assigning the reason by the Family Court and can modify the order directing it to be paid from the date of application.[20]

Calcutta High Court has observed that the Court must put in a few words as to why it was awarding maintenance from the date of the order. But if the order, granting maintenance from the date of order is justified, then the said order would not be illegal.[21]

47. Scope of sub-sec. (3): Enforcement of the order.—— Updated On 04-04-2019

1. This sub-section provides for the execution and enforcement of the order granting maintenance under sub-sec. (1),—(a) by issuing a distress warrant for levying the amount of maintenance which the person ordered under sub-sec. (1) has failed to pay; and (b) by sentencing him to imprisonment for such default continuing after the issue of such warrant.
2. The levy can be made by attachment of movables, including salary.[22]

   But the Calcutta High Court has held that future salary, not being tangible corporeal property and not belonging to the husband cannot be attached for recovery of maintenance.[23]

   Contrary view has been taken by the Karnataka High Court that future salary is also attachable but the order of attachment of future salary, every prior to the disbursement of salary, shall be operative only when the salary becomes due.[24]

   The same view has been taken by the Orissa[25] and Madras High Court[26] by expressing the view that future salary is attachable and the same becomes operative only when the salary falls due.

3. These steps cannot be taken unless—

   (a) An application is made by the wife or other dependant for recovery of any amount due under the order made under sub-sec. (1) *within 1 year* [27] from the date when it became due;

   (b) If the Magistrate, after holding an inquiry,[28] is satisfied that the Opposite Party has failed to comply with the order without sufficient cause.

4. Sub-section (3), thus, given an opportunity to the Opposite Party to show cause why the order under sub-sec. (1) should not be enforced.[29]
5. The first proviso to sub-section (3) contemplates that the procedure for recovery of maintenance under *s. 125(3) of the Code of Criminal Procedure* , namely, by construing the same to be a levy of a fine and the detention of the defaulter in custody would not be available to a claimant who had slept over his/her rights and has not approached the Court within a period of one year commencing from the date on which the entitlement to receive maintenance has accrued. However, in such a situation the ordinary remedy to recover the amount of maintenance, namely, a civil action would still be available.[30]
6. The second Proviso also gives a husband one more opportunity of offering to maintain the wife on condition of her living with him.[31]
7. When the two separate applications for execution have been filed, one within one year of the date of the order and the other beyond it, the first application being within time, the Magistrate would be justified in issuing warrant for recovery of the amount of the first application.[32]
8. When the main application for execution is within time for the period from 20.01.1993 to 31.08.1993, the fact that pending such application one interim application for the period 20.01.1993 to 16.06.1998 was filed, the fact that such interim petition is pending original petition cannot be held to be barred by limitation.[33]
9. Attachment of property for the realization of amount in terms of the maintenance order is restricted to property of the husband, movable and immovable and not the property of his mother.[34]

48. Warrant of arrest when without.—Jurisdiction.—— Updated On 04-04-2019

Section 421 Cr.P.C. prescribes two modes of recovery of arrear, namely—

1. the Court can either issue warrant for levy of the amount by attachment and sale of movable property of the defendant: or
2. issue a warrant to the Collector of the District authorizing him to realize the amount as arrears of land revenue from the movable or immovable property of the defendant.

It is only after the Magistrate has exhausted the two modes of recovery, he can sentence the defendant to imprisonment when the said two modes fail, otherwise not. However, prior to issue warrant of arrest the Court has to issue notice to the defendant.[35]

The Magistrate has no jurisdiction to straightway issue warrant or arrest against the person liable to pay the maintenance order in the event of non-payment of amount due within the time fixed by the Court without levying the amount due as fine and without making attempt for realization of fine as provided in Clause (a) or Clause (b) of sub-section (1) of *s. 421 Cr.P.C.* So, when without exhausting the above modes of recovery the warrant of arrest was issued, the said order is totally without jurisdiction.[36]

However, when it appears to the Magistrate that issuing of distress warrant would be futile exercise, the Magistrate can then straightway issue warrant of arrest after issuing show cause notice.[37]

49. Imposing sentence of imprisonment, extent.—— Updated On 04-04-2019

The language of *s. 125(3) Cr.P.C.* is clear and it circumscribes the power of the Magistrate to impose punishment of sentence of imprisonment to the defendant which may extend to one month or until payment if sooner made. The power of the Magistrate cannot be enlarged and, therefore, only after the expiry of the period of one month for breach of non-compliance of the order of the Magistrate, the petitioner wife can approach for similar relief. But by no stretch of imagination, it can be said that the Magistrate be permitted to impose the sentence of imprisonment for more than one month.[38]

The Kerala High Court has held that when the execution is filed in respect of the default of payment of maintenance for more than one month, the defendant can be sentenced to imprisonment for more than one month because each month's default would be visited with the maximum sentence of one month's imprisonment[39].

50. Execution against husband's estate.—— Updated On 04-04-2019

The husband's liability to maintain his wife ceases with his death. But arrears of maintenance due up to his death may be levied against the husband's estate whoever may be in possession thereof.[40]

51. Hearing of objection of party ordered.—— Updated On 04-04-2019

1. Sub-section (3) provides that steps for enforcement of the order under sub-sec. (1) can be made only if the person ordered has failed to comply with it 'without sufficient cause', —

   which fact has to be determined by the Court after hearing the opposite party (*i.e.* the person ordered). On receipt of an application for execution, therefore, the Court should issue a notice upon the opposite party to show cause[41] why a warrant under sub-sec. (3) should not be made, and then hear the objection filed by the opposite party, if any.[42]

2. It cannot be held that such cause cannot be shown unless and until the maintenance order is cancelled under sub-sec. (5),[43] If, as a matter of fact, the husband is able to prove the allegations he has made in his objection, the Magistrate will not only refuse to issue a distress warrant under sub-sec. (3) but should also cancel the order of maintenance under sub-sec. (5).[44]

3. It is for the Opposite Party, on receipt of such notice, to show cause why the order passed under sub-sec. (1) should not be enforced.[45] If, after such notice, he does not plead any cause, it is not for the wife to prove absence of sufficient cause on the part of the husband (of which he must be best aware) or for the Court to make any inquiry. In such a case, no evidence need be recorded before issuing the distress warrant or passing the sentence or imprisonment (as the case may be), because the husband has not pleaded any cause to be inquired into.

4. Since there is no express requirement in the sub-section to issue a notice before issuing the warrant, the issue of a warrant or a sentence of imprisonment cannot be set aside for absence of such notice or hearing, if the Magistrate had before him *other materials* [46]
   from which it could reasonably be concluded that he has failed to pay the amount ordered under sub-sec. (1) 'without sufficient cause', *e.g.*, where he avoids service or he does not raise any objection that he has 'sufficient cause' for non-payment even when brought before the Court on arrest.[47]

52. Sufficient cause.—— Updated On 04-04-2019

1. The Legislature has not exhaustively enumerated the grounds which would furnish a 'sufficient cause' for non-payment of the maintenance ordered under sub-sec. (1), beyond the three grounds which are mentioned in sub-sec. (4), which disentitles a *wife* to maintenance under sub-sec. (1) itself.[48] Besides these grounds, it is left to the Court to decide in each case, on its facts, whether the opposite party has sufficient cause for not complying with the order for maintenance of his wife, child or parent, as the case may be. Broadly speaking.—

   A. The following have been held to constitute sufficient cause:

(A) *In the case of wife*—

(i) That since the order was passed under sub-sec. (1), the husband has made an offer to maintain the wife on condition of her living with him, which offer has been rejected by the wife without any 'just ground' [Prov. (2) to sub-sec. (2)].

(ii) That the wife has since been living in adultery [sub-sec. (4)].

(B) On the other hand, the following circumstances have been held *not* to constitute sufficient cause :

(i) The mere fact that an order of adjudication of insolvency has been made against the opposite party, in the absence of his factual inability to pay.[49]

(ii) A mere agreement between the parties to pay a certain sum by way of maintenance, short of a decree of the Civil Court.[50]

(iii) Lunacy of the defaulter.[51]

2. There has been controversy whether the grounds which could be pleaded to defeat the application under sub-sec. (1) can be urged as 'sufficient cause' to defeat the application for execution under sub-sec. (3), *e.g.*—

(i) Whether the opposite party had sufficient means to maintain the Petitioner;

(ii) Whether he has neglected or refused to maintain the Petitioner.

The better view seems to be that the principle of *res judicata* applies to such proceedings, so that any grounds which were taken or could be taken by the Opposite Party before the order under sub-sec. (1) was made, cannot be agitated again at the stage of execution under sub-sec. (3). In other words, he can show why he could not obey the orders of the Court, but cannot be allowed to challenge the decision of the Court,[52] embodied in the order under sub-sec. (1) which can be done only by way of revision before a superior.

In the result, in reply to an application under sub-sec. (3), the husband would be permitted to urge only such causes which were not the subject-matter of challenge when the order under sub-secs. (1)-(2) was made,[53] The reason is, normally an order under sub-sec. (1) has got to be complied with by the husband unless changes in the situation of husband and wife take place after the making of the order, which may be classed as 'sufficient cause' for his failing to comply with the order.[54]

53. Compromise as 'sufficient cause'.—— Updated On 04-04-2019

1. There is no provision in the *Cr.P.C.* (corresponding to O. 23 of the C.P.Code) for disposing of an application for maintenance under s. 125, or an application for enforcement of an order made under s. 125(1), in accordance with a compromise.[55]

2. But where an application for enforcement of an order under s. 125(1) has been made, the concerned party may plead that he did not pay because there had been a compromise, which constituted 'sufficient cause' within the purview of s. 125(3).[56] Where such a plea is taken the Court has to investigate whether there has been a genuine compromise after giving an opportunity to the parties to be heard. If it is found to be genuine, the Court should refuse to enforce the order; but if it is found to be vitiated by fraud or the like, the plea of sufficient cause should be rejected.[57]

3. For the reasons just stated, when the question of fraud had been raised by the applicant for enforcement of the order, neither the lower Court nor the Revisional Court can refuse the determine that question on the ground that the compromise should be declared invalid by a Civil Court.[58]

54. Proviso 2 : Conditional offer by husband.—— Updated On 04-04-2019

1. This Proviso says that even after an order granting maintenance has been made under sub-sec. (1), it is open to a husband to make a *bona fide* offer to the wife to receive maintenance after coming over to live with him.[59]

2. The object of giving this opportunity at this stage is twofold—(a) to bring about a reconciliation between the parties because the marital tie has not been dissolved by an order for maintenance under sub-sec. (1) : (b) The right to obtain the allowance granted under sub-sec. (1) for each month being separate, the mere fact that the wife was justly entitled to the allowance for one period is no ground that she should continue to receive it in future if she unjustly refuses the fresh offer to the husband to maintain her on condition of living with him.[60]

3. The word 'wife' in this Proviso and in sub-secs. (4)-(5) cannot include a divorced wife, who has ceased to be the wife of the person and is not, therefore, bound to live with such person or to discharge marital obligations.[61]

4. Put otherwise, a husband cannot be held guilty of refusing to maintain his wife when the wife refuses to live with him as a condition of her receiving maintenance. This proposition is subject to the following exceptions—

   (a) The wife may state why she is refusing to live with him and the court considers such ground to be a 'just' ground [2nd Prov. to sub-sec. (3)]

   (b) The husband has married another wife or kept a mistress. The word '*shall* be considered' in the *Expl.* to the 2nd Proviso shows that in this case, the Court has no discretion and must hold that the wife is justified in refusing to live with the man, so that it must be a case of refusing to maintain the wife without lawful excuse, notwithstanding his conditional offer as under the 2nd Proviso.[62]

55. 'Just ground for refusal to live with husband'.—— Updated On 04-04-2019

See under sub-sec. (4), *below.* Apprehension of physical harm; impotency of the husband, are just grounds.[63]

Explanation.—This *Expl.* corresponds to the paragraph which was inserted under *old* s. 488(3), by Act IX of 1949. It means that if the wife has a just ground for refusal to live with the husband, by reason of his (a) marrying again, or (b) keeping a mistress, the husband must maintain the wife notwithstanding her refusal to live with him.[64] It thus contemplates two kinds of matrimonial injury to a wife (belonging to any community—Hindu, Christian or Muslim), *viz.*, the husband either marrying again or taking a mistress.[65]

56. Applicability of the Explanation to Muslim.—— Updated On 04-04-2019

1. The Supreme Court has held[66] that the wide language of the *Explanation*, read with other provisions of the section, leads to the conclusion that the *Explanation* is also applicable to Muslims. Hence, even though the personal law of Muslims enables a man to marry up to four wives, under the present section, a Muslim wife may have a right to live separately from her husband and to claim maintenance from him on an application to a Magistrate, on the mere ground that the husband has married a second wife,—irrespective of the personal law between the parties.[67]

2. The position is the same where the other woman with whom the husband is living is not a married wife but only a mistress.[68]

57. Whether Proviso 2 with its Expl. can be referred to, in making order under sub-sec. (1).—— Updated On 04-04-2019

Prima facie the two provisos to sub-sec. (3) are provisos to that sub-section, so that the questions as to the wife's refusal to live with the husband and her having just ground for so doing would arise when the application for enforcement of the order of maintenance is presented;[69] hence, the question of the husband's refusal or neglect has to be determined independently.[70]

But several High Courts[71] took the view that (a) the words 'may make an order under this section' indicate that the circumstances mentioned in Proviso 2, together with its *Expl.* are relevant in making an order under sub-sec. (1) as well; (b) if a wife is justified in living separately from the husband, *e.g.*, where he has kept a mistress or because of his cruelty, it would be an obvious case of refusal or neglect to maintain her, within the meaning of sub-sec. (1)[72] so that she would be entitled to maintenance on this ground alone.

This *latter view* has been taken by the Supreme Court in *Deochand v. State of Maharashtra,* [73] holding that since the wife is, under the *Expl.* to the 2nd proviso to sub-sec. (3), justified in refusing to live with the husband, when he marries a second wife or keeps a mistress, the husband is under a legal obligation to maintain her, and, on his refusal to do so unless she lives with him, she would be entitled to an order for maintenance under sub-sec. (1). The observations of the Supreme Court in the later case of *Subanu* [74] that the provisions in sub-secs. (1), (4), (5) and the *Explanation* to Proviso (2) of sub-sec. (3) should be read together have to be read together as they have the common object of permeating a wife from resorting to vagrancy and destitution owing to refusal by the husband to maintain her.

According to the Supreme Court,[75] just as sub-secs. (4)-(5) exempt the husband from the liability to maintain his wife if she is living in adultery, so the *Explanation* entitles the wife to separate residence and maintenance if the husband has married a second wife or taken a mistress.

58. Suggestion for law revision.—— Updated On 04-04-2019

In view of the decisions of the Supreme Court that the *Explanation* to sub-sec. (3) should be taken into consideration while dealing with an application under sub-sec. (1), this *Explanation* should be placed at the end of the section, as an Explanation to the whole section, or as an additional sub-section.

59. Revision.—— Updated On 04-04-2019

An order of imprisonment is liable to be quashed—

If it has been made without issuing a warrant of attachment and sale in the first instance.[76]

60. Scope of sub-sec. (4).—— Updated On 04-04-2019

1. This sub-section applies to a case where an allowance has been fixed under sub-sec. (1) and *thereafter* the wife starts living in adultery or refuses to live with the husband without just cause or lives separately by mutual consent.[77]
2. The object of the Legislature behind this provision is to protect both the husband and the wife.[78]—

   (a) The husband is not to be compelled to maintain a wife who becomes unvirtuous or is so unreasonable as not to live with him and perform her conjugal duties.[79]

   (b) The wife may refuse to live with the husband and perform her conjugal functions if there is sufficient reason for the same.[80]

Living in adultery means an outrageous conduct when the wife lives out of wedlock.[81] But mere friendship with a man is not tantamount to living in adultery.[82]

The expression ‘living in adultery’ connotes a wife living perpetually or semi-perpetually as a wife with a male other than her husband and having sexual relation with him. But sporadic instance of sexual relationship of a wife with a person other than her husband would not constitute ‘living in adultery’ to forfeit the wife of her right of maintenance under *s. 125 Cr. P.C.*[83]

So, proof of continuous course of adulterous conduct is necessary to forfeit the claim of a wife to claim maintenance from her husband under *s. 125 Cr. P.C.* [84]

So, mere proving one or more instances of lapses in the character of the wife is not sufficient for the husband to get over his liability to maintain.[1]

Mere admission by wife that the pregnancy was cause prior to marriage was not sufficient to prove adultery, particularly when access between the husband and wife prior to marriage has been established.[2]

While determining the factum of living in adultery the Court must consider the evidence on record to ascertain as to whether the wife was living quasi-permanently with the man with whom she was committing adultery.[3]

Consequently, when the evidence adduced showed only one act of unchastity on the part of wife the refusal of maintenance under sub-section (4) of *s. 125 Cr.P.C.* is not proper.[4]

When there was no iota of evidence produced by the husband to suggest that the wife had illicit relationship with another person and on the contrary because of ill-treatment and harassment of the husband the wife is compelled to live separately, then the wife has been granted separate maintenance under *s. 125 Cr.P.C.* [5]

The husband filed a suit for divorce on the ground of adultery but his suit was dismissed because of his failure to pay interim maintenance and only a few stray incidents of adultery were proved. So the wife cannot be refused maintenance under s. 125 Cr.P.C [6].

When the wife was living in adultery and separately, refusal of maintenance to her was proper.[7]

The wife contracted another marriage during the lifetime of her first husband while marriage with him had not been snapped by divorce. It is held that it would come under the four corners of adultery. So, wife would not be entitled to maintenance or interim maintenance from the first husband.[8]

When the wife ceased to be living in adultery, she cannot be disentitled from claiming maintenance. This is because “if she is living in adultery” in *s. 125(4) Cr.P.C.* conveys present continuous tense and does not speak of any past tense.[9]

When the wife has been divorced, her prayer for maintenance cannot be refused on the ground that she is

living in adultery after divorce.[10]

61. 'Sufficient reason for refusing to live with husband.—— Updated On 04-04-2019

In view of the *Explanation* to the 2nd Proviso to s. 125, it has been held that it would be a sufficient reason for a wife to refuse to live with the husband (including a Muslim) who has married a second wife or taken a mistress.[11]

62. Whether grounds specified in sub-sec. (4) may be urged to defeat an application under sub-sec. (1).—— Updated On 04-04-2019

1. The words 'entitled to receive an allowance' in sub-sec. (4) make it clear that the provisions of sub-sec. (4) govern the whole of s. 125, including sub-sec. (1).[12]

2. Hence, an application of a wife for maintenance, under sub-sec. (1) would be refused if the husband alleges and proves that she is living in adultery, or refusing to live with the husband, without sufficient reason or is living separately by mutual consent.[13] On the other hand, the application cannot be defeated if the wife establishes that there are sufficient reasons for her living separately.[14],[15]

3. In other words, sub-sec. (1) is to be read with sub-sec. (4), so that if the grounds mentioned in sub-sec. (4) exist *at the time of considering* the application for maintenance under sub-sec. (1), that application should be dismissed,[16],[17] Hence, an *ex parte* decree for divorce on the ground of wife's adultery obtained by the husband 5 years prior to the application by the wife for maintenance would not satisfy the requirement of s. 125(4).[18]

63. Living in adultery.—— Updated On 04-04-2019

1. This expressions means a continuous adulterous conduct and not a single or occasional lapse from virtue.[19],[20]

64. 'Sufficient reason' for refusal to live with husband.—— Updated On 04-04-2019

1. Neither in this sub-section nor in sub-sec. (5), the Code attempts to enumerate what would be 'sufficient reason' for a wife-claimant to refuse to live with her husband and yet succeed in her claim for maintenance. It is left to be determined by the Court objectively, having regard to the circumstances of each case and the social ideas and customs of the community to which the parties belong.[21]

2. Under sub-sec. (4), a wife, who without sufficient reason, refuses to live with her husband, is not entitled to maintenance under s. 125 . Under sub-sec. (3), if she has 'just ground' (see *ante*) for such refusal, she would be entitled to have the order of maintenance enforced notwithstanding the offer of the husband to maintain her on condition of her living with him. It is apparent that the two expressions 'just ground' and 'sufficient reason' bear the same meaning.[22]

3. Where the Court finds that the wife has sufficient reason to live separately from the husband, no restriction can be imposed on her movement nor any direction as to where she should live.[23] The only restriction imposed by law as a condition for receiving maintenance is that she should not resort to adultery.[24]

4. The following have been held to be 'sufficient reason'[25] for refusing to live with the husband—

(i) *Ill treatment.*—Torture of ill-treatment[26] in the husband's house would be sufficient reason even though the husband may not be guilty personally.[27]

(ii) *Cruelty* in the technical sense, without *physical* violence, *e.g.*, false imputation of immorality to the wife,[28] keeping a mistress in the house,[29] denying parentage of wife's child,[30] or *mental* cruelty,[31] impotency of husband.[32]

Even cruelty by the mother-in-law has been held to be a sufficient reason.[33]

(iii) Husband has married another wife, even though he may be a Mohammedan.[34]

The Supreme Court has[35] held that since under the *Expl.* to sub-sec. (3), the wife is justified in refusing to live with her husband because he has contracted a second marriage or keeps a mistress,[36],[37] she should be entitled to maintenance also under sub-sec. (4), for this ground should be a 'sufficient reason' for the refusal to live with the husband.[38] In this conclusion there should not be any difference whether the parties are Hindu or Mahomedans.[39]

It has been held that where a wife living separately from the husband on the ground that he has married again, claims maintenance, her application under s. 125 need not remain stayed because a case under s. 494, I.P.C., is pending against the husband, for, the scope of the two proceedings is different and, in the proceedings for maintenance, a bare denial by the husband of the factum of marrying a second wife would be sufficient defence for him.[40]

(iv) Discretion.[41]

(v) A threat to the wife to return to the husband on pain of being divorced.[42]

(vi) Impotency of the husband.[43]

(vii) Apprehension of physical harm owing to persistent demands of dowry from the husband's family.[44]

65. Absence of sufficient reason for living separately.—— Updated On 04-04-2019

What would possibly be a just ground for a wife to live with the husband in a proceeding for maintenance would also be an answer to a suit for restitution of conjugal rights brought by the husband against the wife. Hence, it has been held that where prior to the order in an application under the present section, a Civil Court has decreed a suit for restitution of conjugal rights against the wife, it would be equivalent to the decision of a competent Court that she had *no* sufficient reason for refusing to live with her husband. In such a case, the Criminal Court cannot allow her to contumaciously disobey the decree and yet claim maintenance under the present section.[45] Nor can the Criminal Court, in such a case, inquire into any allegation of failure or neglect by

the husband to maintain the wife, prior to such decision of the Civil Court.[46]

These decisions[47] are, however anterior to the Supreme Court decision in *Subanu's* case[48] that the marriage of a second wife (even in the case of a muslim) or the keeping of a mistress gives the first wife an independent right to live separately and to claim maintenance.[49]

Apart from this, there are decisions to the effect that where the decree for restitution was obtained *ex parte*, the Court may nevertheless make an interim order of maintenance in favour of the wife and enter into an inquiry as to whether the wife had any just ground for living separately.[50]

The fact that the husband does not want the wife to return to the matrimonial house, is a sufficient cause for the wife living separately from him.[51]

When the wife prayed for separate maintenance alleging ill-treatment, cruelty, demand of dowry and second marriage and husband does not produce evidence that he made sincere effort to live with the wife in cordial relationship, even if the wife failed to prove second marriage of the wife, the wife is entitled to separate maintenance.[52] Merely because the legally wedded wife (first wife) left the house for 4-5 years and did not come back, it is no ground to justify second marriage by the husband and this act on the part of the first wife will not disentitle her to claim maintenance. Particularly, when evidence of the first wife was very specific that when her husband contracted second marriage, she was residing in her matrimonial house and she, along with her children, was thrown out of the house.[53]

When the family court was satisfied that the husband ill-treated the wife and drove her out of the house and failed to prove voluntary desertion by the wife, provision of sub-section (4) of *s. 125 Cr.P.C.* is not attracted and the wife is entitled to separate maintenance[54]

When the wife failed to prove sufficient ground to live separately from husband and no sufficient reason was there for the wife to live separate from her husband and it is proved that the husband and wife enjoyed normal mental life for several years, there being no sufficient cause for the wife to live separately from her husband, the Magistrate refused maintenance which was ultimately upheld by the Supreme Court.[55]

When it is established that the wife is living separately from her husband without any sufficient reason, the husband cannot be directed to pay maintenance to her in view of s. 125(4) of the Code.[56]

Even the wife living separately from her husband due to sufficient reason but in the same house with the husband and the husband having sufficient reasons refusing and neglecting the maintenance, the husband is liable to pay maintenance.[57]

66. 'Living separately by mutual consent'.—— Updated On 04-04-2019

1. 'Mutual Consent' means that the agreement of separate living was the outcome of the desire of both parties independently, and not forced by circumstances brought about by one of them.[58]
2. These words mean that a wife cannot claim or enforce an order of maintenance against her husband if—

   (i) She has entered into an agreement with her husband voluntarily and freely to live separately,[59] as distinguished from the case where she is compelled to live separately on account of justifying reasons, such as cruelty[60] or re-marriage of the husband;[61]

   (ii) They are actually living apart in terms of such agreement, at the time of the proceeding,[62] *e.g.* under a compromise entered into a previous proceeding under the present section.[63]

3. It follows that in the following case it *cannot* be held that the wife, who was living apart, was doing so by 'mutual consent':

Where she has been obliged to live separately on account of the husband's cruelty, marrying again or keeping a mistress.[64]

However, if by the agreement entered into between the husband and wife, the husband agreed to pay certain amount to the wife monthly, but failed to pay the amount in terms of the agreement, then the wife is entitled to apply for maintenance under *s. 125 Cr.P.C.* as it would be a case of neglect and refusal to pay maintenance.[65]

If a wife prior to divorce lives separately by mutual consent, she becomes disentitled to get maintenance from the husband. But the divorced wife living separately is not disentitled to claim maintenance under s. 125(1).[66]

67. Divorce by mutual consent.—— Updated On 04-04-2019

When by virtue of an agreement between the husband and wife, there was divorce by mutual consent, sub-section (4) of *s. 125 Cr.P.C.* disentitling the divorced wife to claim maintenance does not arise.[67]

The Supreme Court has also held that where there is divorce by mutual consent, the wife is not disentitled to claim maintenance so long as she remains unmarried and is unable to maintain herself.[68]

It is also made clear by the Supreme Court that when there is a divorce on any ground there is no question of husband and wife living separately by mutual consent and sub-section (4) of *s. 125 Cr.P.C.* does not apply to a case of a woman who has been

divorced or who has obtained a decree of divorce.[69]

Karnataka High Court has observed that an agreement to divorce by mutual consent except under *s. 13B of the Hindu Marriage Act, 1955* is contrary to the provisions of the *Hindu Marriage Act* and unenforceable, but when it has been established that the parties have been living separately by mutual consent, sub-section (4) of *s. 125 Cr.P.C.* is attracted. However, it has been brought to the notice of the High Court that after agreement had been entered into, the parties applied for divorce by consent under *s. 13B of the Hindu Marriage Act* which was granted by the District Court and the husband paid a lump sum of Rs. 75,000/- which was the amount agreed to by the wife. So, the High Court has set aside the order of maintenance passed by the Trial Court in favour of the wife in view of sub-section (4) of *s. 125 Cr.P.C.* [70]

68. Whether the consent can be revoked by a wife for the purpose of claiming maintenance.—— Updated On 04-04-2019

It has been held in some cases,[71] that living apart by mutual consent does not sever the marital tie, but only keeps the right to maintenance in abeyance, so that at any subsequent point of time, the wife may revoke that consent and offer to perform her obligations as wife, and thus become entitled to claim maintenance.

69. What are not valid grounds for refusing maintenance to a wife.—— Updated On 04-04-2019

1. Once the conditions of sub-section (1) of s. 125 are satisfied, the wife's right to maintenance can be defeated only if any of the circumstances specified in sub-section (4) can be established by the husband.[72] It follows that a wife's application for maintenance cannot be dismissed *merely* on the following ground :

   That she falsely attributed immorality to the husband or that he has married a second wife.[73]

2. But where there has been a decision of a Civil Court on the merits that a wife is *not* entitled to maintenance, a subsequent claim to maintenance under s. 125 would be barred, even though the scope of *s. 125 of the Cr.P.C.*, is different from the *Hindu Adoptions and Maintenance Act, 1956*, because the Criminal Court being a Court of summary jurisdiction, cannot override the decree of a Civil Court of competent jurisdiction.[74]

70. S. 125(1), Expl. (b) and sub-section (4).—— Updated On 04-04-2019

1. These two provisions deal with different situations and distinguishes between the status of a wife during subsistence of marriage and that after divorce.[75]

2. During subsistence of marriage, refusal to live with the husband or to submit to a decree for restitution of conjugal rights may bar her right to maintenance, but after divorce, she has no obligation to discharge her marital duties, so that maintenance cannot be refused on the ground that she is living separately.[76]

3. It follows that even after a previous application brought by the wife during subsistence of the marriage has been dismissed on any of the grounds mentioned in sub-section (4), the wife is entitled to bring a second application for maintenance on the independent cause of action arising by reason of divorce.[77]

71. Sub-section (5): Cancellation.—— Updated On 04-04-2019

1. An order of maintenance under this section may come to an end only by an order[78] of the Magistrate under sub-section (5), on any of the three grounds specified therein, *viz.* : (a) wife living in adultery; (b) wife refusing to live with husband, without sufficient reason; (c) husband and wife living separately by mutual consent. The order does not come to an end *ipso facto* on the happening of any of these contingencies.[79]

   So, it is clear that sub-section (5) of *s. 125 Cr.P.C.* provides that if the wife is living in adultery or without sufficient reasons refuses to live with the husband or is living separately by mutual consent, then on proof of any such fact, the Magistrate may cancel the order of maintenance passed under *s. 125(1) Cr.P.C.* So, sub-section (5) comes into play when after the order of maintenance is passed by the Court, the husband files an application on any of the above grounds. On the other hand, under sub-section (4) of *s. 125 Cr.P.C.* no order of maintenance can be passed by the Court when any of the conditions specified in sub-section (4) of *s. 125 Cr.P.C.* exist.

   But under sub-section (5) of *s. 125 Cr.P.C.* if a petition is filed by the husband satisfying any of the grounds specified in sub-section (4) of *s. 125 Cr.P.C.* maintenance order will be cancelled. So, sub-section (4) of *s. 125 Cr.P.C.* contemplates a stage prior to the making of the order, but sub-section (5) of *s. 125 Cr.P.C.* contemplates a stage subsequent to the passing of the order of maintenance.[80]

2. The order cannot be put an end to by other circumstances, *e.g.*, reunion or resumption of cohabitation.[81]

3. An order of maintenance survives until cancelled or vacated under sub-sections (4) or (5) of s. 125 or s. 127.[82]

1 Words “not exceeding five hundred rupees in the whole” omitted by *Cr.P.C.* (Amendment) Act, 2001 (50 of 2001), S. 2 (w.e.f. 24-9-2001).

2 Inserted by *Cr.P.C.* (Amendment) Act, 2001 (50 of 2001), S. 2 (w.e.f. 24-9-2001).

3 Substituted by *Cr.P.C.* (Amendment) Act, 2001 (50 of 2001), S. 2 (w.e.f. 24-9-2001).

4 Substituted by *Cr.P.C.* (Amendment) Act, 2001 (50 of 2001), S. 2 (w.e.f. 24-9-2001) for the word “allowance”.

5 The words “not exceeding five thousand rupees” omitted by U.P. Act 15 of 2011, s. 2.

6 The words “one thousand and five hundred rupees” omitted by W.B. Act 33 of 2001.

7 Vide 41st. Rep. of the Commission, Vol. I, paras 36.1-36.10.

8 Vide 41st. Rep. of the Commission, Vol. I, paras 36.1-36.10.

9 *Jagir* *v.* *Ranbir,,*
AIR 1979 SC 381 [
LNIND 1978 SC 323](para 8) :
(1979) 1 SCC 560 [
LNIND 1978 SC 323] :
1979 Crlj 318 .

10 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

11 Vide 41st Rep. of the Commission, Vol. I, paras 36.1-36.10.

12 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

13 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

14 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

15 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

16 Vide 41st Rep. of the Commission Vol. 1, paras 36.1-36.10.

17 This condition was inserted by the Joint Committee on the Bill of 1970 (p. xiii, on Cl. 125).

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AIR 2011 SC 614 .

19 *Nand Lal v. Kanhaiya,*
AIR 1960 SC 882 [
LNIND 1960 SC 105]; *Savitri v. Govind,*
(1986) Crlj 41 :
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1985 Crlj 875 .

20 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,,*
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1984 Crlj 1297 .

21 *Mohd. Ahmed Khan v. Shah Bano Begum,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](para 7) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 ; *Savitri v. Govind,*
(1986) Crlj 41 :
AIR 1986 SC 984 : (1985) 4 SCC 337.

22 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
AIR 1963 SC 1521 [
LNIND 1963 SC 40](*1525*); *Mohammed Yamin v. Shamim,*
1984 Crlj 1297 .

23 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
AIR 1963 SC 1521 1525 ; *Mohammed Yamin v. Shamim,*
1984 Crlj 1297 .

24 *Mohd. Ahmed Khan v. Shah Bano Begum,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](para 7) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 ; *Savitri v. Govind,*
(1986) Crlj 41 :
AIR 1986 SC 984 : (1985) 4 SCC 337 ; *Mehbubabi v. Nasir,*
(1977) Crlj 390 (para 11) Bom.

25 *Nandlal v. Misra,*
(1960) 3 SCR 431 [
LNIND 1960 SC 105] (437).

26 *Habeebulla v. Shakeela,*
(1984) Crlj 1062 (para 6) [Muslim Law]; *Kirtikant v. State,*
(1996) 4 SCC 479 [
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27 *Jamunabai v. Anantaro,,*
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LNIND 1988 SC 64](para 6) :
(1988) 1 SCC 530 [
LNIND 1988 SC 64] :
1988 Crlj 793 [Hindu Law].

28 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
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1984 Crlj 1297 .

29 *Nandlal v. Misra,*
(1960) 3 SCR 431 [
LNIND 1960 SC 105] (437).

30 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
AIR 1963 SC 1521 [
LNIND 1963 SC 40]; *Mohammed Yamin v. Shamim,*
1984 Crlj 1297 .

31 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
AIR 1963 SC 1521 [
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AIR 1963 SC 1521 [
LNIND 1963 SC 40]; *Mohammed Yamin v. Shamim,*
1984 Crlj 1297 ; *Chaturbhuj v. Sita Bai,*
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LNIND 2007 SC 1374]:
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LNIND 2007 SC 1374] :
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34 *Ranchhoddas v. Emp.,*
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35 *Mulla, Mahomedan Law,* (1961), pp. 238, 303.

36 *Bhagwan v. Kamla,* (1974) II SCWR 468 (paras 10, 25); *Jagjit v. Jaswant,*
AIR 1963 SC 1521 [
LNIND 1963 SC 40]; *Mohammed Yamin v. Shamim,*
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37 *Mulla Mahomedan Law,* (1961), pp. 238, 303.

38 *Fyzee, Outlines of Mahomedan Law,* (1964), p. 206.

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40 *Nanak Chand v. Chandra Kishore Aggarwal,* [AIR 1970 SC 446 : *LNIND 1969 SC 209*](para 5) : [(1969) 3 SCC 802 : *LNIND 1969 SC 209*] : 1970 Crlj 522 .

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49 *Sethuratnam v. Barbara,* (1970) SC [CA 223/69, dated 25-3-1970].

50 *Lalit v. Sarumati,* (1977) Crlj 1657 (Gau).

51 *Ramesh Chander Kaushal Captain v. Yeena Kaushal,* AIR 1978 SC 1807 [LNIND 1978 SC 140](para 9) : (1978) 9 SCC 70 : 1979 Crlj 3 .

52 *Bai Tahira v. Ali,* (1979) Crlj 151 (paras 10-11) SC.

53 *Sabanu v. Abdool,* AIR 1987 SC 1103 [LNIND 1987 SC 368]: (1987) 2 SCC 285 [LNIND 1987 SC 368].

54 *Lalit v. Sarumati,* (1977) Crlj 1657 (Gau).

55 *Raj Kumari v. Dev Raj,* AIR 1977 SC 1101 [LNIND 1977 SC 87](para 9) : (1977) 2 SCC 190 [LNIND 1977 SC 87] : 1977 Crlj 940 .

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57 *Ahathinamiligai v. Arumugham,* (1988) Crlj 6 (para 10) Mad; *Bahuleyan v. Karthiyani,* (1978) KLT 73 (Ker).

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68 *Prasad* *v.* *Kesari,* AIR 1941 Pat 444 446 ; *Shareef v. Hanifa,* (1989)1 DMC 150 (All).

69 *Pannamma* *v.* *Neelakantan,* AIR 1967 Ker 216 [LNIND 1967 KER 25](para 4).

70 *Mohomed* *v.* *Emp.,* AIR 1946 Bom 344 .

71 *Pannamma* *v.* *Neelakantan,* AIR 1967 Ker 216 [LNIND 1967 KER 25](para 4); *Ashish v. Tewari,* AIR 1970 Delhi 98 [LNIND 1969 DEL 15](para 6); *Danlatram v. Saraswati,* (1978) Crlj 806 (para 6) AP.

72 *Ashish* *v.* *Tewari,* AIR 1970 Delhi 98 [

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73 *Sita Devi v. Harnarain,*
(1930) 32 Crlj 196 (198).

74 *Bhikaji v. Maneckji,*
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LNIND 1907 BOM 45].

75 *Ashish v. Tewari,*
AIR 1970 Delhi 98 [
LNIND 1969 DEL 15](para 6); *Danlatram v. Saraswati,*
(1978) Crlj 806 (para 6) AP.

76 *Chand v. Hyderbaig,*
(1972) 78 Crlj 1270 (para 6) (AP); *Padmamma v. Narsi,*
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1978 Crlj 1648 .

78 *Purnima v. Suresh,*
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96 *Manmohan v. Mahindra,* (1976) Crlj 1664 (All); *Bishambhar v. Anguri,* (1978) Crlj 385 (All).

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29 *Gabriel* *v.* *Phressya,* (1987) Crlj 688 (paras 9, 11) Ker; *Sivarama v. Bharathi,* (1986) Crlj 317 (para 3) AP.

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31 *Kongini* *v.* *Visalakshy,* (1986) Crlj 697 (para 8) Ker (DB).

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55 *Bhagwan v. Kamala,*
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67 *T.K. Rama Krishnan v. C.N. Subhadra,* 2007 Crlj 4212 Ker.

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70 *C. R. Manjunalli v. Smt. Pushpa,* 2007 Crlj NOC 923 Kant.

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90 *Shail Kumari Devi* *v.* *Krishan Bhagwan Pathak,*
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(2008) 9 SCC 632 [
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98 *Vasudevan* *v.* *Gouri,*
(1970) KLR 201 (para 5).

99 Cf. *Boomi* *v.* *Leela,*
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17 *T.K. Rama Krishnan v. C.N. Subhadra,* 2007 Crlj 4212 ker.

18 *Shail Kumari Devi v. Krishan Bhagwan Pathak,* AIR 2008 SC 2006 [*LNIND 2008 SC 864*]: (2008) 9 SCC 632 [*LNIND 2008 SC 1521*] : (2008) 3 SCC 839 (Cri) : 2008 Crlj 3881 .

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23 *Jahangir, v. Manoara,* (1991) Crlj 83 (DB) (Cal).

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25 *Surekha v. Ramhari,* 1990 Crlj 639 Ori.

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29 *Hari Narayan* *v.* *Rani,*
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32 *Sabita* *v.* *Satrighan,*
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37 *Rajendra* *v.* *Pramila,*
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39 *A Sundaram* *v.* *M. Sumathi,*
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40 *Prithviraj* *v.* *Pavanvir,*
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41 *Padmawati* *v.* *Kalyan,*
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42 *Kamla* *v.* *Nilmoni,*
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43 *Kamla* *v.* *Nilmoni,*
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44 *Kamla* *v.* *Nilmoni,*
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46 *Pradip* *v.* *Minu,*
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51 *Rajalaxmi* *v.* *Kothadapani,,*
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53 *Gupteswar v. Ram Peari,* AIR1971 Pat 181 (184).

54 *Radha Rani v. Mati Lal,* (1940) 2 Cal 525 ; *Amirkhan,* AIR 1948 Nag 387 .

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56 *Changi v. Manni,* (1977) Crlj 883 (All).

57 *Changi v. Manni,* (1977) Crlj 883 (All).

58 *Changi v. Manni,* (1977) Crlj 883 (All).

59 *Velukutty v. Prasannakumari,* (1985) Crlj 1558 (para 8) Ker.

60 *Velukutty v. Prasannakumari,* (1985) Crlj 1558 (para 8) Ker.

61 *Subanu v. Abdul,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](paras 11-12) : (1987) 2 SCC 285 [*LNIND 1987 SC 368*] : 1987 Crlj 980 .

62 *Subanu v. Abdul,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](paras 11-12).

63 *Siraj v. Hafizunnissa.,* AIR 1981 SC 1972 [*LNIND 1981 SC 384*](paras. 14, 20) : 1981 4 SCC 250 [*LNIND 1981 SC 384*] : 1981 Crlj 1430 .

64 AIR 1974 SC 1488 : (1974) 4 SCC 610 : 1974 Crlj 1089 .

65 *Subanu v. Abdul,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](paras 11-12) :

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66 This proposition is not affected by the *Muslim Women (Protection of Rights on Divorce) Act, 1986* [see Appendix]; *Mohd. v. Shah Bano,*
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LNIND 1985 SC 145] (*856*) :
AIR 1985 SC 945 [
LNIND 1985 SC 145]:
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

67 *Mohd. v. Shah Bano,*
(1985) 3 SCR 844 [
LNIND 1985 SC 145] (*856*) :
AIR 1985 SC 945 [
LNIND 1985 SC 145]:
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

68 This proposition is not affected by the *Muslim Women (Protection of Rights on Divorce) Act, 1986* [see Appendix].

69 *State v. Anwarbi,*
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LNIND 1955 CAL 179]; *Ishar v. Soma,*
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70 *State v. Anwarbi,*
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71 *Ghulam v. Noor Bibi,*
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72 *Ghulam v. Noor Bibi,*
(1971) 77 Crlj 1628 (J&K); *Shambu v. Ghalamma,*
AIR 1966 Mys 311 ; *Tejbai v. Shankarrao,,*
AIR 1966 Bom 48 [
LNIND 1965 BOM 9]; *Pannamma v. Neelakantan,*
AIR 1967 Ker 216 [
LNIND 1967 KER 25].

73
AIR 1974 SC 1488 : (1974) 4 SCC 610 : 1974 Crlj 1089 .

74 *Begum Subanu v. A.M.Abdul Gafoor,*
AIR 1987 SC 1103 [*LNIND 1987 SC 368*](para 12) : (1980) Crlj 980 : (1987) 2 SCC 285 [*LNIND 1987 SC 368*].

75 *Begum Subanu v. A.M.Abdul Gafoor,*
AIR 1987 SC 1103 [*LNIND 1987 SC 368*](para 12) : (1980) Crlj 980 : (1987) 2 SCC 285 [*LNIND 1987 SC 368*].

76 *Karnail v. Gurdial,*
(1974) Crlj 38 (Punj); *Jagannath v. Purnamashi,* AIR 1968 Or. 35 .

77 *Velukutty v. Prasannakumari,*
(1985) Crlj 1558 (para 8) Ker; *Sukra Devi v. State,* 2008 Crlj 1144 Jhar DB.

78 *Velukutty v. Prasannakumari,*
(1985) Crlj 1558 (para 8) Ker.

79 *Karnail v. Gurdial,*
(1974) Crlj 38 (Punj); *Jagannath v. Purnamashi,* AIR 1968 Or. 35 .

80 *Karnail v. Gurdial,*
(1974) Crlj 38 (Punj); *Jagannath v. Purnamashi,* AIR 1968 Or. 35 .

81 *Bilwati v. Phukan,* 1988 Crlj NOC 30 Gau.

82 *Mehbubai v. Nasir,*
1977 Crlj 391 Bom.

83 *Pandurang* v *Lila,*
1997 Crlj 3976 ; *Kasturi* v.*Ramaswamy,* 1979 Crlj 741 Mad.

84 *Chandra Kant v. Sulochana,*
1997 Crlj 520 Bom; *Chanda v. Preetam,* 2002 Crlj 1397 Bom.

1 *Baisnab Charan Jena v. Rita Rani Jena,* 1993 Crlj 238 Ori.

2 *Eswaran* v *Pichayee,* 1988 Crlj 3376 Mad.

3 *K. Yeeraiah v. Muthu Laxmi,* 1999 Crlj 624 Mad.

4 *N. T. Sandhya v. K.T. Narayanan,* 1999 Crlj 1663 Ker.

5 *Bhimla v. Surender Singh,* 1998 Crlj 1464 .

6 *A. Jagadishwari v. A. Bishapathy,* 1998 Crlj 2503 AP.

7 *Supro Devi v. State of Jharkhand,* 2008 CrLJ 1144 (1145) DB.

8 *Babita Ganwar v. Ram Pal Gangwal,* AIR2009 (NOC) 2944 : (2009) 51 ALJ 464 (All).

9 *Md. Abdul Sattar v. State of Assam,* AIR2009 (NOC) 212 (Gau).

10 *Gopi v. Krishna,* 2002 Crlj 1173 (P&H).

11 *Begum Subanu v. A.M.Abdul Gafoor,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](para 12) : 1980 Crlj 980 : (1987) 2 SCC 285 [*LNIND 1987 SC 368*].

12 *Kandasami v. Nachammal,* AIR 1963 Mad 263 [*LNIND 1962 MAD 237*].

13 *Mango v. Mangu,* (1976) Crlj 93 (para 7) (HP).

14 AIR 1974 SC 2488 : (1974) 4 SCC 610 : 1974 Crlj 1089 .

15 *Ammakutty* *v.* *Narayana,* AIR 1967 Ker 216 [*LNIND 1967 KER 25*]; *Haneefa v. Mariam,,* AIR 1969 Mad 414 [*LNIND 1968 MAD 131*].

16 *Velukutty* *v.* *Prasannakumari,* (1985) Crlj 1558 (para 8) Ker.

17 *Nalini* *v.* *Khuku Rani,* (1977) CHN 228 (para 8); *Samila v. Shankar,* (1978) Crlj 176 (NOC) (HP).

18 *Nalini* *v.* *Khuku Rani,* (1977) CHN 228 (para 8); *Samila v. Shankar,* (1978) Crlj 176 (NOC) (HP).

19 *Subramaniyam* *v.* *Panna Kshinunal,,* AIR 1958 Mys. 41 ; *Narayana v. Kondaiah,* (1976) Crlj 1240 (para 4) AP.

20 *Rachita* *v.* *Basanta,* (1987) Crlj 655 (para 6) Or.

21 *Gantapalli v. Gantapalli,* (1897) 20 Mad 470 (FB).

22 *Ponnamma* *v.* *Neelakanta,* AIR 1967 Ker 216 [*LNIND 1967 KER 25*](para 12); *Ayyub v. Zaibul,* (1974) 80 Crlj 1237 (para 3) All.

23 *Jadab* *v.* *Kausalya,* (1975) Crlj 856 (para 10) Or.

24 *Jadab* *v.* *Kausalya,* (1975) Crlj 856 (para 10) Or.

25 Reference, in this connection, may be made to the provisions of s. 18(2) of the Hindu Adoptions & Maintenance Act, 1956.

26 *Ganesh v. Sheomala,* (1951) Nag 233.

27 *Pannambalam* *v.* *Saraswathi,,* AIR 1957 Mad 693 [*LNIND 1956 MAD 199*].

28 *Narayana* *v.* *Kondiah,* (1976) Crlj 1240 (para 4) AP; *Udaivir v. Vinod,* (1985) Crlj 1923 (para 17) All; *Narendra v. Kamlesh,* (1977) All Crc 304.

29 *Ram Saran v. Ramm Piari,* AIR 1937 All 115 116 .

30 *Ponnamma v. Neelakanta,* AIR 1967 Ker 216 [*LNIND 1967 KER 25*](para 12).

31 *Sukla v. Ambarendu,* (1986) Crlj 891 (para 7) Cal.

32 *Siraj Mohmeed Khan Janmohamad Khan v. Hafizunnissa Yasinkhan,* AIR 1981 SC 1972 [*LNIND 1981 SC 384*](para 6) : (1981) 4 SCC 250 [*LNIND 1981 SC 384*] : 1981 Crlj 1430 ; *Ashok Kumar Singh v. Vith Addl.* Judge, AIR 1996 SC 333 [*LNIND 1995 SC 879*]: (1996) 1 SCC 554 [*LNIND 1995 SC 879*] : 1996 SCC (Cri) 161 .

33 *Radhamani v. Sonu,* (1986) Crlj 1129 (para 9) MP; *Pannambalam v. Saraswathy,,* AIR 1957 Mad 693 [*LNIND 1956 MAD 199*]; *Juliet v. Anthony,* (1985) Crlj 1613 (Mad).

34 *Subanu v. Abdul,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](para 12).

35 *Deochand v. State of Maharasthra,* AIR 1974 SC 1488 (para 3) : 1974 Crlj 1089 : (1974) 4 SCC 610 .

36 *Subanu v. Abdul,* AIR 1987 SC 1103 [*LNIND 1987 SC 368*](para 12).

37 Cf. *Mithu v. Siya,* (1975) Crlj 1694 (para 9).

38 *Deochand v. State of Maharasthra,* AIR 1974 SC 1488 (para 3) : 1974 Crlj 1089 : (1974) 4 SCC 610 .

39 *Mohorunnissa v. Abdul,* (1974) Crlj 78 (DB).

40 *Hara Sankar v. Bela Rani,*
(1976) Crlj 1867 (Cal).

41 Cf. *Mithu v. Siya,*
(1975) Crlj 1694 (para 9).

42 *Khatoon v. Yamin,,*
AIR 1982 SC 853 [
LNIND 1982 SC 4]:
(1982) 2 SCC 373 [
LNIND 1982 SC 4] :
1982 SCC (Cri) 439 .

43 *Siraj Mohmeed Khan Janmohamad Khan v. Hafizunnissa Yasinkhan,*
AIR 1981 SC 1972 [
LNIND 1981 SC 384](para 6) :
(1981) 4 SCC 250 [
LNIND 1981 SC 384] :
1981 Crlj 1430 ; *Ashok Kumar Singh v. Fifth Additional Sessions Judge, Varanasi,*
AIR 1996 SC 333 [
LNIND 1995 SC 879]:
(1996) 1 SCC 554 [
LNIND 1995 SC 879] :
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44 *Siraj Mohmeed Khan Janmohamad Khan v. Hafizunnissa Yasinkhan,*
AIR 1981 SC 1972 [
LNIND 1981 SC 384](para 6) :
(1981) 4 SCC 250 [
LNIND 1981 SC 384] :
1981 Crlj 1430 .

45 *Siddiq v. Zubeda,,*
AIR 1952 All 616 [
LNIND 1949 ALL 19]: *Geeta v. Siva Charan,*
(1975) Crlj 137 (para 6) Raj; [contra. *Narayan v. Bhagyalakshmi,*
(1984) Crlj 276 (para 16) Knt; *Gopala v. Padmini,*
(1978) Ker LT 485 ; *Ghulam v. Parveenpatima,* (1981) Crlj NOC 2].

46 *Siddiq v. Zubeda,,*
AIR 1952 All 616 [
LNIND 1949 ALL 19]: *Geeta v. Siva Charan,*
(1975) Crlj 137 (para 6) Raj; [contra. *Narayan v. Bhagyalakshmi,*
(1984) Crlj 276 (para 16) Knt; *Gopala v. Padmini,*
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47 *Siddiq v. Zubeda,,*
AIR 1952 All 616 [
LNIND 1949 ALL 19]: *Geeta v. Siva Charan,*
(1975) Crlj 137 (para 6) Raj; [contra. *Narayan v. Bhagyalakshmi,*
(1984) Crlj 276 (para 16) Knt; *Gopala v. Padmini,*
(1978) Ker LT 485 ; *Ghulam v. Parveenpatima,* (1981) Crlj NOC. 2].

48 *Subanu* *v.* *Abdul,*
AIR 1987 SC 1103 [
LNIND 1987 SC 368](para 12).

49 *Sampuran* *v.* *Gurdev,*
(1985) Crlj 1072 (P&H).

50 *Babulal* *v.* *Sunita,*
(1987) Crlj 525 (paras 8, 10) MP; *Amina v. Mohamedali,*
(1985) Crlj 1909 (para 7) Bom.

51 *Khangembanu* *v.* *Yumnam,*
1995 Crlj 2327 Gau.

52 *Jadumani* *v.* *Brundabati,*
1999 Crlj 354 Ori.

53 *Saygo Bai* *v.* *Cheeru Bajrangi,*
AIR 2011 SC 1557 [
LNIND 2010 SC 1116]:
(2010) 13 SCC 762 [
LNIND 2010 SC 1116] :
(2011) 2 SCC 415 (Cri).

54 *Adwaitya* *v.* *Tahpani,*
1999 Crlj 1209 .

55 *Deb Narayan Halder* *v.* *Anushree Halder,*
AIR 2003 SC 3174 [
LNIND 2003 SC 705]:
(2003) 11 SCC 303 [
LNIND 2003 SC 705] :
2004 SCC (Cri) 164 . :
2003 Crlj 4470 .

56 *Anil Kumar v. State of Uttaranchal,* 2007 Crlj NOC 725 Uttara.

57 *Rajpal* *v.* *State of U.P.,*
AIR 2007 NOC 1269 (All) :
2007 (2) ALJ 512 .

58 *Ram Chand* *v.* *Jiwan,*
AIR 1958 Punj 431 .

59 *Yeeranna* *v.* *Sumitra Bai,*
(1990) 1 Crimes 355 :
(1990) 1 DMC 49 (Kant).

60 *Satya* *v.* *Jamnna,*
(1971) 77 Crlj 1789 (Del).

61 *Ramsaran* *v.* *Ram* *Piari,* (1937) All 430 .

62 *Ramsashi* *v.* *Nirode,* AIR 1948 Cal 186 .

63 *Ramsashi* *v.* *Nirode,* AIR 1948 Cal 186 .

64 *Satya* *v.* *Jamnna,* (1971) 77 Crlj 1789 (Del).

65 *Chimata* *v.* *Nathanail,* 1991 Crlj 291 AP.

66 *Santosh Prasad v. State of Bihar,* AIR2009 (NOC) 2642 (Pat).

67 *K.* *Pandian* *v.* *A.* *Savithri,* 1999 Crlj 8 (Mad).

68 *Gurmit* *Kaur* *v.* *Surjeet* *Singh,* (1996) 1 SCC 39 [*LNIND 1995 SC 1200*] : (1996) 1 DMC 354 : (1995) 4 Crimes 766 .

69 *Vanomala* *v.* *H.M.* *Ranganatha* *Bhatta,* (1996) 1 MLW 7 (Cri) (SC).

70 *Malayaiah* *v.* *G.S.Vasanata* *Laxmi,* 1997 Crlj 163 Kant.

71 *Narasimha*, AIR 1947 Mad 304 [*LNIND 1946 MAD 213*]; *Ponnamma v. Neelakanta,* AIR 1967 Ker 216 [*LNIND 1967 KER 25*](para 6); *Murlidhar v. Pratibha,* (1986) Crlj 1216 (para 5) Bom.

72 *Narayana* *v.* *Kondiah,* (1976) Crlj 1240 (para 4); *Udaivir v. Vinod,* (1985) Crlj 1923 (para 17) All; *Narendra v. Kamlesh,* (1977) All Crc 304.

73 *Narayana* *v.* *Kondiah,* (1976) Crlj 1240 (para 4); *Udaivir v. Vinod,* (1985) Crlj 1923 (para 17) All; *Narendra v. Kamlesh,* (1977) All Crc 304.

74 *Murlidhar* *v.* *Pratibha,*
(1986) Crlj 1216 (para 5) Bom.

75 *Mampekkattu* *v.* *Mampekkat,*
(1986) Crlj 652 (Ker).

76 *Mampekkattu* *v.* *Mampekkat,*
(1986) Crlj 652 (Ker).

77 *Mampekkattu* *v.* *Mampekkat,*
(1986) Crlj 652 (Ker).

78 *Bhupinder* *v.* *Daljit,*
AIR 1979 SC 442 [
LNIND 1978 SC 327]:
(1979) 1 SCC 352 [
LNIND 1978 SC 327] :
1979 Crlj 198 .

79 *Bhupinder* *v.* *Daljit,*
AIR 1979 SC 442 [
LNIND 1978 SC 327]:
(1979) 1 SCC 352 [
LNIND 1978 SC 327] :
1979 Crlj 198 .

80 *Amarendra* *v.* *Gouri,*
1990 Crlj 2415 :
(1999) 2 CHN 84 (Cal); *Kalabati v. Hasan,*
1981 Crlj 74 All.

81 *Jagannath* *v.* *Sarjoo,*
(1971) 77 Crlj 158 ; *Rajendran v. Ravathy,*
(1994) Crlj 3017 (Mad).

82 *Bhupinder* *v.* *Daljit,*
AIR 1979 SC 442 [
LNIND 1978 SC 327]:
(1979) 1 SCC 352 [
LNIND 1978 SC 327] :
1979 Crlj 198 .

It would not, therefore, be proper to cast on her the onerous burden of against making an application under s. 125(1) for a fresh order of maintenance merely because after obtaining the first order she was persuaded to resume cohabitation and then, finding it impossible to live together, she again separated. [83] [See also under s. 127(2),*post.*]

However, when the decree of restitution of conjugal rights has been passed against the wife and the Court held that there was no sufficient reason for the wife to live separately from her husband, the determination of the Civil Court would prevail and the maintenance liable to be cancelled. [84]

But when *ex parte* decree of restitution of conjugal rights has been passed against the wife and the husband has not been given any intimation to the wife nor did he seek to get it executed, the wife would not become disentitled to claim maintenance under *s. 125 Cr.P.C.* against the husband.[85]

72. 'Adultery'.—

Though direct evidence as to adultery may not be possible to adduce because of the very nature of the offence, there must be some evidence showing opportunity and desire to commit the offence or access of the man to the woman. [86] The Court cannot make such finding on hearsay evidence. [87] The Court should always guard itself against any attempt on the part of the husband to defeat an order of maintenance by resorting to an afterthought. [88]

73. Can the order of cancellation have retrospective effect?—

There has been a sharp controversy as to the date from which the cancellation of the order of maintenance passed under sub-section (1) shall have effect.

I. Some High Courts [89] have held that when the order is cancelled under sub-section (5), the order under sub-section (1) shall be deemed never to have existed, as a result of which the order under sub-section (1) cannot be enforced even for any period anterior to the date of cancellation or the application under sub-section (5) when the grounds of cancellation, *e.g.* , adultery, may not have existed.

II. The *better* view [90] is that an order of cancellation should have no retrospective effect, for the following reasons :

(a) An order made under sub-section (1) remains effective until it is cancelled under sub-section (5). [91]

(b) The claim for the allowance granted for each month gives rise to an independent right; hence, even though the wife has subsequently become adulterous, there is no reason why she should be deprived of arrears of maintenance for the period when she had been leading a virtuous life, and yet the husband had neglected to maintain her. [92]

(c) An unreasonable result which would arise from giving retrospective effect to the order of cancellation would be that the wife would have to refund the amounts which had justly been paid to her before her disqualification arose. [93]

(d) Though the grounds mentioned in sub-sections (4) and (5) are common, the two sub-sections deal with different situations. While sub-section (4) relates to a period anterior to the making of the order under s. 125(1) and any of the contingencies mentioned stand as a bar to any order of maintenance in favour of the wife, sub-section (5) refers to the period subsequent to the passing of the order under s. 125(1). In this latter case, the contingency is a ground for cancellation of the order of maintenance already made; the cancellation would take place from the date of the order of cancellation, so that the wife would be entitled to maintenance for the period up to the date of the order of cancellation, [1] even though she may be living in adultery since the order under s. 125(1).

(e) The cancellation of maintenance allowance of the divorced wife that she had surrendered her right of maintenance in agreement for divorce for mutual consent is not proper since such agreement is opposed to the public policy. [2]

74. Cancellation of order of maintenance in consequence of Civil Court decree. —

See under s. 127(2),*post* .

75. Cancellation of order of maintenance in case of a divorced wife.—

See under s. 127(3),*post* .

76. Evidence.—

1. The general rule is that it is for the Petitioner to produce evidence in support of her case, according to the requirements of the section, *e.g.* , that (a) he or she is unable to maintain himself or herself; (b) that the Respondent, having sufficient means is neglecting or refusing to maintain the Petitioner. [3]

2. Of course, where the only defence of a husband is the adultery of the wife, he ought to begin his case. [4] But if there are several pleas, including adultery, the general rule [5] should prevail, but after the husband adduces evidence as to adultery, the wife should be permitted to lead further evidence in rebuttal of the evidence led by the husband in support of the allegation of adultery. [6]

77. Appeal.—

1. No appeal under the Code lies against an order under s. 125, since there is no 'accused' nor 'conviction' for any offence on 'trial' in such proceeding, within the meaning of s. 374,*post* .

2. But appeal lies, by special leave, to the Supreme Court, under Art. 134(1)(c) [7] or Art. 136[8] of the *Constitution* .

78. Review.—

No review lies against an order under s. 125, except to correct a clerical or arithmetical error. [9]

79. Revision.—

Revision lies, under s. 397 [*old* s. 435] to the Sessions Judge [10] or the High Court [11] against an order granting [12] or refusing an application for maintenance under s. 125; [13] or an order cancelling or varying an order of maintenance. [14]

80. Changes made by the new Code.—

The following momentous changes introducing the law on this point have been made in accordance with the recommendations of the Joint Committee on the Bill of 1970: [15]

(a) The Sessions Judge's power in revision has been made as final as that of the High Court [s. 399(1)], *omitting* the provision for *reference* to the High Court in *old* s. 438.

(b) When an application for revision has been made before and disposed of by the Sessions Judge, no further proceeding by way of revision will lie before the High Court [s. 399(3)].

(c) By reason of s. 397 (which corresponds to *old* s. 435, with changes), the aggrieved party who seeks to move for revision of an order under s. 125, shall have to make his choice as between the Sessions Judge and the High Court :

> If he makes his application for revision to the Sessions Judge, he cannot make another application before the High Court.
>
> In such a case, the jurisdiction of the High Court is barred to entertain a subsequent application, which cannot be revived by the applicant by allowing his application before the Sessions Judge 'dismissed as not pressed'. [16]

81. Grounds for revision.—

1. The Sessions Court or the High Court may interfere in revision—

   (i) if the Magistrate has erred in law; [17]

   (ii) if he has failed to exercise his discretion judicially; [18]

   (iii) if he grants maintenance to a woman without coming to a finding that she is the wife of the opposite party; [19]

   (iv) if he grants maintenance to a wife [20] or other dependant without taking into account the separate income or means of the Petitioner; [21] or in the absence of any averment that the Petitioner is unable to maintain himself or herself; [22]

   (v) if he refuses maintenance to a child on the ground of any fault on the part of the mother in whose custody the child is living; [23]

   (vi) if he has made the order granting maintenance after a Civil Court of competent jurisdiction has held that the Petitioner is *not* entitled to maintenance. [24]

2. But in the absence of the foregoing conditions, the superior Court would not interfere—

   (i) Merely because that Court would have come to a different conclusion on the evidence, sitting as a Court of original jurisdiction, [25] or as a Court of appeal. [26]

   (ii) On the ground that the marriage between the parties is invalid, [27] or that the Respondent was not the father of the child [28] because the Civil Court is the proper forum to agitate this question. [29]

   (iii) That the proceedings were held in a wrong place, which has not occasioned a failure of justice. [30]

3. A Court of revision would not interfere with the amount of maintenance awarded by the Magistrate unless it is grossly inadequate [31] or so manifestly perverse that it requires interference without any further argument on the subject. [32] Where the Sessions Judge confirms the quantum of maintenance awarded by the Magistrate, the High Court would not ordinarily interfere with such concurrent finding of fact. [33]

4. No new ground is allowed in the Petitioner's Petition for revision against the order dismissing her application for maintenance. [34]

5. The High Court should not interfere with concurrent findings of the Courts below, to quash an order granting maintenance, particularly where a suit before the Civil Court would be open to the Revision Petitioner and a more appropriate remedy to decide the issue involved, such as paternity, legitimacy or the like. [35]

6. The order granting maintenance has been passed by the Magistrate by properly appreciating the evidence. The Revisional Court without properly appreciating the contention of the wife, by a cryptic order came to the conclusion that the wife failed to establish refusal by the husband to maintain. Such finding is improper and liable to be set aside by the High Court. So, the High Court directed the husband to pay all arrears towards the maintenance. [36]

82. Limitation for application for revision.—

90 days from the impugned order, under

Art. 131 of the Limitation Act, 1963 . [37]

83. Remedy under Art. 227.—

1. An order made under the present section can be quashed under *Art. 227 of the Constitution* , where it is vitiated by a defect of jurisdiction, *e.g.* —

   Where the Court below has refused maintenance to a divorced wife on the ground that she was living in adultery, relying merely on suspicion or speculation. [38]

2. Of course, in a petition under Art. 227, the High Court cannot interfere with findings of fact.

3. A Division Bench [39] of the Bombay High Court has observed that where a revision application before the High Court is barred by *s. 397(3),Cr.P.C.* , because the Petitioner has made an earlier application for revision before the Sessions Judge, the Petitioner cannot get out by filing before the High Court, a Petition under Art. 227. The soundness of this view is open to question, because Art. 227 is a constitutional jurisdiction, which cannot be taken away by an alternative remedy by statute, though, of course, in such a case, the High Court should be chary in exercising its jurisdiction under Art. 227.

84. Interference with order of Sessions Judge, in exercise of inherent power, under s. 482.—

1. Though after an aggrieved party has preferred an application to the Sessions Judge for revision, a second petition for revision before the High Court is barred by s. 397(3), the High Court may, in exercise of its inherent power "to secure the ends of justice", interfere with the order passed by a Sessions Judge in revision against an order under s. 125 where the view taken by the Sessions Judge is *shocking* to the judicial conscience of the High Court; but it cannot use this extraordinary power in such manner that the effect would be just to entertain a second revision which has been expressly barred by s. 397(3). [40]

2. It may also lie to prevent abuse of the process of the Court. [41]

85. Suit for maintenance.—

1. Since the proceeding under s. 125 is a summary one, the findings of the Magistrate in this proceeding are *not final* and the parties may agitate their rights in a Civil Court. [42]
2. In fact, the question of *status* of the parties can be determined only in a suit, notwithstanding the result of the proceeding under s. 125. [43] Thus,

   Where an application of a child under s. 125 is dismissed on the ground that the paternity of the Respondent has not been proved, the child may bring a suit for declaration under

Section 34 of the Specific Relief Act, 1963 , for a declaration that he or she is the legitimate or illegitimate child (as the case may be) of the Respondent.[44]

If such suit is decreed, the child would be entitled to present a fresh application [45] under s. 125 on the footing of that decree or to get the earlier order cancelled or varied, [46] under s. 127(2), according to which it is obligatory upon the Magistrate to act in conformity with the Civil Court decision which settles the status of the parties. [47]

3. The validity of a Civil Court decree relating to status cannot be questioned by the Magistrate, [48] except when it is a nullity, *e.g.* , a foreign decree obtained by fraud. [49]

4. While decreeing such suit, the Civil Court should take into account the money already received by the plaintiff under an order, if any, made in his favour under s. 125 of the Code [s. 127(4),*post*].

5. But where there is no dispute as to the status of the parties, an order for maintenance passed under s. 125 cannot be assailed in a suit before the Civil Court except on the ground of *fraud* . [50]

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83 *Kasinath v. Padmabati,* AIR 1956 Or 199 .

84 *Satish v. Smt. Yoglata,* AIR2009 (NOC) 819 (Raj).

85 *Anand Kumar Srivastava v. State of U.P.,* AIR2009 (NOC) 497 : (2008) 8 ALJ 230 (All) .

86 *Kulwanto v. Jodhan,* (1948) 2 DLR 177 179Pat.

87 *Kulwanto v. Jodhan,* (1948) 2 DLR 177 179Pat.

88 *Kulwanto v. Jodhan,* (1948) 2 DLR 177 179Pat.

89 *Kalyani v. Nirmal,* AIR 1957 Cal 115 ; *Rukmini v. Bhan Singh,* AIR 1963 AP 407 [*LNIND 1962 AP 182*].

90 *Mehrunnisa v. Noor Md.,* AIR 1971 All 138 (paras 39, 41-42); *Jagmaiah v. Seshirekhamma,* (1976) Crlj 219 (para 5) AP.

91 *Mehrunnisa v. Noor Md.,* AIR 1971 All 138 (paras 39, 41-42).

92 *Mehrunnisa* *v.* *Noor* *Md.,*
AIR 1971 All 138 (paras 39, 41-42).

93 *Mehrunnisa* *v.* *Noor* *Md.,*
AIR 1971 All 138 (paras 39, 41-42).

1 *Jagmaiah* *v.* *Seshirekhamma,*
(1976) Crlj 219 (para 5) AP.

2 *Suresh Kumar v. Vidya,* AIR2009 (NOC) 213 (HP).

3 *Balraj* *v.* *Sudesh,*
AIR 1962 Punj 266 .

4 *Subbayamma* *v.* *Venkata,*
AIR 1954 Mad 90 [
LNIND 1952 MAD 79].

5 *Balraj* *v.* *Sudesh,*
AIR 1962 Punj 266 .

6 *Balraj* *v.* *Sudesh,*
AIR 1962 Punj 266 .

7 Cf. *Deochand* *v.* *State* *of* *Maharashtra,*
AIR 1974 SC 1488 : (1974) 4 SCC 610 :
1974 Crlj 1089 .

8 Cf. *Bhagwan v. Kamla,* (1974) II SCWR 468; *Rajkumari Vijh v. Dev Raj Vijh,*
AIR 1977 SC 1101 [
LNIND 1977 SC 87](paras 18-19) :
(1977) 2 SCC 190 [
LNIND 1977 SC 87] :
1977 Crlj 940 .

9 *Nandan* *v.* *Mahamaya,*
(1913) 21 CWN 344 ; *Venkayya v. Paidanna,*
AIR 1923 Mad 707 [
LNIND 1923 MAD 75].

10 Cf. *Nanak* *v.* *Chandra,*
AIR 1970 SC 446 [
LNIND 1969 SC 209](para 2) :
(1969) 3 SCC 802 [
LNIND 1969 SC 209] :
1970 Crlj 522 .

11 *Sukhwanti* *v.* *State,* AIR 1968 All 214 [*LNIND 1967 ALL 50*](para 6).

12 Cf. *Ayyub* *v.* *Zaibul,* (1974) 80 Crlj 1237 (All) .

13 *Ignatius* *v.* *Alagamma,* (1934) 36 Crlj 1044 .

14 Cf. *Ali* *Md.* , AIR 1926 Sind 270 .

15 Com. I-5, p viii (on Clauses 397-402), in the light of 14th Rep. of the Commission, Vol. 2, p. 826.

16 *Mohammad* *v.* *Shamin,* (1977) Crlj 116 (All) .

17 *Mohammad* *v.* *Shamin,* (1977) Crlj 116 (All) .

18 *Mohammad* *v.* *Shamin,* (1977) Crlj 116 (All) .

19 *Lakshmi* *v.* *Andiammal,* (1938) 39 Crlj 228 .

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21 *Manmohan* *v.* *Mahundra,* (1976) Crlj 1664 (All) .

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27 *Palmerino* *v.* *Palmerino,*
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(1927) 28 Crlj 51 (Bom) .

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32 *Jagir* *v.* *Jaswant,*
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LNIND 1960 SC 105]:
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47 Cf. *Raghubar* *v.* *Emp.,*
AIR 1915 Oudh 113 .

48 *Satya* ,
AIR 1975 SC 105 [
LNIND 1974 SC 290]:
(1975) 1 SCC 120 [
LNIND 1974 SC 290] : 1975 Cr11J 52.

49 *Satya* ,
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IX
ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

S. 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.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases:

Provided **that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.**

(3) The Court in dealing with applications under Section 125 shall have power to make such order as to costs as may be just.

1. Scope of sub-section (1) : Jurisdiction for proceedings for maintenance.—

1. Since the present Chapter providing for maintenance of wives, children and parents serves a social purpose, the present section prescribes alternative forums to enable a deserted wife or child or neglected parent to get urgent relief. [51] Proceedings for maintenance under s. 125 may be taken against the husband, father [52] or son [53], as the case may be, before a Magistrate of the First class,—

(a) in the place where he resides, [54] permanently or temporarily; or (b) where he last resided in any district in India with his wife, or with the mother of the illegitimate child (when the application is on behalf of such child); or (c) when the applicant is the wife, where she herself resides.

'Is'.— This would refers to the presence or existence of the person in the district where the proceedings are taken. [55] It is much wider than the word 'resides' and is not limited by the *animus manendi* of the person or the duration or the nature of his stay. [56] It is intended to reach a person, who deserts his wife or child, leaving either or both helpless in any particular district and goes to a distant place or a foreign country, but subsequently returns to that district or a neighbouring one on a casual or a flying visit. The wife can take advantage of such visit and file a petition in the district where he is for the time being. So, too, if the husband who deserts his wife, has no permanent residence, but is always on the move, the wife can catch him at a convenient place, and file a petition under this section. She may accidentally meet him at a place where he happens to come by coincidence and take action against him before he leaves that place. [57]

'Resides', 'last resided'.— 1. The word 'reside' does not require a permanent residence or domicile. It means something more than a flying visit to stay at the particular place. [58] There should be an intention to stay for a period, the length of the period depending upon the circumstances of each case,—but no such continuity as to amount to a domicile is required. [59] Thus,

A. The word 'resides' would not include the following places of casual visit—

(i) A, living in a village, goes to a nearby town to attend a marriage or to make purchases, and stays there for such purpose for a day or two. [60]

(ii) A, a tourist, goes from place to place, and stays for a few days in each of the places he visits. [61]

B. On the other hand, the place B, in the following cases, would fall under the word 'resides', for the purposes of jurisdiction under this section :

(i) A, a resident of a village, suffering from a chronic disease, goes along with his wife to town B, and remains there for treatment for some 6 months. [62]

(ii) A permanent resident of a town goes to a city B, for higher education and stays there for a length of time to complete his studies. [63]

2. 'Resides' refers to the place of residence on the date of filing the application under s. 125. [64]

3. The expression 'last resided' must also be interpreted in consonance with the meaning of the word 'reside' as given above. It would then refer to the place where the person had his last temporary residence,—in the company of his wife,—within the territories to which the Code extends [s. 1(2),*ante*], and cannot refer to residence in a foreign territory, for an Indian Act cannot be so interpreted as to confer jurisdiction upon a foreign Court. [65]

2. 'Or where his wife resides'.—

1. These words, added to Clause (b) of the *new* s. 126(1), introduces a *momentous change* in the law relating to jurisdiction in proceedings under the present section. It was introduced according to the recommendation of the Law Commission [66] as follows:

> "Under sub-section (8) [of *old* s. 488], the place where the wife resides after desertion by the husband is not material as regards the venue of the proceedings, though the place where the husband resides—even temporarily—is relevant. Often deserted wives are compelled to live with their relatives far away from the place where the husband and the wife last resided together. They would be put to great harassment and expenditure, unless the venue of the proceeding is *enlarged* so as to include the place where they may be residing on the date of the application".

2. In view of this enlargement of the jurisdiction by including the place of wife's residence, many of the controversies which arose under the *old* section are eliminated. Thus,—

> "Notwithstanding the pronouncement of the Supreme Court in *Jagir's* case [67] that a wife could, by reason of the word 'is', bring an application under the present section against her husband at a place where he happens to be at the time the proceedings are initiated, irrespective of the absence of the husband of any *animus manendi* as to the duration or nature of his stay at such place, a single Judge of the Calcutta High Court [68] held that the principle laid down by the Supreme Court would not apply where the presence of the husband at the place where the wife was residing had been *compelled* by some act of the wife herself, *e.g.* , by bringing a criminal cases against the husband or even a previous proceeding for maintenance, in a wrong jurisdiction to defend which the husband was obliged to stay at that place for some time. It is clear that no such objection could be raised by the husband in the cited case, [69] had it been instituted after the coming into force of the *new* Code, because the wife was admittedly residing in Calcutta at the time of the application though the husband was residing at Delhi on account of his employment. Hence, an application for maintenance could validly be brought by the wife before a Calcutta Magistrate.

3. It is to be noted, however, that in the case of a wife, under Clause (b), the verb used is 'resides' and there is no 'is' as in Clause (a). Hence, the wife would not be entitled to bring an application at the following places on the ground of her own residence—

> Where she has been on a casual visit at the time of the application. [70]

4. Of course, the words 'resides', as has been stated earlier, would include both permanent and temporary [71] residence.

3. 'District'.—

Under the *old* s. 488(8) some difference of opinion arose as to the meaning of the words 'in any district':

A. The consensus of opinion was that the proceeding could be instituted in any competent Court (*i.e.* , a First Class Magistrate) of the *district* or any of the districts [72] within which the husband was or resided. [73]

B. The Madras [74] and Andhra High Courts, [75] however, took the view that such proceedings could be instituted only in that Court which had jurisdiction over the particular *place* where the husband was or resided and not any other Court of *that* district.

The former view, [76] which was commended to Law Commission, [77] is preferable, because the word 'district' is not limited by any other words.

Hence, if the husband or the wife resides within district A, the wife would be entitled to initiate proceedings for maintenance under s. 125 in *any* of the competent Courts within district A. [78]

The maintenance petition has been filed by the Family Court of the district concerned. The respondent resides in the same district but to territorial jurisdiction of another Magistrate. The Family Court dismisses the petition on the ground of lack of jurisdiction. But an application can be filed against any person in any district where he resides. So, when the Family Court assumed the jurisdiction to entertain the petition under *s. 125 Cr.P.C.* , the jurisdiction would be of the Family Court of the said district where the Family Court for the district is situated. So, the order of the Family Court has been set aside and the Supreme Court directed the Family Court for fresh consideration.[79]

4. Alternative Forums. —

Section 126 Cr.P.C. provides for alternative forums so that a deserted wife, neglected child or parent may require urgent relief.[80]

A petition filed by wife at the place she resides is quite competent under s. 126(1) *Cr.P.C.* and the Magistrate committed illegality by refusing to entertain the petition on the ground that the husband was not residing within his jurisdiction.[81]

Residence of the wife may be temporary or permanent. [82]

When the wife was residing at Kanpur with her uncle and the wife was last beaten up there, the Court at Kanpur will have the jurisdiction even is such residence of the wife was temporary. [83]

Because of alternative forums have been prescribed for wife and children to apply for proceedings for maintenance it can be filed at the place where the wife and children reside. [84]

5. Parent's application : forum. —

The question arises as to whether the parent can present the application for maintenance at the district of the place where he or she resides. There were conflict of decisions of different High Courts on this point.

Calcutta High Court has held that the parent can file the petition only at the place where the son or daughter against whom maintenance is claimed resides. [85]

But contrary view has been expressed by the Allahabad [86] and Karnataka [87] High Courts, stating that the father or mother can file the maintenance application also at the place where he or she resides. But the Supreme Court has settled the law on the subject by holding that such an application filed by the parent has to be filed at the place where the person against whom the maintenance is claimed. [88]

6. Effect of proceeding in a wrong jurisdiction.—

1. It is evident that the jurisdiction to entertain a proceeding under s. 125 is twofold. (a) The *power* to try an application under s. 125 is confined to a Magistrate of the First Class [s. 125(1),*ante*]. It goes to the root of the matter, and any order passed by any other Magistrate, of any other rank, would be void, [89] and the defect of jurisdiction cannot, in such a case, be cured by invoking s. 462 (*post*). (b) The *territorial* jurisdiction for a proceeding under s. 125 is dealt with in s. 126(1), and a First Class Magistrate having jurisdiction over any of the places mentioned in Clauses (a)—(c) of sub-section (1) would be competent to try such proceeding. If a First Class Magistrate of any other place, having the *power* but not the territorial jurisdiction to entertain an application under s. 125, the defect is curable, provided the conditions of that section are satisfied. [90]

2. In view of s. 462 [*old* s. 531], an order under Sections 126-126 cannot be set aside on the ground that the proceedings had been taken in a wrong *place,* contrary to the provisions of s. 126, unless it has occasioned a failure of justice. [91]

3. But s. 462 would come into operation only after a decision or order has been made in the proceeding [92] If an objection as to territorial jurisdiction is taken before the Magistrate during the proceedings before him, it should be his duty to determine that question, for s. 462 does not operate to confer a jurisdiction upon him which he has not got under the law. The section can be invoked only when the decision of the Magistrate is challenged before a superior Court. [93]

7. Resides, meaning.—

The word ‘resides’ means the place of residence at the time of filing the petition. [94]

When both the husband and wife reside in the same district, the wife can file an application at any place within that district. [95]

8. Family Court.—

In view of *Section 7 of the Family Courts Act*, 1985 in the areas where the Family Courts have been established, the jurisdiction of the Judicial Magistrate to entertain the petition under *s. 125 Cr.P.C.* has ceased. So, the application for maintenance by the wife, child or parent has to be filed before the Family Court having the jurisdiction. Such jurisdiction will be governed by the provisions of s. 126(1) of the Code. This is because the Family Court has to be governed by Chapter-IX of the Code.[96] An appeal under *Section 19(1) of the Family Courts Act* cannot lie against an order of maintenance passed by a Family Court under *s. 125 Crpc*. Section 125 comes under Chapter IX of the *CrPC* and there is a bar on filing appeal against an order passed under Chapter IX of the Code.[97]

9. Scope of sub-section (2).—

1. This sub-section reproduces *old* s. 448(6), with the addition of the words ‘subject ... just and proper’ at the end of the *proviso* to the sub-section.

   It lays down two requirements as to how the evidence in a proceeding under s. 125 is to be taken—(a) it must be taken in the presence of the party against whom the order is to be made, or his pleader where the personal presence of the party has been dispensed with; (b) the evidence so taken must be recorded in the manner prescribed for summons-cases, *i.e.*, in the manner laid down in s. 251 [*old* s. 242].

2. The requirement of this sub-section is mandatory. Hence, if the evidence on which the order under s. 125 is passed is not taken in the presence of the party against whom it is made (husband, father or son, as the case may be), in a case where his personal attendance has *not* been dispensed with, the order must be set aside, [1] even though the evidence had been taken in the presence of the party’s lawyer.

3. Personal attendance can be dispensed with only for good reasons. [2]

10. How the evidence is to be taken.—

1. This sub-section is a self-contained provision laying down the procedure to be followed by the Magistrate before whom an application under s. 125 has been filed. Sections 200- 203 have no application to a proceeding under this Section. [3] It does not contemplate any preliminary inquiry before

issuing notice to the opposite party. [4] The words "all evidence ...shall be taken in the presence of the person..." indicate that there shall be only one inquiry held after notice to the party against whom maintenance is claimed. [5]

2. The procedure laid down in this sub-section is mandatory and the Magistrate has no discretion to deviate from this procedure having regard to the high status of the opposite party or other extraneous considerations. [6]

3. It is the duty of the Court, before making an order under s. 125(1), to find definitely, though in a summary manner, that the applicant is the wife, child or parent of the opposite party. [7] This finding must be arrived at on evidence of both parties, taken in the presence of the opposite party, after issuing notice to him. He has no jurisdiction to dismiss the application, on an *ex parte* examination of the applicant or any other evidence on his or her behalf, coming to a finding that the applicant has no *prima facie* case. [8]

4. The requirement as to recording of evidence, as in a summons case [s. 274(1)— *old* s. 355], is also mandatory, and the exemption of Presidency-Magistrates from this requirement, in the *old* s. 355 has also been omitted by the *new* Code. In the result, all Magistrates shall, in a proceeding under s. 125 of this Code, record the substance of the evidence of each witness examined in the proceedings, in the form of a memorandum, as the examination of each witness proceeds. [9]

5. The Court has no jurisdiction to make any other order under s. 125, on affidavits. If this is done, the order will be invalid. [10]

6. When the wife filed the petition for maintenance the husband appeared on receiving the summons, but he did not attend the future dates. The Magistrate then called upon the petitioner wife to file affidavits in support of the petition and on the basis of the said affidavits, the order of maintenance was passed *ex parte* . As the procedure to be adopted is of the summons procedure, the recording of evidence is a must. Even if the Magistrate decides to hear the matter *ex parte* , he has to record evidence before disposing of the petition and disposing of the matter on affidavits is illegal. [11]

11. Evidence to be recorded in presence of the opposite party.—

Evidence has to be recorded in presence of the opposite party as in summons procedure. [12]

However, when the party has been granted personal exemption, then the evidence may be recorded in the presence of the lawyer who is representing the opposite party. [13]

12. Service, how to be effected.—

1. Before an *ex parte* order under the present sub-section can be made, the notice of the application must be served in the manner laid down in Sections 62- 65 [*old* Sections 69- 71], [14] which must be strictly complied with. Thus, substituted service would not be good in the absence of evidence that personal service could not be effected by the exercise of due diligence. [15] Service by post or publication in a local newspaper cannot be regarded as a substitute for service as required by Sections 62- 65 (as may be applicable). [16]

2. In a proceeding for setting aside the *ex parte* order, if it appears that the service has not been in compliance with the foregoing provisions, which are mandatory, the *ex parte* order must be set aside. [17] , [18]

13. Service by registered post.—

As the proceedings under *s. 125 Cr.P.C.* is a civil proceeding, the failure to serve notice in accordance with Chapter VI of *Cr.P.C.* is not fatal. The notice to the opposite party can be served even by registered post and if the Magistrate is satisfied that the service by registered post has been duly made but the opposite party is avoiding to attend the Court to contest the application, then the Magistrate can proceed *ex parte* . [19]

14. Proviso: When an order may be passed ex parte .—

1. While the normal rule, laid down in the substantive part of Clause (2), is that an order under s. 125 can be made only after a hearing in presence of both parties, the Proviso lays down that the Magistrate may make an *ex parte* order where he is satisfied that the Opposite Party is (a) *wilfully* avoiding service, or (b) *wilfully* neglecting to attend the Court, after service. [20]

2. The proviso to sub-section (2) of *s. 126 Cr.P.C.* is an exception. It is only when the Magistrate is satisfied that the husband is wilfully avoiding to attend the Court, the evidence of the petitioner may be recorded *ex parte* and on the basis of such *ex parte* evidence the maintenance order may be passed. [21]

3. Before doing so, the Magistrate must record the satisfaction that the opposite party was wilfully avoiding attending the Court even after the service of summons. [22]

4. Although a formal order is necessary to record such satisfaction of the Magistrate, yet when no such formal order of satisfaction has not been recorded, it may be sufficient if the fact of such avoiding service is disclosed from the record. But an *ex parte* order would not be justified merely because the opposite party has not appeared after service of summons unless it appears from the order or from records that the non-appearance by the opposite party is wilful. [23]

15. Setting aside of ex parte order.—

1. The *ex parte* order may be set aside—

   (i) If the Opposite Party makes an application within 3 months of such order;

   (ii) If he shows ‘good cause’ for his absence, which, read with the first part of the Proviso means that he was no ‘wilfully’ avoiding service or ‘wilfully’ neglecting to attend Court. [24]

2. The following has been held to be good cause for this purpose:

   Absence from station in connection with employment. [25]

When the summons to the opposite party husband has been returned refused, it amounts to wilful avoidance of service of summons, the husband could not establish bona fide nor could he explain as to why he did not appear. So, when the husband did not establish good ground to set aside the *ex parte* order, the *ex parte* order can not be for set aside. [26]

When the Magistrate refused to set aside the *ex parte* order and the husband moved the High Court under *Article 226 of the Constitution* , the High Court not having found any sufficient reason and having found that the husband was delaying the matter, refused to interfere. [27]

However, the *ex parte* order was passed for a sum of Rs.15000/- without recording any details of the salary of the husband which was assumed to be Rs.30000/- So the High Court has set aside the *ex parte* order. [28]

While recalling *ex parte* order of maintenance, the Magistrate can grant interim maintenance under the proviso to *s. 126 Cr.P.C.* because the word "terms" cover such grant of interim maintenance.[29]

16. Limitation.—

The limitation for filing the application for setting aside the *ex parte* order is according to the proviso to sub-section (2) of *s. 126 Cr.P.C.* is three months from the date of the order.[30]

It may also commence from the date of the knowledge of the order but in such a case, the onus is on the opposite party to prove the date of knowledge. [31]

The time may also be reckoned from the date when the party in default came to know about the *ex parte* order and in such a case the application for setting aside the *ex parte* order within three months from the date of the knowledge of the *ex parte* order would be deemed to be in time. [32]

When the service of notice of the proceedings of the Respondent husband was made by the registered post and he refused to accept the notice, he can be presumed to have knowledge of the proceedings including the date of disposal of the application and in such a case the period of limitation would commence from the date of order. [33]

17. Section 5 of the Limitation Act may be invoked .—

In appropriate cases *Section 5 of the Limitation Act, 1963* may be invoked to condone the

delay in filing the petition for setting aside the *ex parte* order. [34]

When the Magistrate does not record his satisfaction that the husband was wilfully avoiding the service or wilfully neglected to attend the Court, the period of limitation prescribed by the proviso to sub-section (2) of *s. 126 Cr.P.C.* is not attracted and the husband can invoke *Section 5 of the Limitation Act, 1963* to condone the delay in filing the petition for setting aside the *ex parte* order [35] .

18. Revision .—

Remedy against *ex parte* order of maintenance is primarily seeking setting aside the *ex parte* order on application under the proviso to s. 126(2) *Cr.P.C.* But in an appropriate case, the aggrieved party may move the Court of revision but the jurisdiction of the court of revision is very limited[36] .

However, the revision against the *ex parte* order passed by the husband cannot be allowed lightly. The Revisional Court cannot interfere with such *ex parte* order merely because of some different view is possible. [37]

19. Inherent power .—

However, the inherent power under *s. 482 Cr.P.C.* should not invoked when efficacious remedy under *s. 126 Cr.P.C.* is available[38] .

The Single Judge of the Calcutta High Court has held that where an application for setting aside the order made under *s. 125 Cr.P.C.* has not been brought under the proviso to s. 126(2) *Cr.P.C.* but has been brought under *Section 181(1) of the Merchant Shipping Act, 1958* , the Court may entertain such petition under the present proviso in exercise of its inherent power under *s. 482 Cr.P.C.* in view of the fact that the applicant husband was a seaman on service[39] .

20. Suite to set aside ex parte order.—

1. A suit to set aside an order under s. 125 would not ordinarily lie and the party aggrieved must seek his remedy under the Code itself, *e.g.* , application under the Proviso to s. 126(2), or revision. [40]

2. But a suit to set aside an *ex parte* order would lie on the ground of *fraud* , which vitiates all transactions [41] affecting the civil rights of parties.

21. Dismissal for default.—

Section 126, which deals with the procedure for an application for maintenance under s. 125, provides for

making an *ex parte* order, in sub-section (2). But while sub-section (2) deals with the situation where the Respondent is absent, it is silent as to the situation where the Petitioner is (or even where both parties are) absent on the date fixed for hearing. From this, a single Judge of the Andhra Pradesh High Court has held that a Petition under s. 125 cannot be dismissed for default under any circumstances, and that if the Magistrate does dismiss for default an application under s. 125, such illegal order is liable to be set aside in revision. [42]

Delhi and Punjab and Hariyana High Court have expressed the view that a maintenance proceeding being essentially a civil proceeding any application dismissed for default may be restored after setting aside the order. [43]

22. Evidence and proof in maintenance proceeding.—

When in a petition for maintenance by the wife, the marriage is disputed onus is upon the applicant wife to prove that she is legally married to the opposite party husband. But the standard proof is not as high as that of criminal case for bigamy or under the *Indian Divorce Act* . [44]

The negligence by the husband may be proved by the applicant wife by preponderance of probabilities. [45]

But when the husband wants to resist the application taking the plea that the wife is living in adultery, onus is upon the husband opposite party to prove satisfactorily by independent witness. [46]

His solitary evidence will not be sufficient. [47]

23. Costs.—

In a proceeding for maintenance, the Trial Court has the power to award such costs as it may deem proper in view of s. 126(3) *Cr.P.C.*

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51 *Jagir Kaur v. Jaswant Singh,* AIR 1963 SC 1521 [*LNIND 1963 SC 40*](para 12) : (1964) 2 SCR 73 [*LNIND 1963 SC 40*] : (1963) 2 Crimes 413 .

52 *Ananth v. Gopal,* (1985) Crlj 152 (paras 12-13) Knt.

53 *Ananth* *v.* *Gopal,*
(1985) Crlj 152 (paras 12-13) Knt.

54 *Ananth* *v.* *Gopal,*
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56 *Jagir* *Kaur* *v.* *Jaswant* *Singh,*
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IX
ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

S. 127
Alteration in allowance.

48

[(1) On proof of a change in these circumstances of any person, receiving under Section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance, for the maintenance or interim maintenance, to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance as the case may be.]

(2)

Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3)

Where any order has been made under Section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that—

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made;

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to [49] [maintenance or interim maintenance, as the case may be,] after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom [50] [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under Section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person [51] [as monthly allowance from the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order.

STATE AMENDMENTS

Madhya Pradesh. —In its application to the State of Madhya Pradesh, in sub-section (1) of Section 127 of the Principal Act, for the words "father or mother", substitute "father, mother, grand father, grand mother".—Madhya Pradesh Act 15 of 2004, Section 3 (assented on 26-11-2004 and published in M.P. Gazette (Extr.) dated 6-12-2004).

Maharashtra. —In its application to the State of Maharashtra, in section 127—

(a) in sub-section (1), in the proviso, for the words "five hundred rupees" the words "fifteen hundred rupees" shall be substituted;

(b) in sub-section (4),—

(i) for the words "monthly allowance", where they occur for the first time, the words "maintenance allowance" shall be substituted;

(ii) after the words "monthly allowance", where they occur for the second time, the words "or, as the case may be, the lump sum allowance" shall be inserted. [*vide* Maharashtra Act XXI of 1999, S. 3 (20-4-1999)].

Rajasthan. —In its application to the State of Rajasthan, in Section 127, sub-section (1), for the words "five hundred" occurring after the words "the monthly rate of" and before the words "rupees in the whole", substitute "two thousand five hundred".—Rajasthan Act 3 of 2001, Section 3.

Tripura. —In its application to the State of Tripura, the principal Act, in proviso to sub-section (1) of Section 127, for the words "five hundred rupees", the words "one thousand and five hundred rupees" shall be substituted. [*vide* Tripura Act 9 of 1999, S. 3 (w.e.f. 9-4-1999)].

Uttar Pradesh. —In its application to the State of Uttar Pradesh, in Section

127, sub-section (1), in the proviso, for the words "five hundred rupees", substitute "five thousand rupees".— Uttar Pradesh Act 36 of 2000, Section 3 (w.e.f. 13-8-2001).

West Bengal. —In its application to the State of West Bengal, the proviso to sub-section (1) of Section 127 of the Principal Act, for the words "five hundred rupees", the words "one thousand and five hundred rupees" shall be substituted. [*vide* W.B. Act 14 of 1995, S. 3 (w.e.f. 2-8-1993)].

In its application to the State of West Bengal, in sub-section (1) of Section 127 of the Principal Act, the proviso shall be omitted. [*vide* W.B. Act 33 of 2001, S. 4].

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1. Scope of s. 127.—

1. This section corresponds to *old* s. 489, with the following changes:

   (i) Sub-sections (1)-(2) correspond to sub-sections (1)-(2), with the addition of the words 'father or mother, as the case may be'.

   (ii) Sub-sections (3)-(4) have been *added* , in consequence of the changes made in s. 125,*ante,* and in pursuance of the recommendation of the Joint Committee. [52]

2. This section envisages an application [53] by either of the parties to an order of maintenance passed under s. 125, for alteration of that order on the ground that circumstances have changed since then, [54] necessitating such alteration. That order cannot be altered on the ground of circumstances which were in existence at the time of that order. [55]

2. Amendment Act 50 of 2001.—

As the *Code of Criminal Procedure* (Amendment) Act, 2001 (50 of 2001) has made specific provisions for interim maintenance to be awarded pending the decision of the main petition, the sub-section (1) of s. 127 has been substituted by the new sub-section and in sub-sections (3) and (4) of s. 127, consequential amendments, have been made to include the interim maintenance, if ordered by the Trial Court.

3. Procedure under s. 127.—

The fact that section does not lay down any particular procedure which must be followed by the Magistrate in making an order under this section shows that he is left to follow any procedure, consonant with natural justice, in order to be satisfied as to the change in the circumstances alleged. Normally, a notice should be issued to the opposite party who would be affected by such alteration. [56]

4. Jurisdiction.—

From the opening words of s. 126 it is clear that the provision is confined to proceeding under s. 125, and is not applicable to an application under s. 127 which is for altering or cancelling the order made under s. 125. An application under s. 127 can, therefore, be filed only before the Court of the Magistrate who had made the order

under s. 125, which is sought to be cancelled or modified. [57]

However, the Kerala High Court has held that the enhancement of amount of maintenance need not necessarily be granted by the same Court which had passed the original order under *s. 125,Cr.P.C.* Thus, if by force of circumstances, the defendant after obtaining maintenance has changed his residence, the application under *s. 127 Cr.P.C.* can be made by her at any place mentioned in s. 126. Such purposive and meaningful interpretation would sub-serve the legislative intent and purport.[58]

5. Sub-section (1) : 'Change in circumstances'.—

1. Such circumstances may relate to *either* of the two parties—the person ordered or the person in whose favour the order under s. 125(1) has been made,—which would justify an increase or decrease of the rate of monthly payment originally fixed, *e.g.* ,—

(i) A change in the pecuniary circumstances of either party, [59] *e.g.* , in the separate income of the wife, [60] or of husband. [61]

(ii) The attainment of majority of a child who does not come under Clause (c) of s. 125(1). [62]

(iii) Marriage of minor daughter with a husband of sufficient means. [63]

(iv) The death of the child or the fact that he has grown older, [64] and is in need of a more expensive education. [65]

(v) Change in the custody of child. Where since the order under s. 125(1) the child has come over to the mother from the father, she would be entitled to enhancement of the quantum of maintenance on account of the child, irrespective of any question of propriety of such change in custody. [66] Thus,

Even though under a compromise decree, the husband is entitled to custody of the child, if the child goes over to the mother owing to his neglect in the matter of maintaining the child, he cannot use the compromise decree as a shield against the wife's claim for additional maintenance for the child. [67]

(vi) A change in the cost of living. [68]

(vii) A compromise or agreement between the parties, modifying the terms of the order under s. 125(1). [69]

But the Magistrate need not take any act ion where—

The compromise relied upon for alteration has not been incorporated in any signed order of the Court or where it is a conditional one, requiring further investigation. [70]

(viii) *Subsequent* [71] decree of a Civil Court. Sub-section (2) provides that in such a case, the Magistrate is to determine whether the order under sub-

section (1) is to be cancelled or varied. Thus, the order may have to be cancelled if it is superseded by the Civil decree. [72]

(ix) By reason of the *new* Expl. (b), divorce of the wife is no longer a change in the circumstances for the purposes of s. 127(1). [73]

2. But under sub-section (3) of s. 127, the following are grounds for cancellation of the order—

(i) voluntary surrender by the divorced wife of her right to maintenance;

(ii) receipt by her of the money payable on divorce;

(iii) remarriage of the divorced wife.

3. On the other hand, the following are *not* such circumstances as would justify an order of alteration of the monthly allowance for maintenance:

(i) The divorce of the wife, who has not remarried (see *above*).

(ii) That an interim order of maintenance has been made by the Civil Court in a pending petition for restitution of conjugal rights brought by the husband, under the *Hindu Marriage Act, 1955* .[74]

4. If there has been a 'change in the circumstances' as stated above, the statutory right to 'alteration' cannot be defeated by the plea of estoppel on the ground that a previous application under s. 127 had been settled by compromise. [75]

6. Change in circumstances or not, some illustrative cases.—

(a) When the husband begins to earn more, the wife can pray for enhancement of maintenance. [76]

(b) When the wife begins to earn, the husband may apply either for reducing the maintenance or cancelling the maintenance order. [77]

(c) If an able-bodied man capable of earning more does not earn without any lawful excuse, he cannot apply for reducing maintenance. [78]

(d) When there was a settlement between the parties and the petitioner was receiving annual allowance and not monthly maintenance, no petition by wife for enhancement of maintenance is maintained. [79]

7. Judicial notice to be taken of inflation.—

The fact of inflation resulting in the fall of purchasing power of money and consequent rise of cost of commodities can be taken judicial notice of for enhancing the maintenance. [80]

8. Retirement of husband.—

Subsequent retirement of the husband is not such a change in circumstances for the Court to reduce the maintenance. [81]

9. 'Alteration in the allowance'.—

There has been a sharp difference of judicial opinion as to the meaning of the word 'alteration', *viz.* , whether it could include a total discontinuance of the maintenance or reducing it to nothing.

A. Some High Courts have taken a liberal view to hold that 'alteration in the allowance' would justify an order reducing it to nothing, [82] if the change in the circumstances called for a discontinuance of the maintenance.

   According to this view, further, any ground which would justify a cancellation of the order passed under s. 125(1) [*old* s. 488(1)] could be used a ground for an order under s. 127(1) [*old* s. 489(1)], *e.g.* , divorce. [83]

B. The better view [84] has been taken by other High Courts that if alteration included reduction to nothing, it would, in effect, be a *cancellation* of the order granting maintenance, which is dealt with separately, in sub-section (2). Hence, 'alteration' in sub-section (1) can mean only an increase or decrease in the amount of maintenance fixed by the order made under s. 125(1). It cannot authorise the Court to reduce the amount to nil. [85]

New s. 127 has, in fact, indirectly solved this problem by putting divorce as a ground of 'cancellation' under sub-section (3), so that it cannot be intended that 'divorce' could be used as a ground for 'alteration' under sub-section (1) as was held by the Madras, Kerala and Nagpur High Court. [86]

10. Impact of Amendment Act 50 of 2001.—

The Magistrate originally awarded maintenance to the wife at Rs.400/- per month. However, Sessions Judge in revision was directed by the High Court to reconsider the same. The Sessions Judge having found that the husband has substantial income and property directed that the husband shall pay from the date of application i.e. 07.12.1995 till 24.09.2001 at the rate of Rs. 500/- per month and, from the 24.09.2001 i.e. the date on which the maximum limit of Rs. 500/- has been omitted at the rate of Rs. 1000/- per month till the same is altered or set aside by the competent court. The husband challenged such order before the High Court contending that when the wife did not apply for enhancement of the quantum of maintenance, the Sessions Judge has no power to enhance it to Rs. 1000/- from the date when the Amendment Act 50 of 2001 came into force. The High Court has upheld the order. It is observed that the Court can enhance or reduce the maintenance amount on the proof of change of circumstances and hence, it cannot be said that the Court has no power to grant maintenance more than the amount in the petition for the period subsequent to the amendment of *s. 125 Cr.P.C.* in 2001 because *s. 127 Cr.P.C.* empowers the Court to enhance the maintenance granted under *s. 125 Cr.P.C.* on proof of change in the circumstances. It is pointed out that

s. 127 Cr.P.C. does not mandate that an application is required to be filed to enhance the maintenance amount after the amendment of 2001 in *s. 125 Cr.P.C.* [87]

11. Impact of Enforcement of Muslim Women (Protection on Right of Divorce) Act, 1986 to maintenance order to Muslim divorced wife.—

1. When the Muslim divorced wife was awarded maintenance by the Magistrate prior to enforcement of the Muslim Women (Right on Divorce) Act, 1986, she can apply for enhancement of such maintenance under *s. 127 Cr.P.C.* [88]
2. When an order of maintenance under *s. 125 Cr.P.C.* has been made prior to the above 1986 Act, the husband cannot apply for cancelling that order on the ground that the 1986 Act has in the meantime come into force.[89]

12. Date from which the order of enhancement takes effect.—

There was conflict of decisions of the different High Courts as to whether the order of enhancement of maintenance under s. 127 shall take effect from the date of application [90] or from the date of order. [91]

The Supreme Court has revolved the conflict by holding that whether the enhancement shall take effect from the date of the application or from the date of the order is the discretion of the Court and that when the Court has enhanced the maintenance from the date of application the husband cannot challenge it on the ground that he has incurred loans and has to repay the loans by instalments. [92]

13. Cancellation, prospective.—

When the Magistrate cancels the order of maintenance, the same is always prospective and cannot have effect retrospectively. [93]

14. Sub-section (2) : Cancellation or variation of the order made under s. 125.—

1. While sub-section (1) of the present section deals with the alteration of the quantum of monthly allowance, sub-section (2) empowers the Court to cancel or vary the order itself granting the maintenance, under s. 125.
2. The condition for the application of sub-section (2) is that a competent Court has made a decision 'in consequence of' which the order under s. 125 should be cancelled or varied.

   This provision also shows that a Magistrate has no power to order maintenance under s. 125 after a Civil Court of competent jurisdiction has held that the Petitioner is *not* entitled to maintenance. [94]

3. The provision in this sub-section obviates any doubt as to what should be the relation between the Civil and Criminal Courts in matters relating to maintenance. It is clear, according to this provision, that the jurisdiction of the Magistrate is only auxiliary to that of the Civil Court, [95] so that the Magistrate is bound to mould his order in accordance with a subsequent Civil Court decree. [96]
4. This does not mean that the Magistrate is deprived of all discretion in the matter. He can still consider whether the Civil Court decree really affects the situation: [97]

(a) There is no such decision of the Civil Court to justify a cancellation or variation under the present sub-section—

> Where only an *interim* allowance has been ordered under *Section 24 of the Hindu Marriage Act* , pending disposal of a petition for restitution of conjugal rights brought by the husband.[1]

(b) Similarly, where the husband, after the passing of an order for maintenance under s. 125(1) against him, obtains a Civil Court decree for restitution of conjugal rights, the Magistrate is not bound to cancel the maintenance order as a matter of course, but is competent to satisfy himself that the husband is *bona fide* prepared to give effect to the decree, that is to say, to offer the wife a home which she ought to accept; [2] and has not obtained the decree only to defeat the order of maintenance. [3]

> When an *ex parte* decree of restitution of conjugal rights had been obtained by the husband and the husband had not intimated the wife of such decree nor did he take any steps for execution at that order, the order of maintenance passed cannot be cancelled. [4]
>
> However, the question would be otherwise when the Court has passed the decree for restitution of conjugal rights against the wife on a specific finding that the wife had no legal right to live separately from her husband. The order of maintenance passed in her favour is liable to be cancelled. [5]

15. 'Competent Court'.—

A Family Court is a Court of competent jurisdiction. [6]

16. 'Order'.—

1. From the context of the several provisions of s. 127, it would appear that the word 'order' in sub-section (2) refers to an order granting maintenance, which is capable of being cancelled or modified. [7]
2. Hence, where subsequent to the dismissal of the wife's application under s. 125, the husband obtains 'divorce', a fresh cause of act ion arises in favour of the wife for maintenance, for which she would be entitled to bring a fresh application under s. 125(1), to which Art. 127(2) cannot be attracted. [8]

17. Sub-section (3) : New grounds of cancellation of order.—

This provision, inserted by the Act of 1973, adds the following new grounds for *cancellation* of an order of maintenance made under s. 125(1) in favour of a divorced wife:

(a) The woman remarrying after the date of the order [s. 127(3)(a)]. In this case, the cancellation shall be made with effect from the date of the remarriage, which means that the woman shall be entitled to the enforcement of the order until the date of her remarriage. This clause is thus only a corollary from the words 'and has not remarried' in s. 125(1), Expl. (b), *ante* .

Clause (a) of sub-section (3) applies both where the divorce is effected by the husband unilaterally (talak) or by agreement as well as where it is obtained by the wife through Court under the Muslim Dissolution of Marriages Act, 1939. [9]

(b) Receipt by the woman, whether before or after the date of the order, of the whole of the money payable to her, on divorce, according to the customary or personal law of the parties [s. 127(3)(b)].

Clause (b) is confined to the case where the divorce has been effected by the husband and does not include the case where divorce has been obtained by the wife. [10]

(c) Voluntary surrender of her rights to maintenance after the divorce which was obtained by her from her husband [s. 127(3)(c)].

Clause (c) applies only where the divorce has been obtained by the woman and not where she has been divorced by the husband.

But s. 127(3)(c) shall have no application where the conditions specified in sub-section (1) are not present, namely, that there has been an order under s. 125, granting a monthly allowance to the Petitioner. Thus, where, in a previous proceeding under s. 125, the parties came to a settlement under which the wife was to receive an amount in lump sum, instead of an adequate monthly allowance, the wife would not be barred from bringing a subsequent application under s. 125, to obtain an order for proper monthly maintenance. [11] In the result, s. 127 would come into operation only after the order under s. 125 is passed and for the purpose of alteration or cancellation thereof. [12]

18. Sub-Clause (b) : 'Payable under any customary or personal law'.—

1. The Supreme Court has taken the view [13] that the payment in lump sum referred to in sub-Clause (b) must be a *reasonable substitute* for the provision for maintenance made by law under s. 125(1). The payment of an illusory amount under customary or personal law cannot totally absolve the husband of

his obligation, but it may be taken into consideration by the Magistrate in determining the rate of maintenance to be ordered by him. [14] Hence, an application under s. 125(1) would still be maintainable where the lump sum payment to the divorcee has been illusory. [15]

2. The foregoing principle [16] is to be followed in the cases of parties other than Muslims. [17]

But Muslim divorced wife would be governed by the provisions of the *Muslim Women (Protection of Rights on Divorce) Act, 1986* (see *post*).

19. Money payable on divorce, under Muslim law.—

There has been much controversy on the interpretation of this sub-clause as to whether the payment of the dower debt and maintenance for the period of *iddat* would absolve a Muslim husband from his obligation under s. 125(1)(a) and Expl. (b) to pay for the maintenance of his divorced wife who is unable to maintain herself.

I. Prior to 1979, the view taken by the High Courts was that s. 127(3)(b) was in the nature of a Proviso to s. 125(1)(a), so that an order of maintenance of a divorced wife under s. 125(1)(a) could be defeated by the husband by paying off the whole of her dower debt (*mahr*) as well as the maintenance payable during the period of *iddat* , under Muslim law. [18]

II. More beneficial for a divorced wife was the view taken by a three-Judge Bench of the Supreme Court [19] that the payment of any amount under s. 127(3)(b) will not go to a total extinction (though it may be taken into consideration for the purpose of reduction) of the statutory right to maintenance where the quantum of money paid under the customary or personal law is unreasonable in relation to the amount payable under the statutory provision in s. 125. [20]

III. In 1985, a five-Judge Bench of the Supreme Court [21] reviewed the entire law relating to the question and even overruled the view taken by the three-Judge Bench in *Bai Tahira's* case, [22] and laid down the following propositions :

(i) The Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of *iddat* , [23] does not contemplate the situation envisaged by *s. 125 Cr.P.C.* , which deals with the case where the divorced wife is *unable to maintain herself* , even though she might have been paid the maintenance for the period of *iddat* .

Reading s. 127(3)(b), together with s. 125(1)(a), the true position, according to the Court [24] is—

(a) If the divorced wife is able to maintain herself, the husband's liability to provide for maintenance for her ceases with the expiration of the period of *iddat* . [25]

(b) If, however, she is unable to maintain herself she is entitled to take recourse to *s. 125,Cr.P.C.* [26]

(ii) *Mahr* or the deferred dowry is *not* a sum payable to her *on* (*i.e.* on account of) divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband; but the payment of this money is ' *not occasioned* by the divorce' [para 24]. [27] *Mahr* is an amount payable by the husband in consideration of the *marriage* and out of *respect* for the wife. But divorce cannot be described as a mark of respect for the wife nor can an amount payable in consideration of marriage be said to be payable in consideration of divorce, which dissolves the marriage [paras 28-29]. [28]

IV. The foregoing law laid down by the Supreme Court [29] has been *superseded* by the *Muslim Women (Protection of Rights on Divorce) Act, 1986* .

But some High Courts have taken the view that once an order of maintenance under s. 125 has become final, the provision of the *Muslim Women (Protection of Rights on Divorce) Act, 1986* does not entitle parties to re-open the same. Nor can such order be cancelled for that enactment. [30]

20. Sub-Clause (c) : 'Obtained divorce'.—

This expression, in Expl. (b) to s. 125(1) [see *ante*] as well as in Section 127(3), includes a 'dissolution' of marriage under the *Dissolution of Muslim Marriages Act, 1939* , which constitutes a legal 'divorce', by operation of law.[31]

But, in Clause (c) of s. 127(3), a dissolution obtained by the wife through Court under the Act of 1939 would not *ipso facto* cancel the order of maintenance made under s. 125(1) unless the woman voluntarily surrenders her right to maintenance after divorce.

It is to be noted that the case of a wife obtaining dissolution through Court under the Act of 1939 appears to be *excluded* from the operation of the Muslim Women (Protection of Rights on *Divorce Act*), 1986 [*see* , Appendix], inasmuch as the definition of 'divorced woman' in s. 2(a) of that Act uses the words—'has obtained divorce from her husband *in accordance with Muslim Law* '.

21. S s. 127(3) and 125(5).—

Both provisions provide for cancellation of the order of maintenance made under s. 125(1) in favour of wife, but on different grounds—

(a) on proof that the wife is (i) living in adultery; or (ii) refusing to live with her husband without sufficient reason; or (iii) living separately from her husband by mutual consent [s. 125(5); *ante*].

(b) on proof that—

(i) the woman *has been divorced or obtained* a divorce, and thereafter she has remarried [s. 127(3)(a)]; or

(ii) the women has been *divorced* and upon such divorce she has received the sum payable to her on such divorce, under any customary or personal law applicable to the parties [s. 127(3)(b)]; or

(iii) the wife, having *obtained* divorce, has voluntarily *surrendered* her right to maintenance [s. 127(3)(c)].

22. S s. 127(3) and 125(1)(a).—

Since s. 127(3) relates to a stage *subsequent* to the order under s. 125(1), the considerations under s. 127(3) cannot be brought in to refuse an application under s. 125(1)(a). At that stage, an order for maintenance would be made if the Magistrate is satisfied that the husband, having sufficient means has neglected or refused to maintain his wife who is unable to maintain herself. [32]

23. Effect of Civil Court decree on the maintenance awarded under s. 125 Cr.P.C.—

1. Only because the husband subsequent to the order of maintenance obtains a decree for divorce from the District Court on the ground of adultery of wife, the order of maintenance is not automatically cancelled and it is only when the husband files a petition under *s. 127 Cr.P.C.* for cancelling the maintenance order on the ground that the wife has been living in adultery and proves it the magistrate may cancel the order of maintenance under *s. 127 Cr.P.C.* [33]

2. After the husband obtains the decree for restitution of conjugal rights, the order of maintenance under *s. 125 Cr.P.C.* also is not automatically cancelled. The husband has to apply under *s. 127 Cr.P.C.* alleging that the wife has refused to obey the decree and the Magistrate may cancel the order of maintenance.[34]

3. But when subsequent to the order of maintenance under *s. 125 Cr.P.C.* , the Civil Court granted the decree for annulment of marriage, the wife ceases to be the wife and the Magistrate under *s. 127 Cr.P.C.* may cancel the order of maintenance.[35]

24. Revision.—

See under s. 125,*ante* . A Revisional Court would interfere with an order under s. 127 under the following circumstances, *inter alia* —

Where, notwithstanding a substantial increase in the husband's income, the Magistrate refuses to increase the allowance of the wife which had, in the order under s. 125(1), been fixed at the minimum subsistence level. [36]

48 Subs. by *Cr.P.C.* (Amendment) Act, 2001 (50 of 2001), S. 3 (w.e.f. 24.9.2001), for sub-section (1).

49 Substituted by Amendment Act, 2001 (50 of 2001), S. 3 for "maintenance" (w.e.f. 24.9.2001).

50 Substituted for "monthly allowance has been ordered" by Amendment Act, 2001 (50 of 2001), S. 3 (w.e.f. 24.9.2001).

51 Substituted for "as monthly allowance in pursuance of" by Amendment Act, 2001 (50 of 2001), S. 3 (w.e.f. 24-9-2001) .

52 Rep. of the Jt. Committee, p. 14.

53 *Lilawati v. Madan,* (1925) 27 Crlj 68 .

54 *Govindan v. Jayammal,* (1950) 51 Crlj 455 (Mad) .

55 *Govindan v. Jayammal,* (1950) 51 Crlj 455 (Mad) .

56 Cf. *Zindabhai* , AIR 1937 Bom 454 .

57 *Raj Kumar v. Shanta Bai,* 2002 Crlj 2894 Raj ; *Sarvesh Kumar v. State,* 2007 Crlj 845 All ; *Balraj v. Mallamma,* 1984 Crlj 1170 AP .

58 *George v. Easliyamma George,* AIR2009 (NOC) 2638 (Ker); *Raj Kumar v. Sham Bai,* 2002 Crlj 2894 Raj dissented from.

59 *Abu v. Ulfat,* (1896) 10 All 50 ; *Bhagwan v. Kamla,* (1974) II SCWR 468 (para 19); *Sampoornam v. Arjunan,* (1975) Crlj 1466 (Mad) .

60 *Bhagwan v. Kamla,* (1974) II SCWR 468 (para 19); *Sampoornam v. Arjunan,* (1975) Crlj 1466 (Mad) .

61 *Gangamma* *v.* *Subbarayudu,* [AIR 1961 AP 510 *LNIND 1960 AP 269*].

62 Cf. *Nair* *v.* *Parvathi,* (1967) Crlj 1231 (Ker) .

63 Cf. *Meenakshi v. Karupanna,* (1924) 48 Mad 503.

64 *Ramayee* , (1890) 14 Mad 398.

65 *Nanak* *v.* *Chandra,* [AIR 1970 SC 446 *LNIND 1969 SC 209*](para 13) : [(1969) 3 SCC 802 *LNIND 1969 SC 209*] : 1970 Crlj 522 ; *Ashish v. Tewari,* [AIR 1970 Delhi 98 *LNIND 1969 DEL 15*].

66 *Mariyam* *v.* *Ouseph,* [(1960) Ker LT 1356 *LNIND 1960 KER 359*].

67 *Chellamma* *v.* *Kunju,* (1975) Crlj 106 (Ker) .

68 *Bimbadhar* *v.* *Pratimamani,* 1999 Crlj 1085 Cri ; *Subbagal v. Muthuswamy,* 1984 Crlj 692 Mad .

69 *Linga* *v.* *Raman,* (1978) Crlj 469 (Mad) ; *Yameen v. Shamia,* (1984) Crlj 1297 (para 15) All.

70 *Gulrozbanu* *v.* *Kamarali,* (1974) Crlj 1438 (para 9) Bom.

71 *Linga* *v.* *Raman,* (1978) Crlj 469 (Mad) ; *Yameen v. Shamia,* (1984) Crlj 1297 (para 15) All.

72 *Linga* *v.* *Raman,* (1978) Crlj 469 (Mad) ; *Yameen v. Shamia,* (1984) Crlj 1297 (para 15) All.

73 Cases like *Janni v. Abdul,* (1955) Andhra 301; *Rahimullah* , (1947) Mad 859, are no longer good law.

74 *Swarajyawati* *v.* *Munnalal,* (1972) 78 Crlj 291 (AP) .

75 *Joydel* *v.* *Moduri,* (1994) Crlj 3382 (para 11) Cal; *Ranjit v. Pavittar,* (1992) Crlj 262 (P&H); *Padmanabhan v. Bama,* (1988) Crlj 1386 (Mad) .

76 *Raj Kumari v. Dev Raj,* 1984 Crlj NOC 206Del ; *Meenakshmi v. Bala Krishnan,* 1980 Crlj 1200 Mad .

77 *Abdul Salim* *v.* *Najima,* 1980 Crlj 232 All .

78 *Lalit* *v.* *Dimabati,* (1990) 1 DMC 100 (Ori) .

79 *Mukhtiari* *v.* *Gagan,* 1997 Crlj 4293 Del .

80 *Dhanraj* *v.* *Kishri,* 1998 Crlj 1312 Raj

81 *T. Kaushalya* *v.* *T. Narayana Reddy,* 1998 Crlj 1795 AP .

82 *Ibrahim* *v.* *Saidani,* *(1964) 2 MLJ 70* ; *Ismail v. Sarammal,* AIR 1960 Ker 262 [*LNIND 1959 KER 314*].

83 *Ibrahim* *v.* *Saidani,* *(1964) 2 MLJ 70* ; *Ismail v. Sarammal,* AIR 1960 Ker 262 [*LNIND 1959 KER 314*].

84 *Mumtajali* *v.* *Karimunnessa,* (1972) 78 Crlj 77 (para 9) Guj; *Bhupinder v. Daljit,* AIR 1979 SC 442 [*LNIND 1978 SC 327*]: (1979) 1 SCC 352 [*LNIND 1978 SC 327*] : 1979 Crlj 198 .

85 *Mumtajali* *v.* *Karimunnessa,* (1972) 78 Crlj 77 (para 9) Guj.

86 *Sarvesh Kumar v. State,* 2007 Crlj NOC 845All .

87 *S. Brahmanandan v. S. Rama Devi,*
2007 Crlj 811 AP ; (*Sabitaben* v *State of Gujarat,*
AIR 2005 SC 1809 [
LNIND 2005 SC 249]relied upon).

88 *Hamidan v. Mohd. Rafiq,*
1994 Crlj 348 All .

89 *M. A. Hameed* v. *Arif,*
1990 Crlj 96 AP ; *Ramesha v. Rehman,*
(1989) 1 DMC 509 (P&H); *P.A. Shamshudeen v. Sabhiya,*
(1989) 1 DMC 97 (Ker) .

90 *Abdul Hamid v. Sahibbin,*
1998 Crlj 225 AP ; *Kamatchi v. Veluchamy,*
1997 Crlj 418 Mad .

91 *Omar Ali v. Aspia Bibi,*
1998 Crlj 752 Cal .

92 *Jaydev v. Bharati,*
1994 Crlj 2234 Cal ; *Madan* v *State,*
(1993) 1 HLR 632 ; *Rulia Singh v. Kartaro,*
(1990) 1 Punj LR 43 [
LNIND 1989 PNH 276] (P&H).

93 *S.S.N. Niphade v. N.S. Niphade,*
1996 SCC (Cri) 53 .

94 *Murlidhar v. Pratibha,*
(1986) Crlj 1216 (para 5) Bom.

95 *Nafees v. Asif,*
AIR 1963 AP 143 147 .

96 *Nafees v. Asif,*
AIR 1963 AP 143 147 ; *Raghubar v. Emp.,*
AIR 1915 Oudh 113 ; *Venkayya v. Paidanna,*
AIR 1923 Mad 707 [
LNIND 1923 MAD 75].

97 *Nafees v. Asif,*
AIR 1963 AP 143 147 .

1 *Swarajyawati v. Munnala,*
(1972) 78 Crlj 291 (AP) .

2 *Fakruddin v. Jenab,*
AIR 1944 Bom 11 ; *Kunti v. Nabin,*
AIR 1955 Cal 108 [
LNIND 1954 CAL 87].

3 *Velayudhan* *v.* *Sukumari,* (1978) Crlj 1209 (Ker) .

4 *Amad Kumar Srivastava v. State of U.P.,* 2009 (NOC) 497 : (2008) ALJ 230 (All) .

5 *Satish v. Smt. Yaglata,* AIR2009 (NOC) 819 (Raj).

6 *Abu* *v.* *Subada,* (1994) Crlj 3672 (para 14).

7 *Mampekkattu* *v.* *Vasantha,* (1984) Crlj 1206 Ker (para 12).

8 *Mampekkattu* *v.* *Vasantha,* (1984) Crlj 1206 Ker (para 12).

9 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (para 8).

10 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (para 8).

11 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (para 8); *Laxmiben v. Bharatbhai,* (1986) Crlj 1418 (paras 4, 9, 12) Guj.

12 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (para 8).

13 *Bai* *Tahira* *v.* *Ali,* AIR 1979 SC 363 (paras 11-12).

14 *Bai* *Tahira* *v.* *Ali,* AIR 1979 SC 363 (paras 11-12).

15 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (para 8).

16 *Bai* *Tahira* *v.* *Ali,* AIR 1979 SC 363 (paras 11-12).

17 *Leelaben* *v.* *Goswami,* (1987) Crlj 1637 (paras 12, 16) Guj.

18 Cf. *Mushaque* *v.* *Jaysun,*
(1977) Crlj 484 (para 5); *Aluri v. Zahirabai,*
(1978) Crlj 211 (AP) ; *Rukhsana v. Sk. Md.,*
(1971) Crlj 1041 (Bom) (para 20).

19 *Bai* *Tahira* *v.* *Ali,*
(1979) Crlj 151 (paras 11-12).

20 *Bai* *Tahira* *v.* *Ali,*
(1979) Crlj 151 (paras 11-12).

21 *Ahmed* *v.* *Shah* *Bano,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

22 *Bai* *Tahira* *v.* *Ali,*
(1979) Crlj 151 (paras 11-12).

23 Cf. Mulla, *Mahomedan Law* , 18th Ed., para 279.

24 *Ahmed* *v.* *Shah* *Bano,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

25 *Ahmed* *v.* *Shah* *Bano,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](paras 24, 28-29) :
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LNIND 1985 SC 145] :
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26 *Ahmed* *v.* *Shah* *Bano,*
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LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
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1985 Crlj 875 .

27 *Ahmed* *v.* *Shah* *Bano,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

28 *Ahmed* *v.* *Shah* *Bano,*
AIR 1985 SC 945 [

LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

29 *Ahmed v. Shah Bano,*
AIR 1985 SC 945 [
LNIND 1985 SC 145](paras 24, 28-29) :
(1985) 2 SCC 556 [
LNIND 1985 SC 145] :
1985 Crlj 875 .

30 *Hamid v. Arif,*
(1990) Crlj 96 (AP) ; *Idris v. Ramesha,*
(1990) 1 DMC 107 (Gau) ; *Hazran v. Abdul,*
(1989) 1 DMC 509 (P&H); *Shamsuddin v. Sabhiya,*
(1989) 1 DMC 97 (Ker) ; for contra see *Anowaruddin v. State,* (1989) Crlj NOC
20(Cal) .

31 *Zohra v. Ibrahim,*
AIR 1981 SC 1243 [
LNIND 1981 SC 93](paras 17, 20, 23) :
(1981) 2 SCC 509 [
LNIND 1981 SC 93] :
1981 Crlj 754 .

32 *Leelaben v. Goswami,*
(1987) Crlj 1637 (para 8).

33 *T. Raja Rao v. T. Nilamma,*
1990 Crlj 2430 AP .

34 *Sayed Gulam Sajjad v. Parveen,* 1981 Crlj NOC 2AP .

35 *Purna v. Sila,*
(1989) 2 DMC 72 (Ori) .

36 *Gangamma v. Subbarayudu,*
AIR 1961 AP 510 [
LNIND 1960 AP 269].

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER IX
ORDER FOR MAINTENANCE OF WIVES, CHILDREN AND PARENTS

S. 128
Enforcement of order of maintenance.

A copy of the order of [37] [maintenance or interim maintenance and expenses of proceedings, as the case may be,] shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to [38] [whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be,] is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the [39] [allowance, or as the case may be, expenses due].

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1. Legislative change.—

Section 128 Cr.P.C. , has been amended by the *Code of Criminal Procedure* (Amendment) Act, 2001 (50 of 2001) with effect from 24.09.2001 is which consequential of the amendment made by the same Amendment Act of 2001 in *s. 125 Cr.P.C.* that the Magistrate can, pending hearing of the application for maintenance, award interim maintenance and expenses of the proceeding.

2. Scope of s. 128.—

This section reproduces *old* s. 490. It only speaks of the conditions for, and place of enforcement, but not its mode.

37 Substituted by Act 50 of 2001, Section 4, for "maintenance" (w.e.f. 24-9-2001).

38 Substituted by Act 50 of 2001, Section 4, for "whom the allowance" (w.e.f. 24-9-2001).

39 Substituted by Act 50 of 2001, Section 4, for "allowance due" (w.e.f. 24-9-2001).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

A.—Unlawful assemblies

S. 129
Dispersal of assembly by use of civil force.

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

(2) If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer referred to in sub-section (1), may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or member of the armed forces and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

1. Scope of s. 129.—

Sub-section (1) of this section corresponds to s. 127 of the *old* Code, with changes relating to persons vested with the power to disperse an unlawful assembly: (i) it has been confined to Executive Magistrate; and (ii) extended to Police Officers other than the officer in charge of a Police Station, but not below the rank of a sub-Inspector.

Sub-section (2) corresponds to *old* s. 128, (i) with the foregoing changes; and (ii) the words 'member of the armed forces' have been substituted for the words—'soldier, sailor or airman'.

2. Limitations of the constitutional right of assembly.—

Article 19(1)(b) of the Constitution guarantees to every citizen the right to 'assemble', provided it is peaceable and unarmed. [1] This right is not, however, absolute but is subject to 'reasonable restrictions' [2] which the State may impose [Art. 19(3)] in the interests of the sovereignty and integrity of India, or public order. [3]

The provisions in Chapter X, as its title indicates, have been enacted to prevent breaches of the public order, under the foregoing power conferred by *Art. 19(3) of the Constitution* .

3. Conditions for the application of s. 129.—

1. The preventive power to disperse an assembly by force, if necessary, can be invoked in two contingencies : (a) that the assembly is an 'unlawful assembly', the membership of which is an offence, as defined in s. 141 of the I.P.C.; [4] or (b) that, though it does not fall within the definition in s. 141, I.P.C., it is an assembly of five or more persons which, in the circumstances, is *likely* [5] to cause a disturbance of the public peace.
2. An assembly of 5 or more persons becomes 'unlawful assembly' within the purview of s. 141, I.P.C., if the *common object* [6] of the members of such assembly is to do any of the following categories of unlawful act s—

   (i) to overawe by criminal force the Government or the Legislature of the Union or a State, or any public servant in the lawful exercise of his power;

   (ii) to resist the execution of any law or of any legal process;

   (iii) to commit any mischief, criminal trespass or other offence;

   (iv) to take possession of property or to enforce any right, [7] by the use of criminal force;

   (v) to compel, by means of criminal force, any person to do what he is not legally bound to do, or to omit what he is legally entitled to do.

4. Provisions for dispersal of an unlawful assembly.—

1. Sections 129- 131 empower various categories of persons to disperse an unlawful assembly, under different contingencies. It would be useful to read them together.

2. Any Executive Magistrate, or an officer in charge of a police station (or a police officer not below the rank of a Sub-Inspector, in the absence of the officer-in-charge) may exercise power under *s. 129(1),Cr.P.C.* and command an unlawful assembly to disperse in obedience to his command, and these officers may [s. 129(2)] use civil force to effect the dispersal. They may, for this purpose, also require the assistance of *any* male person (other than belonging to the armed forces) for the purpose of dispersing the assembly or for arresting and confining any members thereof either for effecting the dispersal or for their trial according to law.

3. The Executive Magistrate, as compared to an officer in charge of a police station, has been given an additional power under s. 130(1), he is also authorised to use, in the interest of public security, armed forces, if the unlawful assembly cannot otherwise be dispersed. This power may be exercised only by the Executive Magistrate of the highest rank, who may be on the spot.

4. A commissioned or gazetted officer of the armed forces may proceed to disperse an unlawful assembly, with the help of the forces under his command, if that assembly manifestly endangers the public security and no Executive Magistrate can be communicated with. But while such officer of the armed forces is in the course of dispersing, at his own instance, an unlawful assembly, it becomes practicable to communicate with an Executive Magistrate, such officer must so communicate and obey thenceforward the Magistrate's instructions in the matter of continuing or discontinuing the action of dispersal of the unlawful assembly [s. 131].

5. Under all the foregoing provisions, the power to arrest members of the unlawful assembly in order to disperse the assembly and to get them punished under the criminal law, [8] is an incident of the power to disperse the assembly. [9]

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1 *Himat Lal v. Police Commr.,* AIR 1973 SC 87 95 : (1973) 1 SCC 227 : 1973 Crlj 204 .

2 *State of Bihar v. Misra,* (1970) 3 SCC 337 (344-45).

3 *See* elaborate discussion in Author's *Commentary on the Constitution of India* , Latest Edition.

4 *Hanuman v. State,* AIR 1969 All 130 [*LNIND 1966 ALL 176*].

5 Cf. *Tucker* , (1882) 7 Bom 42; *Yeshwant,* AIR1933 Nag 277.

6 *Shambhu v. State of Bihar,* AIR 1960 SC 725 : 1960 Crlj 1144; *Mahadeo v. State of Bihar,* AIR 1970 SC 1492 : 1970 Crlj 1389 : (1970) 3 SCC 46 ; *Masalti v. State of U.P.,* AIR 1965 SC 202 [*LNIND 1964 SC 485*]: (1964) 8 SCR 133 : 1965 Crlj 226 .

7 *State of Bihar v. Nathu,* [AIR 1970 SC 27 *LNIND 1969 SC 516*]: (1969) 2 SCC 207 : 1970 Crlj 5 .

8 *Hanuman v. State,* [AIR 1969 All 130 *LNIND 1966 ALL 176*].

9 *Shariff v. State,* AIR1969 Bom 383 392.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

A.—Unlawful assemblies

S. 130
Use of armed forces to disperse assembly.

(1) If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Executive Magistrate of the highest rank who is present may cause it to be dispersed by the armed forces.

(2) Such Magistrate may require any officer in command of any group of persons belonging to the armed forces to disperse the assembly with the help of the armed forces under his command, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(3) Every such officer of the armed forces shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

1. Scope of s. 130.—

This section corresponds to s. 129 of the *old* Code. *See* under s. 129,*above* .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

A.—Unlawful assemblies

S. 131
Power of certain armed force officers to disperse assembly.

When the public security is manifestly endangered by any such assembly and no Executive Magistrate can be communicated with, any commissioned or gazetted officer of the armed forces may disperse such assembly with the help of the armed forces under his command, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with an Executive Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate, as to whether he shall or shall not continue such act ion.

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1. Scope of s. 131.—

This section corresponds to s. 131 of the *old* Code. *See* under s. 129,*ante* .

2. Sections 130 and 131Cr.P.C and Armed Forces (Special Powers) Act, 1958.—

According to the Supreme Court provisions of *Sections 130* and *131 Cr.P.C.* are not sufficient and adequate to deal with the continuous use of armed forces in aid of civil power for certain period in a particular area as contemplated by the

Armed Forces (Special Powers) Act, 1958 and it is not possible to hold that since adequate provisions have been made in *Sections 130* and *131* *Cr.P.C.* with the situation requiring the use of armed forces in aid of the Civil Government, the conferment of power upon an officer of the Armed Forces under s. 4 of the Act to deal with a grave situation of law and order in the State is neither discriminatory in nature nor is in violative of *Article 14 of the Constitution* .[10]

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10 *Naga people's Movement of Human Rights v. Union of India,* [AIR 1998 SC 431 *LNIND 1997 SC 1511*]: (1998) 2 SCC 109 : [1998 SCC (Cri) 514 *LNIND 1997 SC 1511*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

A.—Unlawful assemblies

S. 132
Protection against prosecution for acts done under preceding sections.

(1) No prosecution against any person for any act purporting to be done under Section 129, Section 130 or Section 131 shall be instituted in any Criminal Court except—

(a) with the sanction of the Central Government where such person is an officer or member of the armed forces;

(b) with the sanction of the State Government in any other case.

(2)

(a) No Executive Magistrate or police officer acting under any of the said sections in good faith;

(b) no person doing any act in good faith in compliance with a requisition under Section 129 or Section 130;

(c) no officer of the armed forces acting under Section 131 in good faith;

(d) no member of the armed forces doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence.

(3) In this section and in the preceding sections of this Chapter,—

(a) the expression "armed forces" means the military, naval and air forces, operating as land forces and includes any other Armed Forces of the Union so operating;

(b) "officer", in relation to the armed forces, means a person commissioned, gazetted or in pay as an officer of the armed forces and includes a junior commissioned officer, a warrant officer, a petty officer, a non-commissioned officer and a non-gazetted officer;

(c) "member", in relation to the armed forces, means a person in the armed forces other than an officer.

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1. Scope of s. 132.—

1. Sub-sections (1)-(2) corresponds to *old* s. 132, with the division of the sanctioning power between the Union and State Governments; while sub-section (3) corresponds to *old* s. 132A, with the addition of Clause (3), in order to distinguish between an officer and other members of the armed forces.

2. The object behind the present section is similar to that of s. 197 (*post*) in relation to the prosecution of a Judge, Magistrate or other public servant for any offence committed while acting or purporting to act in the discharge of his official duty; and, broadly speaking, the same principles have been followed by the Courts in applying the two provisions. [11]

2. When sanction under s. 132 may be required by the Court.—

1. This section provides that where a Magistrate of Police or Military personnel, acting under Sections 129- 131, is sought to be prosecuted for an offence alleged to have been committed by him while purporting to act under the foregoing provisions, the prosecution shall not be maintainable without the sanction of the State Government (or of the Central Government in the case of an officer or member of the armed forces).
2. But it cannot be said that whenever a complaint is filed against any such officer or person, the Court would be entitled to throw it out if the sanction of the appropriate Government is not appended; for, the sanction is required only if the allegations made in the complaint attract the application of s. 132. The Supreme Court has, accordingly, drawn a distinction according to the allegations made in the complaint.

A. Where the complaint itself makes allegations indicating that the accused officer committed the alleged offence while acting or purporting to Act under the provisions of Sections 129- 131 (as may be applicable), the Court shall not ntertain the complaint unless it is shown that the appropriate Government had sanctioned the prosecution. [12]

B. If, however, the complaint merely alleges the offence having been committed by the accused officer, but there is no allegation to indicate that while committing the offence, the latter was acting or purporting to act under the foregoing provisions (*i.e.,* dispersing an unlawful assembly), the Court cannot go behind the allegations made in the complaint and insist on a sanction at that stage, or to throw it out in the absence of the sanction. In such a case, the Court must proceed with the complaint in the same manner as it would have done in connection with a complaint against any other persons. [13]

In a case of this latter category, the question of sanction may arise only at a subsequent stage, if it appears, from the plea of the accused, the evidence and circumstances, or other inquiry, to the Court that the action of the accused officer would *prima facie* come under Sections 129-131 (as the case may be). [14] But the question whether sanction in necessary cannot be determined on the basis of any evidence in some other case or on the fact that the complainants were prosecuted for membership of an unlawful assembly, but on the basis of the evidence and other materials on the records of the very case where s. 132 is invoked. [15]

3. On this point, again, a distinction has to be remembered between facts necessary to prove that the act complained of did not constitute an offence and facts necessary to be established in order to show that the complaint could not have been entertained without the statutory sanction. What is required for the latter purpose and what is necessary for the accused officer to show is that the alleged offences were committed by him in course of the performances of his duties, in the circumstances mentioned in the preceding paragraph. If he succeeds in establishing these facts, the Court should reject the complaint and drop the proceedings, because he had no jurisdiction to proceed in the case without the sanction. [16] There is no room for an order of discharge or acquittal in such a case. [17]

4. The question of sanction has thus to be decided at different stages of the trial, [18] *e.g.* , under Ss. 204, 209. [19]

5. But even where the accused officer fails to substantiate his plea on the ground of absence of sanction, and the Court holds the trial, he would still, be entitled to show that the Acts complained of did not constitute an offence, [20] *e.g.* , because s. 79, I.P.C., was attracted or that he acted in good faith, within the meaning of the relevant clause of s. 132(2).

3. Sanction under S s. 132 and 197 necessary.—

For prosecution of any person for any act purported to have done either under s. 129 or s. 130 or under *s. 131 Cr.P.C.* , sanction order not only under *s. 132 Cr.P.C.* but also under *s. 197 Cr.P.C.* is necessary.[21]

Even when the allegation against police force is that going into the locality in discharge of official duty, they had mal-treated and committed theft of some property of the complainant sanction both under *Sections 132* and *197 Cr.P.C.* are necessary. In the absence of such sanction, prosecution against the police officers concerned is not maintainable.[22]

4. Defence if to be considered while considering sanction.—

At the time when the sanction under s. 132 and *s. 197 Cr.P.C.* is sought for by the prosecution, the defence of the accused should not be taken into account.[23]

5. Facts to be proved by an officer who seeks protection of s. 132, to throw out a complaint.—

1. Though the onus is ordinarily upon the prosecution in any criminal case to prove the ingredients of the offence with which the accused is charged, it is also clear that it is for the accused to establish those circumstances which are in the nature of an exception. [24]
2. Hence, in order to have a complaint rejected for want of sanction under s. 132, the accused officer [25] must establish the following facts—

(i) that there was an unlawful assembly or an assembly of 5 or more persons likely to cause a disturbance of the peace;

(ii) that such an assembly was commanded to disperse;

(iii) that either such assembly did not disperse on such command or, if no command had been given, its conduct had shown a determination not to disperse;

(iv) that in the circumstances he had used force against the members of the assembly. [26]

6. 'Acts purporting to be done under...'.—

1. As to the meaning of this expressions, *see* under s. 197,*post* .
2. Suffice it to say in the present context, the mere fact that the act in question was performed while the accused was performing his official duties would not be sufficient to bring the act within the protection of this expression; it must further be established that the act complained of was within the 'scope of his official duty' or reasonably connected with such duty. [27] Hence, the following act s, *e.g.* , done in course of dispersal of an unlawful assembly, would *not* be covered by this expression : picking the pocket of a member of such assembly; [28] theft, misappropriation or damage to his property. [29]

7. Revision.—

1. Since absence of a sanction where s. 132 is attracted would render the proceedings against the accused officer void for want of jurisdiction, [30] revision would lie where the Magistrate rejects a complaint on the ground that sanction was necessary [31] or rejects the plea of the accused that the complaint was liable to be rejected for want of sanction. [32]

2. From an order in revision, appeal would lie to the Supreme Court under *Art. 136 of the Constitution* . [33]

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11 f. *Sankaran* *v.* *Dy.* *Supdt.,* [AIR 1961 Ker 260 *LNIND 1961 KER 4*]; *Giani* , AIR1965 Punj 192 (para 13).

12 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : [(1964) 3 SCR 671 *LNIND 1963 SC 153*] : (1964) 1 Crimes 161 .

13 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : [(1964) 3 SCR 671 *LNIND 1963 SC 153*] : (1964) 1 Crimes 161 ; *Matajog v. Bhari,* AIR 1956 SC 44 50 : (1955) 2 SCR 925.

14 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : [(1964) 3 SCR 671 *LNIND 1963 SC 153*] : (1964) 1 Crimes 161 .

15 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : (1964) 3 SCR 671 : (1964) 1 Crimes 161 .

16 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : (1964) 3 SCR 671 : (1964) 1 Crimes 161 .

17 *Nagraj* *v.* *State* *of* *Mysore,* [AIR 1964 SC 269 *LNIND 1963 SC 153*](paras 12-15) : (1964) 3 SCR 671 : (1964) 1 Crimes 161 .

18 *Narayan* *v.* *Ananda,* (1984) Crlj 1334 (para 12).

19 *Narayan v. Ananda,* (1984) Crlj 1334 (para 12).

20 *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*] (paras 12-15) : (1964) 3 SCR 671 : (1964) 1 Crimes 161.

21 *Ram Kumar v. State of Haryana,* AIR 1987 SC 735 [*LNIND 1987 SC 40*]: (1987) 1 SCC 476 : 1987 Crlj 703.

22 *Ram Adhar Yadav v. Ram Chandra Mishra,* 1992 Crlj 2216.

23 *Karan Singh v. Hardayal Singh,* 1979 Crlj 1211 (P&H) ; *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*]: (1964) 1 Crlj 161.

24 *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*] (paras 12-15) : (1964) 3 SCR 671 [*LNIND 1963 SC 153*] : (1964) 1 Crimes 161.

25 *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*] (paras 12-15) : (1964) 3 SCR 671 [*LNIND 1963 SC 153*] : (1964) 1 Crimes 161.

26 *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*] (paras 12-15) : (1964) 3 SCR 671 [*LNIND 1963 SC 153*] : (1964) 1 Crimes 161.

27 *Gill v. R.,* AIR 1948 PC 128 ; *Satwant v. State of Punjab,* AIR 1960 SC 266 [*LNIND 1959 SC 191*]: (1960) 2 SCR 89 : 1960 Crlj 410 ; *Dhananjay v. Upadhyaya,* AIR 1960 SC 745 [*LNIND 1960 SC 75*]: 1960 Crlj 1153 : 1960 SCJ 1223.

28 *Gill v. R.,* AIR 1948 PC 128.

29 *Dhananjay* *v.* *Upadhyaya,*
AIR 1960 SC 745
LNIND 1960 SC 75
1960 SCJ 1223
[
]: 1960 Crlj 1153 :
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30 *Nagraj* *v.* *State* *of* *Mysore,*
AIR 1964 SC 269
LNIND 1963 SC 153
(1964) 3 SCR 671
LNIND 1963 SC 153
(1964) 1 Crimes 161
[
](paras 12-15) :
[
] :
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31 *Giani Singh v. Ranjit,* AIR1965 Punj 192 (para 20).

32 Cf. *Sankarakutty* *v.* *Dy.* *Supdt.,*
AIR 1961 Ker 260
LNIND 1961 KER 4
[
](paras 14-15).

33 *Nagraj* *v.* *State* *of* *Mysore,*
AIR 1964 SC 269
LNIND 1963 SC 153
(1964) 3 SCR 671
LNIND 1963 SC 153
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 133
Conditional order for removal of nuisance.

(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order—

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation **.—A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.**

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1. Scope of s. 133.—

1. This section corresponds to *old* s. 133 with the changes indicated by italics:

(a) In sub-section (1), for the words ‘a Magistrate of the first class’, the words ‘any other Executive Magistrate specially empowered... Government’ have been substituted; and for the words ‘police report’, the words ‘the report of a police officer’ have been substituted.

(b) In the last para. Of sub-section (1)—the words ‘subordinate to him’ have been inserted; and for the words ‘and move...hereinafter provided’, the words "and show cause.....why the order should not be made absolute" have been substituted. This latter change appears to be a material one.

2. While Sections 268- 294A, I.P.C., provide for *punishment* of the offence of ‘public nuisance, and other like offences against public safety, health, *etc.* ’, the present section offers a procedural remedy for the removal of the nuisance or obstruction itself.

3. The public nuisance according to the definition of s. 268 I.P.C. is an offence against the public, either by doing a thing which tends to be the annoyance of the whole community in general or by neglect to do anything which the common good requires. It is an act or omission which causes any common injury, obstruction, danger or annoyance to the public or to the public in general who dwell or occupy a property in the vicinity. On the alternative, it causes injury, obstruction, danger or annoyance to the persons who may have occasion to the use of a public right. It is the quantum of annoyance or discomfort in contra distinction to private nuisance which affects and individual is the decisive factor. [34]

2. Object.—

The object and purpose behind s. 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately, irreparable injury would be done to the public. To bring in the application of *s. 133 Cr.P.C.* there must be imminent danger to the property and consequential nuisance to the public. So *s. 133 Cr.P.C.* can be called in to remove public nuisance caused by discharge of effluents and air discharge causing hardship to the general public.[35] *s. 133 Cr.P.C.* is invoked only in case of emergency and imminent danger to health and physical comfort of the community.[36] It is only when speedy and immediate prevention is necessary *s. 133 Cr.P.C.* would be invoked.[37]

Section has no application to anticipated obstruction or nuisance. [38] The Magistrate has to act purely in the interest of the public. [39]

3. Section 133 and civil remedy.—

1. A civil suit may be brought for the removal of a public nuisance. But the jurisdiction under s. 133 stands under an independent footing, so that a proceeding under s. 133 cannot be dropped merely because civil suit could have been filed, [40] or has actually been filed. [41]

2. But s. 133 was not intended for stale cases which could have been decided by civil proceedings, *e.g.* , an obstruction to a public way existing for a long period, say, 10 years or more. [42]

3. In short, s. 133 can be invoked only where speedy remedy is necessary [43] to prevent public nuisance or danger, which cannot await results of a civil litigation.

4. On the other hand, the owner of a land may bring a suit against any person to declare that there is no public right (*e.g.* , right of way) over such land. [44] This question cannot be finally decided by the Magistrate under s. 133. [45] This is clear from s. 137(2) (*post*) itself.

5. If any of the conditions for the application of s. 133 is absent, the party must seek his remedy under the ordinary law. [46] Thus, where none of the clauses of sub-section (1) of s. 133 is satisfied, the Magistrate cannot proceed under it, whatever be the 'inconvenience' caused by the alleged act . [47] Conversely, if the conditions of s. 133 are satisfied, the Magistrate's jurisdiction is not ousted because a ' *bona fide'* claim of title has been raised. [48] He has to *stay* the proceedings, pending the decision of the Civil Court, if the second party adduces 'reliable' evidence negativing the claim of public right (see *post*).

6. A conditional order 'duly made' under s. 133 cannot be questioned by a Civil Court [s. 133(2)], unless it is without jurisdiction [49] which goes to the root of any order. But when the order is made absolute, a suit to establish the right or settle, shall lie notwithstanding the Magistrate's order. [50]

4. Pendency of Civil Dispute, no bar.—

Even when the civil dispute is pending over the self-same matter proceeding under *s. 133 Cr.P.C.* is competent.[51] So, there is no bar to the starting of the proceedings under *s. 133 Cr.P.C.* for demolition of dangerous building in case of emergency, even if the civil suit is pending and interim injunction has been obtained. But it is only if it is a public nuisance and not private nuisance and there is emergency, *s. 133 Cr.P.C.* may be invoked even during the pendency of the civil proceeding.[52]

5. Order only in case of emergency.—

There must be danger to property and consequential nuisance to the public. It does not deal with the potential nuisance and applies when the nuisance is in existence, the proceedings are not intended to settle private disputes but intended to protect the public as a whole against the inconvenience. [53] So, when the order of demolition of the building was passed without recording a *prima facie* satisfaction that the building was in such a condition as it was likely to fall and thereby causing to any person or persons as mentioned in Clause (d) of *s. 133 Cr.P.C.* , the order of removal of the building is illegal.[54]

6. Sections 133 and 144.—

There is common ground between these two provisions in so far as remedy against a public nuisance is also available under s. 144 (*post*); but the following points of distinction are to be noted:

(i) Section 144 can be resorted to only where 'speed remedy' is necessary, [55] and it provides a temporary remedy. An order under s. 133, when made absolute, is a permanent measure, *e.g.* , removal, which is final [s. 133(2)].

(ii) The comparison between the provisions of s. 133 and *s. 144 Cr.P.C.* shows that while former is more specific, the latter is more general. Therefore, the nuisance provided for in the former section is taken out of the general provisions of *s. 144 Cr.P.C.* [56]

(iii) Moreover, while the order under *s. 133 Cr.P.C.* is conditional, that under *s. 144 Cr.P.C.* is absolute.[57]

7. Sections 133 and 147.—

1. Though as regards public rights of way or water, there is common ground between Sections 133 and 147,—while the latter is preventive in nature, s. 133 is of a remedial nature. [58] Hence, s. 133 can be resorted to only when there is a question of *removal* of an obstruction already there on a public way or water, [59] whereas a proceeding under s. 147 can be drawn up when there is no obstruction as yet, but there is an apprehension of interference with the right of user thereof. [60] In the latter case, s. 133 would not be competent. [61]

2. The two conditions precedent to the exercise of the jurisdiction under s. 147 are—(a) the existence of a *dispute* relating to the user of the right in question, and (b) the likelihood of a *breach of the peace* resulting from such dispute. [62] There is no such condition under s. 133.

3. Because of the differences in the two jurisdictions, an application under s. 133,—where the Magistrate finds that the dispute is regarding a private right,—cannot be converted into an application under s. 147 unless the Magistrate is satisfied that there is an imminent apprehension of breach of the peace which could not be averted by directing the party to resort to civil litigation and which called for a summary order from the Criminal Court. [63] [*See also* under s. 137(2),*post*].

8. Water and Air Pollution and power of the Magistrate under s. 133 Cr.P.C. after enforcement of Environment Protection Laws.—

Different High Courts have expressed contradictory views as to whether after the passing of the *Water (Prevention and Control of Pollution) Act, 1974* and *Air (Prevention and Control of Pollution) Act, 1981*, the Magistrate has power under Clause (b) of sub-section (1) of *s. 133 Cr.P.C.* to remove public nuisance when there is a complaint regarding water and air pollution. Karanataka High Court has held that notwithstanding the fact that, there are special and local special and local laws dealing with the particular nuisance, the Magistrate has still power under *s. 133 Cr.P.C.* to pass conditional order to remove the nuisance or, if objected to appear and show cause and that *s. 133 Cr.P.C.* is of a remedial nature whereas the provisions of above two Special Acts are preventive and the purpose of the above laws is to provide for prevention and control of water and air pollution and there being no conflict between the above two Acts and *s. 133 Cr.P.C.*, the above two Acts cannot take away the jurisdiction of the Sub-Divisional Magistrate under *s. 133 Cr.P.C.* [64]

According to the Kerala High Court the provisions of *Water (Prevention and Control of Pollution) Act, 1974* are comprehensive in nature and by implication it has the effect of repealing *s. 133 Cr.P.C.*, so far as it is related to the Prevention and Control of Water Pollution and, therefore, after passing of the above Act of 1974, the Executive Magistrate has no jurisdiction to deal with *s. 133 Cr.P.C.* [65]

Madhya Pradesh High Court in *Abdul Hamid v. Gwalior Rayon* [66] and Andhra Pradesh High Court in *Nagarjuna Paper Mills Ltd* . v. *S.D.M.,* [67] have expressed the same view. However, this conflict has been resolved by the Supreme Court by holding that as *s. 133 Cr.P.C.* and *Water (Prevention and Control of Pollution) Act, 1974* and *Air (Prevention and Control of Pollution) Act, 1981* operate in different areas and there was no impediment as to their existence side by side, the above two Acts did not impliedly overruled *s. 133 Cr.P.C.* [68]

However, Karnataka High Court has expressed the view that the order of closure of industries by the authority under Sections 133A of Water (Prevention and Control of Pollution) Act, 1974 cannot be implemented by the Magistrate by invoking *s. 133 Cr.P.C.* and the said order has to be implemented in accordance with the provisions of the above Act.[69]

9. Procedure under s. 133 for removal of public nuisance.—

1. Section 133 empowers any of the Magistrates specified in sub-section (1) to make a *conditional order* [70] for the removal of a public nuisance, if he is satisfied that such order should be made, on the report of a police officer, or other information, and such evidence (if any) as the Magistrate thinks fit.
2. The conditional order requires the person against whom the order is made, to show cause why it should not be made absolute.
3. If such person appears to show cause, the procedure prescribed by Sections 137- 138 is next to be followed.

These two sections, in short, indicate that—When a proceeding is drawn up under s. 133(1)(a) for alleged obstruction of a public right and the like, the Magistrate has to make two inquiries; [71] (a) to determine, firstly, whether or not there exists any public right in respect of the way, channel or place, and (b) secondly, whether or not there has been obstruction caused on the said way, channel or place regarding the use of it by the public. These two inquiries cannot be made simultaneously, without complying with the requirements of Sections 137, 138. [72]

(a) If, on being questioned by the Magistrate [s. 137(1)], the party against whom the conditional order has been made denies the existence of the alleged public right, the Magistrate shall inquire into that question, by taking the evidence of such objector, and directing a local investigation or examining an expert, if necessary [s. 139]. If, on such inquiry, the Magistrate finds that the evidence in support of the denial of the alleged right is 'reliable', the Magistrate shall stay the proceedings before him until the question of existence of such right is decided by a competent Court [s. 137(2)].

(b) If, however, the Magistrate finds that such evidence is not reliable, he shall then proceed, under s. 138, to determine the other question, namely, whether there has been any obstruction *etc.* caused by the objector, by taking the evidence of both parties, as in a summons case [Sections 137(2); 138]. If, on taking such evidence, the Magistrate finds that the conditional order (made under s.

133) is 'reasonable and proper', he shall make it absolute, with or without modification, as may be necessary [s. 138(2)]; or, if not so satisfied, he shall drop the proceedings under s. 133.

Where the existence of any public right is involved,—in cases of conditional orders passed under Cls. (b)-(f) of s. 133(1),—there is no need for an inquiry under s. 137, so that after the appearance of the second party, the Magistrate should proceed forthwith to take evidence under s. 138, and thereupon either make the conditional order absolute or drop the proceedings.

4. After the conditional order is made absolute, the Magistrate shall issue a fresh notice requiring the second party to perform the act directed by the order absolute, within a time specified therein, on pain of prosecution under s. 188, I.P.C. if the order is not complied with. In case of non-compliance, apart from prosecution, the Magistrate may have the act performed and recover the costs for such performance by the attachment and sale of his property [s. 141].

5. The conditional order is passed *ex parte* . The stages under Sections 137 and 138 are based on evidence other than the *ex parte* evidence taken under s. 135(1), which cannot be treated as evidence at the inquiry under Sections 137- 138. [73]

6. The Magistrate has no jurisdiction to proceed under the subsequent section, *e.g.* , Sections 137- 138 or 142, without first making a conditional order under s. 138(1). [74]

7. So, before proceeding further in the matter, it is necessary for the Sub-Divisional Magistrate to issue a conditional order as required by s. 133(1) *Cr.P.C.* Therefore, when the opposite parties were directed to forthwith remove the air conditioner alleged to be causing nuisance and no conditional order was passed initially and no order was passed to make any conditional order absolute, the final order passed under *s. 138 Cr.P.C.* is illegal.[75]

10. Kinds of public nuisance for which act ion may be taken under s. 133.—

The provisions of this Chapter are applicable and an order under s. 133 can be issued in the case of any of the following kinds of public nuisances—

1. The unlawful obstruction or nuisance to—(a) any way, river or channel which is or may be lawfully used by the public; (b) any public place.

2. The conduct of any trade or occupation or the keeping of any goods or merchandise which is injurious to the health or physical comfort of the community.

3. The construction of any building or the disposal of any substance as is likely to occasion conflagration or explosion.

4. Any building, tent or structure being in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by.

5. Any tank, well or excavation adjacent to any public way or public place remaining unfenced.

6. Any dangerous animal requiring destruction, confinement or disposal.

7. Once the conditions of any of the Clauses of the present section are satisfied, the Magistrate is competent to make an order under s. 133, even though the act complained of does not come within the purview of the definition of a 'public nuisance' under s. 268, I.P.C. [76]

8. Though s. 133 is placed under the heading 'public nuisance', no danger to the 'general public' is necessary to take act ion under s. 133. [77] Thus, under Clause (d), even a danger to a single individual might suffice; it is not necessary that the tree should be likely to fall in a public place. [78]

   Nor is it necessary that a number of persons must come forward as complainants; the Magistrate may initiate the proceeding at the complaint of a single house-owner who has been affected by the nuisance complained of or on any other information received by him or on Police report. [79]

9. When in the interest of maintenance of public order and tranquility complaint has been filed by the respondent for removal of the religious book shop run by the appellants in a tin shed, the Magistrate after issuing conditional removal of public nuisance made it absolute on hearing the objection of the appellants and directed the appellants to remove the shop named. "R K Kitab Ghat". The Supreme Court on considering all the facts refused to interfere. [80]

11. Nuisance.—

Nuisance is an inconvenience which materially interferes with ordinary physical comfort of human being which is not capable of exact meaning. It may be public or private. But s. 133 relates only to public nuisance. [81]

12. Public nuisance.—

Until and unless the nuisance complained of is a public nuisance, the Magistrate cannot issue an order under *s. 133 Cr.P.C.* when the nuisance is caused by discharge of effluents and air discharge causing hardship to the general public, it is a public nuisance.[82]

13. Public nuisance or private nuisance.—

1. When the nuisance causes inconvenience to the complainant's family only, it is not public nuisance to be dealt with by the Magistrate under *s. 133 Cr.P.C.* [83]

   This is because s. 133 is not intended to settle private disputes or a substitute for settling private disputes. [84]

2. When it is alleged that air conditioner fixed on the windows of the bank was causing physical discomfort to the residents of nearby house it cannot be construed as public nuisance and in case of physical discomfort to individuals, the remedy is by way of filing a civil suit. [85]

3. A dilapidated house may cause public nuisance. So, the Magistrate was justified in initiating the proceedings under *s. 133 Cr.P.C.* and issuing conditional order when the

complaint was made by various residents and report of the police as well as Nagar Abhiyanta were considered by the Magistrate that the house is really dilapidated and may fall down any time. The fact that the civil suit is pending between the owner of the house and his tenants cannot deter the Magistrate to initiate the proceedings.[86]

4. In order to bring a trade or occupation within the operation of *s. 133 Cr.P.C.* , it must be shown that the interference with the public comfort was considerable and the large section of the public was affected. When the operation of the godown of dry chilies is affecting the health and physical discomfort of the residents of the locality, the order passed by the S.D.M. under *s. 133 Cr.P.C.* , issuing conditional order has been upheld.[87]

5. The complaint by the landlord that his tenant was running bakery shop in the tenanted premises, raised the number of furnaces without permission which created a public nuisance, smoke, and also increased the heat which could damage to the wall and roof of nearby houses it can be individual obstruction and cannot be a public nuisance and landowner can redress of his grievances by recourse of civil suit. [88]

6. The order for closing down a tea factory allegedly manufacturing adulterated tea cannot be a public nuisance because mere manufacture of adulterated tea could not be said to be an act causing imminent injury to health and physical comfort of the community and not being a public nuisance, the order passed by the Magistrate is liable to be set aside. [89]

7. When the dispute was in relation to a drain in a common pathway in the land partitioned by the parties, the dispute was a private dispute between the parties and for such private dispute *s. 133 Cr.P.C.* cannot be invoked.[90]

14. Procedure under Sections 133- 138.—

In a case of a public nuisance, the procedure before the Magistrate has the following stages:

I. A Magistrate, as specified in sub-section (1), receives the report of a Police Officer or other information that a nuisance of the kind mentioned in Clauses (a)-(f) of that sub-section (1) exists.

II. He is satisfied as to the existence of such nuisance from the Police report or information, and on taking such evidence (if any) as he thinks fit.

III. On being so satisfied, he issues a *conditional* order requiring the person causing such nuisance—

(a) to remove the nuisance within a time fixed in the order; or,

(b) if he objects to do so, to appear before him or some other Executive Magistrate subordinate to him, to appear at a time and place fixed by the conditional order, to show cause why the conditional order should be made absolute.

IV. If, upon service of the conditional order, the person does neither perform the act required by the conditional order nor appear and show cause; the order shall be made *absolute* [s. 136].

V. If, however, the person appears and denies the existence of any public right as alleged and objects to do the act required by the conditional order, the Magistrate shall make inquiry, as required by s. 137.

VI. If, upon making such inquiry,—

(a) the Magistrate is satisfied that the conditional order is proper, he shall make the order absolute with or without modification [s. 138(2)];

(b) the Magistrate is *not* satisfied that the conditional order is reasonable and proper, no further proceeding shall take place [s. 138(3)].

15. Sub-section (1) : 'Other information'.—

1. It would not include the report of a local inquiry in which the Magistrate *himself* had participated. [1]

2. But the *locus standi* of the informant or the likelihood of injury to him are not relevant considerations under s. 133; what is relevant is the satisfaction of the Magistrate as to the existence of the circumstances under any of the Clauses of s. 133. [2]

16. Clause (a) : 'Public place'.—

This expression has been newly added, to make it clear that apart from a way or a channel, the public may have a right of access to and user of a place, *e.g.* , land owned by a State Railway, [3] in which case a proceeding under s. 133 would lie for removal of any encroachment upon it. [4]

17. Public way.—

1. Any obstruction to a way which may be *lawfully used* by the public is a public nuisance under this section, whether it causes act ual inconvenience to the public or not. [5]

2. What is essential is the obstruction to the public user of a way which is open to the public; it need not be dedicated to the public. [6]

3. Once these ingredients are proved, it is immaterial whether the offending constructions are new or old because a right of public way cannot be destroyed by long standing constructions or repeated trespass. [7] On the other hand,—

   No order under this clause can be made so long as there is no *actual* construction or encroachment upon the public path. Mere anticipated construction would give no jurisdiction under this clause. [8]

4. When there is no law prohibiting embankment on one's own land the accumulation of water on the public road as a result thereof cannot attract

s. 133 Cr.P.C. This is because s. 133 is applicable when the obstruction caused on the public thoroughfare is unlawful.[9]

5. When the removal of enforcement on the public pathway was made by the Magistrate without holding any enquiry under *s. 138 Cr.P.C.* and only on the allegations made in the petition under *s. 133 Cr.P.C.*, the conditional order has been made absolute and the report of S.D.L. and L.R.O. did not mention about the public pathway, the order was set aside by the High Court.[10]

6. The petitioner is agitating over the traditional private pathway to go to their house and no case of obstruction to the public access or public way has been established. The Magistrate has no jurisdiction to entertain such private disputes relating to private pathway. [11]

7. The expressions 'public places' and 'any way' used in *s. 133 Cr.P.C.* are not limited to places dedicated to the public. If the public have access to a place as a right, permission or use, it is a public place in respect of which power under *s. 133 Cr.P.C.* may be exercised for removal of obstruction or nuisance.[12]

8. When the persons are carrying on the business of auctioneering vegetables, in a house and the carts stacked with vegetable are brought before that house causing obstruction, the Magistrate cannot proceed against the auctioneers but can proceed only against the persons who bring the carts obstructing the public road. [13]

9. When the opposite party was alleged to have raised wall on the public pathway, the civil suit filed by the petitioner is pending and the Magistrate ordered demolition of the said wall without recording any finding that the construction had been made on the public pathway or as to the extent of encroachment on the public pathway, the order of removal of construction cannot be sustained. [14]

18. 'Removed from'.—

1. From these words, it has been held in a number of cases that s. 133 does not warrant the Magistrate to interfere with any lawful activity on one's private land even though that may cause some nuisance or obstruction of a public way or water, *e.g.* , by the carrying of a lawful trade on one's own land, though that may cause some discomfort to the people passing by an abutting road; [15] erecting a khatal [16] or latrine [17] or wall [18] on his own land, which resulted in an obstruction or nuisance to the user of an adjoining road.

2. There is a contrary decision of the Nagpur High Court [19] where the High Court upheld an order directing an owner to remove an embankment upon his own property, on the ground that it caused accumulation of water on the adjoining road. This decision has been dissented from by many High Courts on the ground that the very words 'removed from' suggest that s. 133 can be applied only where the thing causing obstruction or nuisance which is to be removed exists on the public way or place; [20] if the nuisance *caused* by anything lawfully done by a person on his *own* property, whatever other law might be applicable, s. 133 cannot be applied to stop or remove anything from the person's own land. [21] Of course, s. 133 may be used to remove any portion of the adjoining owner's structure or tree or the like which overhangs or obstructs the user of the way; [22] or if a noxious thing is kept in an injurious condition. [23]

19. Direction on the Municipality to abate nuisance.—

The Magistrate under *s. 133 Cr.P.C.* has sufficient power to direct a municipality to abate a public nuisance in a locality due to open drains, heaps of dirt, pits and public excretion by human beings for want of lavatories, by taking affirmative act ion on a time bound basis. When the Magistrate passes such an order, the Municipality cannot take the plea of financial inability to obey the order of the Magistrate.[24]

20. Removal of foddar tals.—

When the foddar tals in the residential colony and carrying on business result in intolerable noise and cause dust laden with the particles of fodder spread over the neighbouring house, it is a public nuisance for which the Magistrate may initiate the proceedings for removal of nuisance. [25]

21. Clause (b) : 'Trade or occupation...,'.—

1. The Clause warrants an order under s. 133 only if the carrying on of a trade or occupation constitutes a 'public nuisance' by causing injury to the health or physical comfort of the general public in a locality, *e.g.* , noise or smoke emitted by a factory; [26] or pollution caused by a fodder business. [27]

2. In order to bring a trade or occupation within the purview of *s. 133 Cr.P.C. i.e* . public nuisance, it must be shown that the interference with the public comfort was considerable and large section of the public was affected. So, when the operation of a godown of storage of dried chillies is affecting the health and physical discomfort of the residents of the locality, the order passed under *s. 133 Cr.P.C.* issuing conditional order must be upheld.[28]

3. The petitioner erected khatal on his own property resulting in filth being accumulated on the road. No removal for khatal can be made by invoking s. 133 because the khatal is on his private land. [29]

4. When the complaint is made before the Magistrate that the opposite party, the owner of the saw mill, has been obstructing the public road by stacking timber and prays for directing the opposite party to stop the saw mill, such a prayer cannot be granted but the Magistrate can direct the obstruction to public road to be removed. [30]

So, the running of flour mill and oil mill in the densely populated area was causing dust and obnoxious smell, running of oil speller was also creating adverse effect on the health of the people of the vicinity and the noise level was more than the standard prescribed. So, the order of the Magistrate under *s. 133 Cr.P.C.* directing closure of the mills was held to be proper.[31]

22. 'Community'.—

It means that general public or residents of the particular locality where the nuisance exists. Where only a particular person or persons are aggrieved, it is not a public but a private nuisance, for which the remedy is a civil suit and not an order under s. 133. [32] It is, however, not necessary that more than one person shall come as complainant. [33]

23. Clause (d) : Building etc. likely to cause injury to neighbours.—

1. The conditions for the application of the section under the present clause are—

   (a) That building, tent, structure or tree is in such a dangerous condition that it is likely to fall.

   (b) That by such fall it is likely to cause injury to a neighbour [34] or a passer-by.

2. No action under this section can, accordingly, be taken—

   (i) Where the likelihood of danger is to the inmates of the building itself. [35]

   (ii) Where, the buildings stand at some distance from the road, within a compound wall and is not likely, by its fall, to injure anybody outside the compound. [36]

3. On the other hand, it is not necessary for proceeding under s. 133 that the tree must fall on a public place or endanger the 'general public'. [37]

24. 'Persons'.—

1. It has been held that this clause does not specify any *number* of persons to be affected from the fall of a building or tree, which is in a dangerous condition, in order to complain under this clause. [38] Hence, even a single family or the sole occupant [39] of a neighbouring house may complain of the dangerous condition of the building, tree, *etc.* [40]

2. The fact that the neighbour is a known person is no reason to hold that danger to him would not be a 'public nuisance'. [41]

3. Of course, Art. 133 would have no application where the danger is not to neighbours but only to the inmates of the very house which is dilapidated. [42], [43]

25. 'Removal, repair or support'.—

The object of this Clause being to prevent neighbours or passers-by being injured by the fall of a dilapidated building, an order under this Clause cannot be made to direct the owner to *reconstruct* the house and to put back the tenants in it. [44]

26. 'May make a conditional order....'.—

1. It is not obligatory for the Magistrate to make a conditional order under this section in every case where he receives information under sub-section (1). If he is not satisfied as to the existence of the circumstances mentioned in any of the Clauses of sub-section (1), he may drop the proceedings at this stage.

2. An order so dropping the proceedings is a 'final order' so as to attract s. 362; hence, it cannot be reviewed except to correct a clerical or arithmetical error. [45]

27. Transfer of proceedings.—

I. There was a divergence of opinion as to whether s. 192 can be applied to a proceeding under s. 133.

(A) One view is that s. 133, being a special provision, stands by itself independent of s. 192, so that a District Magistrate, a Sub-Divisional Magistrate or other Executive Magistrate specially empowered who makes the conditional order under s. 133 can, at the time of making that order, transfer the case to another Magistrate, by directing the person to appear before such Magistrate; but he *cannot* make an order for transfer (under s. 192), at any subsequent stage of the proceeding. [46] According to this view, the application of s. 192 is excluded by reason of the fact that there are special provisions for transfer of the case in s. 133 itself. [47]

(B) The contrary view is that there is nothing to exclude the application of s. 192 to a proceeding initiated under s. 133, so that it is competent for the Magistrate before whom the person shows cause, to transfer the case to another Magistrate, under s. 192. [48] But such transfer may be made only after the second party shows cause before the Magistrate who drew up the proceedings under s. 133, and not before that stage. [49]

II. *Changes made by the new Code.* —The changes made in the last paragraph of sub-section (1), indicate that the Legislature has taken notice of the foregoing controversy and the following propositions may be drawn from the words in italics, which have been introduced in the paragraph:

(i) The conditional order can be made only by a District Magistrate, Sub-Divisional Magistrate or a Specially empowered Executive Magistrate. If it is passed by some other Magistrate, his order and subsequent proceedings would be *void* [s. 46(h), *post*].

(ii) After making that order, such Magistrate may direct the second party to appear before any other Executive Magistrate subordinate to him and to show cause against the conditional order as to whether it should not be made absolute. The view taken in the under-mentioned case [50] that a transfer cannot be made prior to the party's showing cause against the conditional order, is no longer good.

(iii) It would be evident from the foregoing provisions that s. 192 (*post*) is sought to be excluded, and the subordinate Magistrate to whom the case is transferred under the amended last paragraph of s. 133(1), cannot himself transfer the further proceedings to some other Magistrate, for the following reasons:

(a) Section 192(1) of the *new* Code gives the power of transfer to the Chief Judicial Magistrate, and (b) to another Magistrate who is subordinate to such Chief Judicial Magistrate;

(b) Under sub-section (2) of s. 192, the power can also be exercised by a Magistrate of the first class if so empowered by the Chief Judicial Magistrate.

It is obvious that these conditions cannot be applied to a proceeding under s. 133 under the *new* Code.

28. Revision.—

1. Revision lies against an order made under s. 133, if— It violates any of the conditions of s. 137,*e.g.* ,

   (i) If the Executive Magistrate making the order is not specially empowered, as required by sub-section (1). [51]

   (ii) If, instead of making a conditional order to show cause why that order should not be made absolute (under s. 136 or 138), the Magistrate makes an order *combining* conditional and final order without giving to the opposite party an opportunity of being heard and without making inquiry. [52]

2. See, further, under Sections 137- 138,*post* .

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34 *Vasant Manga Nikumba v. Baburao,* 1996 SCC (Cri) 27 : 1995 Supp. (4) SCC 54.

35 *State of M.P. v. Kedia Leather and Liquor Ltd.,* (2003) 7 SCC 389 [LNIND 2003 SC 686] : 2003 SCC (Cri) 16 [LNIND 2002 SC 628]/42 : AIR 2003 SC 3236 [LNIND 2003 SC 686]: 2003 Crlj 4335.

36 *K.S.M. Kalyanamundan v. K. Ammal,* 1975 Crlj 1717 .

37 *Ranubala v. State,* 1981 Crlj 135 Cal ; *Babulal v. State,* AIR 1961 SC 884 [LNIND 1961 SC 14]: (1961) 3 SCR 423 : 1961 Crlj 16 .

38 *Sohanlal* *v.* *Mohanlal,* 1976 Crlj 1354 .

39 *Narayan* *v.* *S.D.M.,* 1986 Crlj 102 Ori .

40 *Abdul* *v.* *State of U.P.,* (1970) Crlj 301 (All) .

41 *Suresh* *v.* *Krishna,* (1976) Crlj 462 (para 6) All.

42 *Asharfi* *v.* *State,* (1965) 1 Crlj 535 (All) ; *Rameswar v. State of Bihar,* AIR1958 Pat 210.

43 *Murlidhar v. Onkar,* AIR1961 Bom 263; *Kalyanasundaram v. Ammal,* (1975) Crlj 1717 (Mad) .

44 Cf. *Satish* , AIR 1931 Cal 2 ; *Sultan v. State,* (1964) AIRLJ 71 [under *Sections 34, Specific Relief Act, 1963*].

45 Cf. *Satish* , AIR 1931 Cal 2 ; *Sultan v. State,* (1964) AIRLJ 71 [under *Sections 34, Specific Relief Act, 1963*].

46 *Basanti* , AIR 1949 All 650 .

47 *Jagroshan* , AIR1927 Pat 265.

48 *Farzand* *v.* *Hakim,* (1914) 37 All 26 (28).

49 *Mukhtar* *v.* *Ganga,* (1951) 1 All 719 .

50 *Duli* *Chand* , (1929) 51 All 1025 .

51 *Rakesh* *Kumar* *v.* *State of U.P.,* 1994 Crlj 289 All .

52 *Suresh* *Prakash* *v.* *Krishna* *Swarup,* 1976 Crlj 462 .

53 *K.B. Agarwal v. State of Maharashtra,* AIR 2005 SC 4818 : (2005) 9 SCC 36 : 2005 SCC (Cri) 1191 [*LNIND 2004 SC 960*] : 2004 Crlj 4634 .

54 *Shyam Sunder v. State of Rajasthan,* 1998 Crlj 3959 Raj .

55 *Jatindranath* , (1967) Crlj 1716 (FB) .

56 *K.B. Agarwal v. State of Maharashtra,* AIR 2005 SC 4818 : (2005) 9 SCC 36 : 2005 SCC (Cri) 1191 [*LNIND 2004 SC 960*] : 2004 Crlj 4634 .

57 *K.B. Agarwal v. State of Maharashtra,* AIR 2005 SC 4818 : (2005) 9 SCC 36 : 2005 SCC (Cri) 1091 : 2004 Crlj 4634 .

58 *Ismatunnessa v. Sarat,* (1967) Crlj 129 (Gau) ; *Kalyan* , AIR1936 Pat 577; *Murli* , AIR1961 Bom 263.

59 *Ismatunnessa v. Sarat,* (1967) Crlj 129 (Gau) ; *Kalyan* , AIR1936 Pat 577; *Murli* , AIR1961 Bom 263.

60 *Satya v. Sailendra,* AIR 1954 Cal 560 [*LNIND 1953 CAL 61*]; *Panchan v. Mohan,* AIR1950 Pat 315; Provision for removal has also been made under s. 147(3), under the *new* Code.

61 *Ismatunnessa v. Sarat,* (1967) Crlj 129 (Gau) ; *Kalyan* , AIR1936 Pat 577; *Murli* , AIR1961 Bom 263.

62 *Kali v. Anund,* (1896) 23 Cal 557 ; *Phodal* , AIR 1971 MP 437 .

63 *Bhaba v. Ramchandra,* (1987) Crlj 1155 (paras 3, 5) Gau.

64 *Harihar Poly Fibres v. S.D.M.,* 1997 Crlj 2731 Kant .

65 *Tata Tea Limited v. State of Kerala,* 1984 Ker LT 645 .

66 1989 Crlj 2013 (MP).

67 1987 Crlj 2071 (AP).

68 *State of M.P. v. Kedia Leather and Liquor Limited,* (2003) 7 SCC 389 [*LNIND 2003 SC 686*] : 2003 SCC (Cri) 1642 : AIR 2003 SC 3236 [*LNIND 2003 SC 686*]: 2003 Crlj 4335.

69 *E.A. Processors v. Taluka Executive Magistrate,* 1997 Crlj 4472 Kant .

70 *Refique v. State of Rajasthan,* (1986) Crlj 44 (para 9).

71 Cf. *Chowlia v. Ashutosh,* (1975) Crlj 959 (Cal) (para 4).

72 Cf. *Chowlia v. Ashutosh,* (1975) Crlj 959 (Cal) (para 4).

73 *Rajeevan v. S.D.M.* , (1986) Crl-J 693 (paras 3-6) Ker.

74 *Rajeevan v. S.D.M.* , (1986) Crl-J 693 (paras 3-6) Ker.

75 *Vijaya Bank v. State of Gujrat,* 1999 Crl-J 946 (Guj).

76 *Balakrishna v. Madhavan,* (1986) Crlj 109 (paras 4-8) Ker.

77 *Krishna v. State of M.P.,* (1986) Crlj 396 (para 9).

78 *Balakrishna v. Madhavan,* (1986) Crlj 109 (paras 4-8) Ker.

79 *Krishna v. State of M.P.,* (1986) Crlj 396 (para 9).

80 *Amarendra Kumar Pal v. Maya Pal,* (2009) 8 SCC 359 [*LNIND 2009 SC 2273*] : (2009) 3 SCC 868 (Cri) : 2010 Crlj 395 .

81 *Vasant Manga Nikumba v. Baburao Bhikanna Naidu,* 1996 SCC (Cri) 27 : 1995 Supp (4) SCC 54.

82 *State of M.P. v. Kedia Leather and Liquor Ltd.,* (2003) 7 SCC 389 [*LNIND 2003 SC 686*] : 2003 SCC (Cri) 1642 : AIR 2003 SC 3236 [*LNIND 2003 SC 686*]: 2003 Crlj 4335.

83 *Shiraj Cinema v. Srinagar Municipal Corporation,* 1988 Crlj NOC 55 (J&K).

84 *Branch Manager, Vijaya Bank v. State of Gujrat,* 1999 Crlj 946 Guj .

85 *Branch Manager, Vijaya Bank v. State of Gujrat,* 1999 Crlj 946 Guj .

86 *Qmar Jahana v. State of U.P.,* 1997 Crlj 3810 All .

87 *K.B. Agarwal v. State of Maharashtra,* AIR 2004 SC 4818 [*LNIND 2004 SC 960*]: (2005) 9 SCC 36 : 2005 SCC (Cri) 1191 [*LNIND 2004 SC 960*] : 2004 Crlj 4634 .

88 *Ramlal v. State of Rajasthan,* 2007 Crlj 1949 Raj .

89 *Donmington Tea Factory v. S.D.M. and Sub-Collector,* 1998 Crlj 3585 Mad .

90 *Sankar Saha v. State of Tripura,* 2008 Crlj (NOC) 224 (Gau).

1 *S. Datta v. State of W.B.,* (1976) Crlj 1613 (Cal) .

2 *Rajeevan v. S.D.M.,* (1986) Crlj 693 (paras 3-6) Ker.

3 *Ram* , AIR1945 Pat 309.

4 *S. Datta v. State of W.B.,* (1976) Crlj 1613 (Cal) .

5 *Jagroshan v. Madan,* AIR1927 Pat 265.

6 *Gati* , AIR1955 NUC 568(Cal) .

7 *Krishna v. State,* (1977) Crlj 86 (N) (All) .

8 *Sohan v. Mohan,* (1976) Crlj 1354 (HP) .

9 *M.P. Parmeshwaran v. P. Madhvan,* 1975 Crlj 1306 .

10 *Sunil Pattnayak v. Ajit Pattnayek,* 2007 Crlj 4125 Cal .

11 . *Laxman v. Janardhan,* 2007 Crlj 136 Bom .

12 *Angasthey v. Vaskey,* 1989 Crlj NOC 183 : (1989) 1 KLJ 704 : (1989) 1 KLT 654 [LNIND 1989 KER 110].

13 *Ram Avtar v. State of U.P.,* AIR 1962 SC 1794 [LNIND 1962 SC 220]: (1963) 1 Crlj 14.

14 *Diwakar Tiwari v. State of U.P.,* 2008 Crlj (NOC) 1276 : (2008) 5 ALJ 7 (5) (All).

15 *Ram Autar v. State of U.P.,* AIR 1962 SC 1794 [LNIND 1962 SC 220]: (1963 3 SCR 9 [LNIND 1962 SC 220] : (1963) 1 Crimes 14 .

16 *Sumner v. Sanitary Inspector,* AIR 1955 Cal 554 [LNIND 1955 CAL 75].

17 *Shri Ram v. Emp.,* AIR 1935 All 926 .

18 *Parameswaran v. Madhavan,* (1975) Crlj 1306 (Ker) .

19 *Sadasheo v. Chintaman,* AIR1945 Nag 226.

20 *Manuel* , AIR1967 Goa 1FB .

21 *Parameswaran v. Madhavan,* (1975) Crlj 1306 (Ker) .

22 *Manuel* , AIR1967 Goa 1FB ; *Gokul v. Emp.,* AIR 1924 All 627 .

23 *Shri Ram v. Emp.,* AIR 1935 All 926 .

24 *Municipal Council Ratlam v. Virdhichand,* [AIR 1980 SC 1622 : 1980 Crlj 1075 : LNIND 1980 SC 287] : [(1980) 4 SCC 162 : LNIND 1980 SC 287].

25 *Himmat Singh v. Bhagwana Ram,* 1988 Crlj 614 : 1987 RLW 230 Raj .

26 *Gobind v. Shanti,* (1979) Crlj 59 : [AIR 1979 SC 143 : LNIND 1978 SC 252] : (1979) 2 SCC 267.

27 *Ajeet v. State of Rajasthan,* (1990) Crlj 1596 (paras 11-12).

28 *K.B. Agarwal v. State of Maharashtra,* [AIR 2004 SC 4818 : LNIND 2004 SC 960 : (2005) 9 SCC 36 : 2005 SCC (Cri) 1191 : LNIND 2004 SC 960] : 2004 Crlj 4634 .

29 *Chabila Roy v. State of West Bengal,* 1983 Crlj NOC 203Cal : (1983) 2 Crimes 416 : 87 Cal WN 774.

30 *K.T. Kalappan v. Revenue Inspector,* (1986) 3 Crimes 468 (Ker) .

31 *Bankilal Gupta v. Anand Saxena,* 2008 CrLJ 1772 (1775) (MP).

32 *Dwarika v. B.K. Roy,* AIR 1950 Cal 349 ; *Basanti v. R.,*

AIR 1949 All 650 ; *Shaukat v. Sheodayal,*
AIR 1958 MP 350 [
LNIND 1957 MP 8].

33 *Krishna v. State of M.P.,*
(1986) Crlj 396 (paras 9-10) MP.

34 *Rajeevan v. S.D.M.,*
(1986) Crlj 693 (paras 3-6) Ker.

35 *Dwarika v. B.K. Roy,*
AIR 1950 Cal 349 ; *Basanti v. R.,*
AIR 1949 All 650 ; *Shaukat v. Sheodayal,*
AIR 1958 MP 350 [
LNIND 1957 MP 8].

36 *Emp. v. Jasoda,*
(1898) 20 All 501 .

37 *Rajeevan v. S.D.M.,*
(1986) Crlj 693 (paras 3-6) Ker.

38 *Somnath v. State,*
(1974) 80 Crlj 522 (Goa) ; *State v. Chacko,*
(1962) 2 Crlj 666 (Ker) ; *Achalanand* ,
AIR 1959 Raj 44 [
LNIND 1958 RAJ 52].

39 *Rajeevan v. S.D.M.,*
(1986) Crlj 693 (paras 3-6) Ker.

40 *Somnath v. State,*
(1974) 80 Crlj 522 (Goa) ; *State v. Chacko,*
(1962) 2 Crlj 666 (Ker) .

41 *Achalanand* ,
AIR 1959 Raj 44 [
LNIND 1958 RAJ 52].

42 *Emp. v. Jasoda,*
(1898) 20 All 501 .

43 *Achalanand* ,
AIR 1959 Raj 44 [
LNIND 1958 RAJ 52].

44 *Nagappa v. State of Mysore,*
(1971) 2 Mys LJ 209 (201-11).

45 *Sashibhusan* *v.* *State,*
(1985) Crlj 227 (Or) .

46 *Bhola* *v.* *Lachman,*
AIR 1950 All 475 [
LNIND 1950 ALL 86]; *Ramcharan v. Residents, Sahabad,*
AIR 1958 Raj 248 [
LNIND 1957 RAJ 170]; *Md. Baksh v. Emp.,* AIR1948 Lah 49.

47 *Ramcharan* *v.* *Residents,* *Sahabad,*
AIR 1958 Raj 248 [
LNIND 1957 RAJ 170].

48 *Bardeswari* *v.* *Rabinandan,*
AIR 1956 Cal 24 [
LNIND 1955 CAL 92](DB) ; *Mahadeb v. Adhir,*
AIR 1970 Cal 169 [
LNIND 1969 CAL 68](DB) .

49 *Chowlia* *v.* *Ashutosh,*
(1975) Crlj 959 (para 5) Cal.

50 *Chowlia* *v.* *Ashutosh,*
(1975) Crlj 959 (para 5) Cal.

51 *Chindaiah* *v.* *Gopala,*
(1987) Crlj 1264 (para 3) Knt; *Rafique v. State of Rajasthan,*
(1986) Crlj 44 (para 9).

52 *Chindaiah* *v.* *Gopala,*
(1987) Crlj 1264 (para 3) Knt; *Rafique v. State of Rajasthan,*
(1986) Crlj 44 (para 9).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 134
Service or notification of order.

(1) The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

1. Scope of s. 134.—

The section reproduces s. 134 of the *old* Code and provides a self contained procedure for service of the conditional order made under s. 133.

2. Notices to show Cause, mandatory.—

Notice to show cause after passing conditional order under *s. 133 Cr.P.C.* has to be duly served upon the opposite party as laid down in *s. 134 Cr.P.C.* and on getting such notice the opposite party has to appear and to show cause. But when the conditional order is made absolute without issuing notice to show cause under

s. 134 Cr.P.C. , the order is illegal.[53]

Therefore, only on compliance with the provisions of service of notice as provided in *s. 134 Cr.P.C.* , the Magistrate gets the jurisdiction to proceed with the matter under *Sections 137* and *138 Cr.P.C.* [54]

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53 *Narayan v. S.D.M., Jaipur,* 1986 Crlj 102 Ori ; *Mohammed Rafiq v. State,* 1986 Crlj 44 Raj .

54 *T.P. Rajeevan v. S.D.M.,* 1986 Crlj 693 Ker .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
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B.—Public nuisances

S. 135
Procedure where existence of public right is denied.

The person against whom such order is made shall—

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same.

1. Scope of s. 135.—

1. This section reproduces *old* s. 135, after omitting the words 'or.....proper', which enabled the second party to apply for a jury to hear the evidence.
2. As it stands amended, in the *new* Code, it provides that when an order under s. 133 has been made, the person to whom notice of the order is issued has two courses open to him, as laid down in s. 135,—

(i) He can comply with the order; or

(ii) He can appear before the Magistrate before whom he is directed to appear and show cause against the order.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 136
Consequences of his failing to do so.

If such person does not perform such act or appear and show cause, he shall be liable to the penalty prescribed in that behalf in *Section 188 of the Indian Penal Code (45 of 1860)* , and the order shall be made absolute.

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1. Scope of s. 136.—

This section reproduces *old* s. 136, without any change.

2. Consequence of failure to take either of the steps directed under s. 135.—

The consequences of failure on the part of the second party either to perform the act enjoined by the conditional order made under s. 133 or to appear and show cause against such order are laid down in s. 136, namely,

(a) the conditional order shall be made absolute, without any further proceeding under Sections 137- 138;

(b) the person shall be liable to punishment under s. 188, I.P.C., on trial under s. 352 (*post*).

3. Scope of final order.—

The absolute order cannot go beyond the terms of the conditional order under s. 133(1). [55] Thus, where by his conditional order, the Magistrate required the Appellant to demolish the oven and chimney of his bakery which was causing nuisance, the final order could not go beyond and ask the Appellant to close his business at that site altogether. The Supreme Court, accordingly, modified the final order. [56]

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55 *Govind* *v.* *Shanti,* AIR 1979 SC 143 145 : (1979) 2 SCC 267 : 1979 Crlj 59 .

56 *Govind* *v.* *Shanti,* AIR 1979 SC 143 145 : (1979) 2 SCC 267 : 1979 Crlj 59 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 137
Procedure where existence of public right is denied.

(1) Where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under Section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Court; and if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

(3) A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial.

1. Scope of s. 137.—

1. This section corresponds to s. 139A (which had been introduced by Act 18 of 1923), with the change that the reference to jury trial at the end of sub-section (3) has been omitted.

2. The arrangement of sections has been altered by placing this section prior to s. 138 (corresponding to *old* s. 137), to make it clear that it is imperative, before proceeding under s. 138, to make an *ex parte* inquiry under the present sections. [57]

2. Sections 133 and 137.—

1. Section 133 provides for the making of a conditional order, in certain contingencies, which leads to a final order, either dropping the proceedings or making the conditional order absolute. Now, of the 6 contingencies specified in s. 133(1),*one* kind of obstruction, nuisance or danger to a public right [vide sub-section (1)(a)], namely, the right to use a public *way, river, channel* or *place* , is taken out to make a special treatment in s. 137. That special provision is that in this class of cases after making the conditional order under s. 133 and, before proceeding to make a final order under s. 138, the Magistrate must make an inquiry under s. 137.

2. This special procedure, as laid down in s. 137, would not apply in the case of a conditional order made in the other cases under s. 133,*i.e.* , under Clauses (b)-(d) of s. 133(1). In those cases, the Magistrate should proceed directly to act under s. 138.

3. Sections 137 and 138.—

1. The scope of inquiry under the two sections are different. The former relates to the *existence* of the *public right* . The latter relates to the question whether the person proceeded against *caused the nuisance etc.* [58]

2. The Magistrate gets his jurisdiction to proceed under s. 138 only on his finding under s. 137 that there is no reliable evidence in support of his denial of the existence of the public right. Where no finding as to existence of the public right is arrived at, further proceedings under s. 138 shall be without jurisdiction and illegal. [59] In short, the inquiry under s. 137 is obligatory. [60]

3. Where, in reply to a notice under s. 133, the party denies the existence of the public right, the Magistrate must decide that question first and it is not open to him to make a composite final order. Merely because the Magistrate allowed both parties to adduce evidence, it cannot be inferred that the Magistrate dispensed with the inquiry under s. 137. [61]

4. The difference in the inquiries provided for by these two provisions that under s. 138(1), the Magistrate has to weigh the evidence of both parties as at a summons trial; under s. 137(2), he has to consider only whether the evidence of the objector is ‘reliable’. [62]

5. It is only if the objector’s evidence is held by the Magistrate to be ‘unreasonable’, that he shall proceed to take the evidence of both sides, in the manner laid down in s. 138(1). [63]

6. According to the Kerala High Court enquiry under s. 137 is not obligatory. Therefore, omission to hold an enquiry will not vitiate the proceedings. [64] But s. 138 cannot be resorted to if no enquiry under *s. 137 Cr.P.C.* is made.[65]

4. Procedure under s. 137.—

1. In a case of obstruction of public right mentioned in sub-section (1), when the person against whom the conditional order under s. 133 has been made appears, the Magistrate must, in the first instance, question him as to whether he denies the existence of the public right alleged by the first party. [66]

2. If such person denies the existence of the public right alleged, the Magistrate is to make the *ex parte* inquiry into the evidence in support of such denial. [67]

3. If such evidence of the objector is reliable, the Magistrate must stay the proceedings, until the question as to existence of the pubic right is decided by a competent Court [sub-section (2)].

4.

   (a) If the finds that the objector's evidence is *not* 'reliable', he shall proceed, under s. 138, to take the evidence of both parties, as in a summons case. [68]

   (b) If the opposite party fails to produce reliable evidence in support of the denial, the Magistrate cannot straightway pass the final order. Even in such a case, he has to make an enquiry by taking evidence from both the parties as provided in *s. 138 Cr.P.C.* [69]

5. The Magistrate gets the jurisdiction to proceed under *s. 138 Cr.P.C.* only on the finding under *s. 137 Cr.P.C.* that there is no reliable evidence in support of the opposite party's denial of the existence of public right. Where no findings as to the existence of public right is arrived at, further proceedings under *s. 138 Cr.P.C.* shall be without jurisdiction.[70]

6. The scope of enquiry under *s. 137 Cr.P.C.* is to find out if there is any denial of the public right. The Magistrate does not weigh the evidence in order to determine the rights and truth of denial.[71]

7. If the persons appearing before the Magistrate denied the public right, the order making the preliminary order absolute without holding any enquiry is without jurisdiction. [72]

As soon as the Magistrate is satisfied that there is reliable evidence in support of the denial, then he shall not continue the proceeding any further but shall stay the proceedings until the matter of the existence of the public right is decided by the competent Court of Law in view of s. 137(2) *Cr.P.C.* [73]

5. Sub-section (1) : Duty to question the person.—

1. The duty of the Magistrate to question the person, when he appears, as to whether he denies the existence of the public right with respect to which the conditional order had been made, is not an empty formality. If he proceeds to pass an order under s. 137 or 138, without such questioning, his order would be illegal. [74]

2. Where, however, the person, on his appearance, files a written statement denying the existence of the public right, a failure to question him orally, on the same matter, would be a mere irregularity, not vitiating the proceeding. [75] , [76]

6. 'Denies the existence of the public right'.—

1. Where the public right is a right of way or passage along a river, it is not necessary for the Opposite Party to deny the existence of the public right over the entire length of the way alleged; it is sufficient denial, calling for an inquiry under this section, if the Opposite Party denies the existence of the right with respect to that part of the way where the obstruction is alleged to have been made. [77]

2. It is the factum of denial of the public right which sets s. 137(1) into motion. As soon as such denial is made, the Magistrate must proceed to make the *ex parte* inquiry under s. 137(1). At that stage, he is not to consider whether the denial is *bona fide* or frivolous. [78] Of course, if after taking evidence of the objector in support of the denial, under s. 137(2), the Magistrate finds that there is *no* reliable evidence he should refuse to stay the proceedings for the purpose of having the question of existence of the public right decided by a competent Court, [79] and, proceed under s. 138(1), to take the evidence of both parties as in a summons case. [80]

3. The scope of inquiry under s. 137 is only to find whether there is *prima facie* 'reliable' evidence, in support of the case of the Opposite Party about *denial* of the existence of the public right. It does not require definite proof at that stage. [81]

7. Public and private right.—

Where the dispute is between two or more private parties over a right in which the public in general are not interested, the remedy of such private parties is before the Civil Court, say under Sections 6- of the 7 of the *Specific Relief Act* or *s. 9 of the C.P.C* ode. *s. 133 of the Cr.P.C.* cannot be applied to such private dispute. s. 133 comes in only where the public have a right or interest, say, in respect of a public place, waterway and the like, as enumerated in Cls. (a)-(f) of s. 133(1)[82] (see *ante*), the breach of which constitutes a 'public nuisance'. [83]

8. Sub-section (2) : 'Reliable evidence in support of such denial'.—

1. The duty of the Magistrate and the scope of the inquiry under s. 137(1)- (2) is only to find out, summarily, and on the *ex parte* evidence adduced on behalf of the party against whom the conditional order under s. 133 has been made, whether his denial of the existence of the public right alleged by the first party has some substance or is frivolous. [84]

2. The law does not contemplate that at such inquiry the Magistrate should allow the rival parties to lead evidence in support of their rival claims. [85] His function under this section is not to declare the rights of the contending parties, which would be the jurisdiction of the Civil Court. [86]

3. On the one hand, the Opposite Party is not called upon to establish it *affirmatively* that no such public right exists. Before the Magistrate, he has only to produce evidence which is *prima facie* believable and which would induce the Magistrate to leave the question of title of the parties being decided by a competent Civil Court. [87]

4. On the other hand, it would be beyond the jurisdiction of the Magistrate to call upon or allow the first party to produce evidence to rebut the evidence adduced by the Opposite Party in support of his denial. [1] The magistrate has *no* jurisdiction to weigh the evidence of both sides and decide on which the balance leans. [2] , [3] As soon as the Opposite Party produces *ex parte* [4] but reliable evidence to support his denial of the alleged public right (*e.g.* , a *patta* showing his private right), [5] the Magistrate must stay the proceedings before him, [6] pending adjudication of the rights of the parties by the Civil Court. [7] 'Reliable', in this context, does not mean 'proved'. [8] Nor does it mean that it is preferable to the evidence in support of the complaint; the Magistrate is bound to stay the proceedings as soon as he is satisfied that the evidence adduced by the objecting party is *prima facie* believable. [9]

5. It must, however, be 'legal' evidence so that it may be called 'reliable'. [10]

9. Stay until right has been decided by 'competent Court'.—

1. The proceeding under s. 137 concerns a civil right, which must obviously be decided by the Civil Court. [11]

2. The scope of the proceeding before the Magistrate is only to hold a summary inquiry [12] to see whether there is any *prima facie* reliable evidence to support a denial of the public right alleged by the first party; and not that the non-existence of the public right could be proved. [13] Once that is found, he has no other alternative than to stay the proceedings before him and leave the parties to approach the Civil Court. [14]

3. In some cases, it had been held that if, within a reasonable time, the objecting party did not assert his right before a Civil Court, he might resume the proceedings under s. 133. [15] In some cases, the burden of going to the Civil Court was thrown upon the party moving for the proceedings under s. 133. [16]

This view does not appear to be correct, because, s. 137(2) does not put any limit of 'reasonable time', but uses the absolute term 'until', which indicates that as soon as the Magistrate finds that the evidence of the objector in support of the denial of the public right is 'reliable', there is an end to his jurisdiction. It is obligatory upon him to stay the proceedings [17] and he cannot reopen it or to draw up fresh proceedings [18] until the question of public right is decided by a competent Civil Court. Nor can the Magistrate compel either party to go to the Civil Court [19] because s. 137 does not confer upon him any such power.

10. Revision.—

1. The provisions of s. 137 are mandatory [20] where the case comes within its fold, *i.e.* , where the right interfered with is a public right of way, river and the like.
2. Hence, revision would lie in case of breach of any of its provisions, *e.g.* , if the Magistrate—

(i) Fails to question the objector after he appears in response to the conditional order, [21] as to whether he denies the existence of the public right alleged and proceeds to decide the merits of the case. [22]

(ii) Calls the evidence of both the parties, without making the *ex parte* inquiry into the objector's evidence. [23]

(iii) Makes the conditional order absolute without making inquiry under s. 137. [24], [25]

3. The proper order of the revisional Court, where it finds that the provisions of s. 137 have been violated, is to send the case back to the Magistrate with the direction to proceed according to law, [26], [27] from the appropriate stage. [28] Thus, if there was nothing wrong with the conditional order but the final order was vitiated for non-compliance with s. 137, the revisional Court would maintain the conditional order but set aside the final order, directing the Magistrate to proceed afresh from the stage under s. 137. [29]

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57 Cf. *Jaswant v. Jagir,* AIR1972 P&H 192; *Kartika v. Jagannath,* (1964) 1 Cri J 248 (249) Or; *Byahmdeo v. Inderdeo,* (1984) Cri J 300 (301) Pat.

58 *Anand* *v.* *State,* (1974) Crlj 1321 (1323); *Ramakrishnan v. Musalikutty,* (1985) Crlj 630 (paras 7, 9) Ker.

59 *Anand* *v.* *State,* (1974) Crlj 1321 (1323); *Ramakrishnan v. Musalikutty,* (1985) Crlj 630 (paras 7, 9) Ker.

60 *Anand* *v.* *State,* (1974) Crlj 1321 (1323); *Ramakrishnan v. Musalikutty,* (1985) Crlj 630 (paras 7, 9) Ker.

61 *Anand* *v.* *State,* (1974) Crlj 1321 (1323); *Ramakrishnan v. Musalikutty,* (1985) Crlj 630 (paras 7, 9) Ker.

62 *Rupan* *v.* *State* *of* *U.P.,* (1976) Crlj 502 (All) .

63 *Rupan* *v.* *State* *of* *U.P.,* (1976) Crlj 502 (All) .

64 *Cheruchi* *v.* *State* *of* *Kerala,* (2009) 1 KLT 217 [LNIND 2008 KER 669].

65 *Abdul Aziz Mir v. Javaid Ahmad Khan,* 2003 Crlj 2942 (J&K) .

66 *Rupan v. State of U.P.,* (1976) Crlj 502 (All) .

67 *Rupan v. State of U.P.,* (1976) Crlj 502 (All) .

68 *Rupan v. State of U.P.,* (1976) Crlj 502 (All) .

69 *Brahmdeo v. Inderdeo,* 1984 Crlj 300 Pat .

70 *Ramakrishnan v. Musali Kutty,* 1985 Crlj 630 Ker ; *Anand v. State,* 1974 Crlj 1321 .

71 *Raghuveer v. Suresh Chandra,* (1987) 3 Crimes 301 (All) .

72 *Parithran v. Kunjukochu,* 1982 Crlj 103 Ker .

73 *Ramkishore v. State,* 1973 Crlj 1327 .

74 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB; *Banshidhar v. P.W.D.,* AIR1943 Pat 3.

75 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

76 A Single Judge of the Calcutta High Court differs [*Chowlia v. Ashutosh,* (1975) Crlj 959 (para 7)].

77 *Ayub v. State,* AIR 1952 All 215 [*LNIND 1950 ALL 12*]; *Gangaram v. State of Rajasthan,* (1969) Crlj 1458 (Raj) .

78 *Ravi v. Siyaram,* (1983) Crlj 478 (para 3).

79 *Ravi v. Siyaram,* (1983) Crlj 478 (para 3).

80 *Ravi v. Siyaram,* (1983) Crlj 478 (para 3).

81 *Amar Singh v. State of U.P.,* (1980) CrLJ 1350 (1352) All.

82 *Bhaba v. Ramchandra,* (1987) Crlj 1155 (para 3) Gau.

83 See, *Section 268 IPC* , and Authors's *Law of Torts,* Latest Edition.

84 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

85 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

86 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

87 *Sultan v. State,* (1964) ALJ 71 .

1 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

2 *Gangaram v. State of Rajasthan,* (1969) Crlj 1458 (Raj) .

3 *Darshan v. State,* AIR1959 Pat 81(DB) .

4 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

5 *Darshan v. State,* AIR1959 Pat 81(DB) .

6 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

7 *Gangaram v. State of Rajasthan,* (1969) Crlj 1458 (Raj) .

8 *Jai Ram v. Bhuley,* AIR 1963 All 27 [*LNIND 1961 ALL 20*].

9 *Krishan v. State of U.P.,* (1976) Crlj 502 (All) .

10 *Darshan v. State,* AIR1959 Pat 81(DB) .

11 *Sultan v. State,* (1964) ALJ 71 .

12 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

13 *Anand v. State,* (1974) 80 Crlj 1321 (All) DB.

14 *Sultan v. State,* (1964) ALJ 71 .

15 Cf. *Belat v. Abdul,* (1904) 8 CWN 143 ; *Ramsagar* , 26 CWN 442.

16 *Kusha v. Gopalnagar U.B.,* (1934) 61 Cal 390 .

17 *Atul* , AIR 1966 Cal 215 [*LNIND 1965 CAL 48*].

18 *Raghubans* , AIR1948 Pat 15.

19 *Ram Sahai* , AIR 1935 All 79 .

20 *Pavithran v. Konju Kochu,* (1982) Crlj 103 (paras 8,11) Ker; *Ravi v. Siyaram,* (1983) Crlj 478 (paras 3-4) All.

21 *Anand v. State,* (1974) 80 Crlj 1321 (All) .

22 *Thaneswar v. Kumud,* (1987) Crlj 1293 (paras 6-7) Gau.

23 *Anand v. State,* (1974) 80 Crlj 1321 (All) .

24 *Ravi v. Siyaram,* (1983) Crlj 478 (paras 3-4) All.

25	*Brahmdeo*		*v.*		*Indradeo,*
(1984) Crlj 30		(para 4) Pat.			
26	*Anand*		*v.*		*State,*
(1974) 80 Crlj 1321		(All) .			
27	*Rupan*	*v.*	*State*	*of*	*U.P.,*
(1977) Crlj 502		(All) .			
28	*Rupan*	*v.*	*State*	*of*	*U.P.,*
(1977) Crlj 502		(All) .			
29	*Thaneswar*		*v.*		*Kumud,*
(1987) Crlj 1293		(paras 6-7) Gau.			

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B.—Public nuisances

S. 138
Procedure where he appears to show cause.

(1) If the person against whom an order under Section 133 is made appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case.

1. Scope of s. 138.—

This section corresponds to *old* s. 137, with the changes indicated by italics,—to make it clear, *inter alia* , [30] that the Magistrate has the power to *modify* his order, [31] instead of dropping the proceedings or making absolute the conditional order, as it is.

2. Sub-section (1) : Final order to be based on evidence, as in a summons-case.—

1. While the preliminary order under s. 133(1) is founded on a police report or other information, the final order must be founded on legal evidence [the position is similar to that under s. 116(2); see *ante*]. It follows that the Magistrate cannot make the final order on the basis of—

(i) His local inspection, without taking evidence. [32]

(ii) Affidavits of parties instead of recording evidence as at a trial. [33]

2. Since the procedure should be as in a summons-case, the provisions of Sections 251*et seq.* should be followed :

(a) If the party against whom the conditional order under s. 133 is made appears but does not show cause against such order [s. 138(1)], there is no need for any inquiry under s. 138(1), and if the Magistrate is satisfied that the conditional order is reasonable, he shall make the order absolute, with or without modification [s. 138(2)].

(b) If the Opposite Party shows cause, the Magistrate must take all such evidence as may be produced by the prosecution and thereafter by the Opposite party [s. 254]—

(i) The complainant must first lead evidence in support of his allegations. [34]

(ii) If the first party chooses not to lead any evidence, the Magistrate has no jurisdiction to take the evidence of the Opposite Party and make the conditional order absolute on the basis thereof. [35] If the complainant does not appear on the date fixed or adduces no evidence, the proceedings should be dropped. [36]

(iii) The word 'shall' makes it obligatory for the Magistrate to record evidence even where the person against whom the order under s. 133 has been made does not produce any evidence on his side. In such a case, the Magistrate must record the evidence of the complainant and others, if any. If the final order is made without recording such evidence because the opposite party does not lead any evidence, the final order is liable to be quashed. [37]

3. Sub-sections (2)-(3) enjoin the Magistrate to be satisfied that the conditional order is 'reasonable and proper' before making it absolute, with or without modification. For such satisfaction, he cannot rely solely on the evidence taken at the time of making the conditional order or police papers. Even where the opposite party does not pursue his objection to the conditional order, the Magistrate's obligation to satisfy himself on taking evidence on behalf of the complainant remains. [38] There is no provision for penalising the party against whom the order was passed, for his default, in s. 137 or 138. [39]

4. So, it is clear that the conditional order passed under *s. 133 Cr.P.C.* cannot be made absolute without the party being called upon to adduce evidence in support of his claim even though the second party does not after receiving the show cause notice appears to give evidence in support of his denial of the right claimed by the first party. The provisions of s. 138 (1) *Cr.P.C.* are mandatory in nature and before making an order absolute under sub-section (2) of *s. 138 Cr.P.C.* it is imperative for the Magistrate to take evidence in the manner as required in the summons case.[40]

5. Even when the matter has been taken to the High Court challenging the passing of the conditional order but the High Court has not stayed the proceedings, the Magistrate is not debarred from the proceedings under s. 138 (1) *Cr.P.C.*
[41]

6. The Magistrate has to take evidence as provided in s. 138(1) *Cr.P.C.* and cannot act upon the compromise entered into by the parties.[42]

7. Though order cannot be passed only on the basis of local enquiry but Magistrate is not debarred from holding the local enquiry in order to have proper appreciation of evidence produced by the parties. [43]

8. When the opposite parties on receiving the show cause notice against the conditional order had shown cause, the order of Magistrate making the conditional order absolute without giving opportunity to the parties to adduce evidence contravenes s. 138(1) and the order is liable to be set aside. [44]

9. When the first party applies for removal of obstruction on the public pathway the Magistrate passed a conditional order under *s. 133 Cr.P.C.* He then called for the report of S.D.L. and L.R.O. Neither in the said report not in the order passed by the Magistrate, there was any mention of existence of public pathway. But the Magistrate on the basis of the allegations in the petition and without giving opportunity to the parties to produce evidence made the earlier conditional order absolute. So there was non-compliance of s. 138(1) *Cr.P.C.* and the order is liable to be set aside in exercise of inherent power by the High Court.[45]

10. The First Party complained that the opposite party calling herself a doctor on the basis of the certificate issued by the open University was purporting to act as an allopathic doctor and prayed for stoppage of her clinic. The Magistrate issued a conditional order and asked the opposite party to show cause. The opposite party on receiving the show cause notice failed to appear after seeking adjournment. The Magistrate recorded the evidence of several persons, made the conditional order of the stoppage of clinic absolute. The High Court has held that there was sufficient compliance of *s. 138 Cr.P.C.* and upheld the order.[46]

11. So, it is clear that when the opposite party denies public nuisance, it is mandatory for the Magistrate to hold an enquiry under *s. 138 Cr.P.C.* [47]

3. Sub-section (2) : Modification of order under s. 133.—

This power *newly* given, empowers the Court to make such alteration in the conditional order as may have become necessary owing to any change in the circumstances during the intervening period. But it would not justify the rectification of a conditional order which was not in terms of s. 133 at all, *e.g.* , where it contained no direction for removal of the obstruction or nuisance, [48] or to make a new order altogether. [49]

Thus where the conditional order required the appellant to demolish the oven, the final order which required him, further, to cease carrying on the trade of a baker at the site, was struck down. [50]

4. Delay, if a bar.—

1. There are some cases where it has been held that the relief under s. 133 is meant for emergent evils, so that where there is a considerable delay for the aggrieved party to come to the Magistrate since the date of the alleged obstruction, the Magistrate should refuse to interfere under s. 133, and relegate the party to a civil act ion. [51]

For the same reason,—when the alleged nuisance is continuing for several years as permitted by

the Municipal Committee and a suit for permanent injunction restraining running thereof is pending, it not being of recent origin no action under s. 133 is called for. [52]

2. At the same time, since no man can acquire a prescriptive right to commit a public nuisance, [53] and s. 133 does not prescribe any period of limitation, [54] a Magistrate cannot refuse to remove an obstruction, which constitutes a public nuisance and requires speedy removal, merely on the ground that the application is belated. [55]

5. Sub-section (3) : Dropping of proceedings.—

Sub-sections (2)-(3) are to be read along with sub-section (1). The proceedings, therefore, cannot be either made absolute [56] or dropped [57] without taking evidence as required by sub-section (1), even though the Magistrate may have made a local inspection of the premises.

6. Review of order dropping the proceeding.—

When the Magistrate has passed the final order dropping the proceedings, he cannot review the order or revive the proceedings except on the ground of clerical or arithmetical mistake as provided in *s. 362 Cr.P.C.* [58]

7. Revision maintainable when final order vitiated.—

1. When a person against whom the conditional order has been passed has the right to appear to show cause, any conditional order made absolute without issuing any show cause notice upon him is bad and illegal and liable to be set aside in revision. [59] This is because only on compliance of *s. 134 Cr.P.C.* the Magistrate gets the jurisdiction to proceed under s. 137 and *s. 138 Cr.P.C.* [60]

2. Passing of orders of demolition of the building when the notice is defective and without conducting any enquiry as contemplated by *Sections 138*, *139* and *140 Cr.P.C.*, it is improper and without jurisdiction.[61]

3. When the Magistrate without passing any conditional order under *s. 133 Cr.P.C.* directed the opposite party to remove the air conditioner which were alleged to the public nuisance and did not pass any order in compliance of *s. 138 Cr.P.C.*, the order is liable to be set aside in revision.[62]

4. When the opposite party appeared before the Magistrate on receiving the conditional order, the Magistrate did not question him in the manner laid down in s. 137(1) *Cr.P.C.* as to whether he denies the existence of any public right in respect of the concerned way and no opportunity was given to him to give evidence in support of the denial, the final order directing renewal is illegal and liable to be set aside in revision.[63] Similarly, when the opposite party denies that he was committing any nuisance in a complaint for

removal of nuisance, the final order passed without giving opportunity to produce evidence in support of his denial is illegal. [64]

The enquiry under *s. 138 Cr.P.C.* and passing of the final order without issuing show cause or without holding enquiry about the existence of public right when the same is denied is also illegal.[65]

5. Omission on the part of the Magistrate to draw up a preliminary order under *s. 133 Cr.P.C.* and drawing up a final order without following the procedure laid down in s. 138 vitiates the entire proceedings and makes the order unsustainable in law and liable to be set aside in revision.[66]

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30 As recommended by the Law Commission [37th Rep., para 339(ii)].

31 Superseding the contrary view taken in cases like *Ratepayer's Committee v. Dwip Narayan,* AIR 1952 Cal 127 [LNIND 1951 CAL 7]; *Sadanand v. State,* AIR 1958 All 174 [LNIND 1957 ALL 181].

32 *State of Maharashtra v. Hassanali,* (1975) Crlj 1782 (Bom) .

33 *Banta v. Sohawa,* (1976) Crlj 1448 (paras 7-8) P&H.

34 *Maria v. Ananta,* AIR1969 Goa 74; *Raimohan* , (1916) 44 Cal 61 .

35 *Maria v. Ananta,* AIR1969 Goa 74; *Raimohan* , (1916) 44 Cal 61 ; *Achhru v. Emp.,* AIR1930 Lah 662; *Bechan v. Emp.,* AIR 1925 All 614 .

36 *Maria v. Ananta,* AIR1969 Goa 74; *Raimohan* , (1916) 44 Cal 61 .

37 *Gopalaswamy v. State of Mysore,* (1974) Crlj 1119 (Knt) .

38 *Krishna v. Varghese* , (1975) Crlj (Ker) DB.

39 *Velayudhan v. Kesavan,* (1968) KLT 889 [*LNIND 1968 KER 185*](DB) .

40 *Jagdamba Prasad v. State of U.P.,* 1991 CrLJ 1883 (1991) 2 Crimes 635 : 1991 All LJ 403.

41 *Haji Sajad Ali Khan v. Mohammed Siraj,* 1989 Crlj NOC 54Cal .

42 *Suvendra Singh v. Jasbir Singh,* 1985 Crlj 1525 : (1985) 1 Crimes 661 (All) .

43 *Raj Mal v. Joginder Ram,* 1991 Crlj 3059 : (1991) 1 All Crlr 65 (P&H).

44 *Hindustan Ghee and Giletin Factory v. State of U.P.,* 1998 Crlj 1987 All .

45 *Sunil Pattanayek v. Ajit Pattanyek,* 2007 Crlj 4125 Cal .

46 *S.P. Vishwanathan v. S.D.M and Sub-Editor,* 1999 Crlj 4285 Mad .

47 *Sankar Saha v. State of Tripura,* 2008 Crlj (NOC) 224 (Gau).

48 *Suresh v. Krishna,* (1976) Crlj 462 (para 8).

49 Cf. *Manuel v. State,* AIR1967 Goa 1 (para 8) FB.

50 *Govind v. Santi* , (1978) SC [Cr AIR59/73], dated 15-9-1978.

51 *Emp. v. Tulsi Ram,* AIR1938 Lah 523; *Rameshwar v. State of Bihar,* AIR1958 Pat 210.

52 *Alisher v. State,* (1994) Crlj 215 (NOC) (P&H) .

53 *Jagroshan v. Madan,* AIR1927 Pat 265.

54 *State of M.P. v. Manji,* (1964) 2 Crlj 94 (MP) ; *Satya v. Sailendra,* AIR 1954 Cal 560 [*LNIND 1953 CAL 61*].

55 *Raj Kumar v. State,* (1962) 2 Crlj 413 (All) ; *Chhitar v. Chhoga,* (1974) 80 Crlj 1230 (Raj) .

56 *Balakrishna v. State of Mysore,* (1974) Crlj 220 (Mys) .

57 *Shew Khelaon v. Nayan,* AIR 1920 Cal 834 ; *Murari v. Ram,* (1974) Crlj 120 ; *Balakrishna v. State of Mysore,* (1974) Crlj 220 .

58 *Shashibhusan Tripathi v. State of Orissa,* 1985 Crlj 227 : (1984) 2 Crimes 148 : (1984) 59 Cut LT 179.

59 *Narayan Sahu v. S.D.M. Jaipur,* 1986 Crlj 102 Ori ; *Ram Krishnan v. K. Musali Kutty,* 1985 Cr LJ 630 : ILR (1985) 1 Ker 378 (Ker) .

60 *T.P. Rajeevan v. S.D.M.,* 1986 Crlj 693 Ker .

61 *Shyam Sunder v. State of Rajasthan,* 1998 Crlj 3959 Raj .

62 *Branch Manager, Vijaya Bank v. State of Gujrat,* 1999 Crlj 946 Guj .

63 *Bhanu Mondal v. Joydev Choudhury,* 1998 Crlj 320 Cal .

64 *Kantri Parul Service v. State,* 1997 Crlj 679 AP .

65 *Narayan v. S.D.M. Jaipur,* 1986 Crlj 102 Ori ; *I.&K. Chindaiah v. M.K. Gopal,* (1986) 3 Crimes 94 (Kant) .

66 *C.A. Avarchan v. C.V. Srinivasan,* (1996) 7 SCC 71 : 1996 SCC (Cri) 174 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 139
Power of Magistrate to direct local investigation and examination of an expert.

The Magistrate may, for the purposes of an inquiry under Section 137 or Section 138—

(a) direct a local investigation to be made by such person as he thinks fit; or

(b) summon and examine an expert.

1. Scope of s. 139.—

This section is *new* , and takes the places of the provisions for jury trial in *old* Sections 138- 139, which were omitted by the Government, [67] overriding the recommendations of the Commission [68] that they should be retained. In lieu of jury trial, power has been given, under the *new* s. 139, to the Magistrate to order local investigation or to examine experts.

It is to be noted that Cl. (a) does not empower the Magistrate to hold a local inspection himself but to appoint some *other* person (as he thinks fit) to make such inspection. This is also clear from s. 140(2),*below* .

67 Vide Notes on Clauses on the Bill (41) of 1970) (p. 242, under Cls 136-145).

68 37th Rep of the Commission, paras 341-42.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 140
Power of Magistrate to furnish written instructions, etc.

(1) Where the Magistrate directs a local investigation by any person under Section 139, the Magistrate may—

(a) furnish such person with such written instructions as may seem necessary for his guidance;

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.

(2) The report of such person may be read as evidence in the case.

(3) Where the Magistrate summons and examines an expert under Section 139, the Magistrate may direct by whom the costs of such summoning and examination shall be paid.

1. Scope of s. 140.—

This section is new and is incidental to the provision in s. 139.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 141
Procedure on order being made absolute and consequences of disobedience.

(1) When an order has been made absolute under Section 136 or section 138, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by *Section 188 of the Indian Penal Code (45 of 1860)* .

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without such Magistrate's local jurisdiction and if such other property is without such jurisdiction, the order shall authorise its attachment and sale when endorsed by the Magistrate within whose local jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

1. Scope of s. 141.—

This section corresponds to s. 140 of the *old* Act.

2. Scope of sub-section (3).—

While s. 133(2),*ante* , bars a *suit* to challenge the validity of an order made under s. 133,s. 141(3) bars a suit to challenge the act of the Magistrate or any other person to give effect to an order under s. 133, after it has been made absolute, or the legality of the manner in which it is sought to be enforced, provided it has been done in good faith. The object of these two provisions is to ensure that the speedy remedy for removal of nuisances under these provisions should not be allowed to be interrupted by interference through the Civil Court. [69]

2. These provisions would not, however, bar suits such as the following, to enforce civil rights:

(i) A suit to declare that the place from where the Magistrate has ordered removal of nuisance is not a public place, so that his order is without jurisdiction. [70]

(ii) In general, these provisions cannot bar any suit for adjudication of title. [71]

(iii) A suit for damages may lie if the power conferred by Sections 133- 141 is tainted by *mala fides* or absence of good faith.

3. Revision.—

Revision lies to set aside an order under s. 136 and the consequential order under s. 141, if they are passed without service of a conditional order under s. 133(1). [72]

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69 *Q.E. v. Narayana,* (1888) 12 Mad 475.

70 *Chunilal* *v.* *Ram,* (1878) 15 Cal 460 FB.

71 *Mukhtar* *v.* *Ganga,* (1951) 1 All 719 ; *Secy. of State v. Jetha,* (1892) 17 Bom 293.

72 *Narayan* *v.* *S.D.M.,* (1986) Crlj 102 (para 4) Or.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 142
Injunction pending inquiry.

(1) If a Magistrate making an order under Section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

1. Conditions for order under s. 142.—

This section, which reproduces *old* s. 142, authorises a Magistrate to issue an *ex parte* order of injunction upon a person against whom an order under s. 133 has been made, on the following conditions:

(i) Such order of injunction can be made only where a valid conditional order in terms of s. 133 has been made. [73] The injunction will be invalid if the initial order is a peremptory instead of a conditional order

and does not specify the date, *etc.* , when the person may appear before the Court and file objection against the initial order. [74]

(ii) Before issuing the injunction, the Court must be satisfied that unless it is issued, there would result imminent danger of a serious kind, of the nature specified in s. 133(1). [75] The order itself or the file must show that the Magistrate has been so satisfied, with reasons. [76]

(iii) The injunction which is issued must not go beyond the scope of the particular nuisance complained of. [77]

(iv) Sub-section (2) enables the Magistrate himself to do what the person enjoined had been asked to do, in case of his default. But such act ion on the part of the Magistrate would be lawful only where an injunction in terms of s. 142(1) had been issued and disobeyed. [78]

2. Sub-section (3).—

This sub-section protects the Magistrate similarly as s. 141(3),*ante* .

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73 *Mangal v. State of U.P.* , (1977) Cr1_J 1036.

74 *Mangal v. State of U.P.* , (1977) Cr1_J 1036.

75 *Rebati* , AIR 1936 Cal 692 .

76 *Mangal v. State of U.P.* , (1977) Cr1_J 1036.

77 *Panchanan v. State,* (1948) 53 CWN 907 .

78 *Jobed* , (1947) 52 CWN 797 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 143
Magistrate may prohibit repetition or continuance of public nuisance.

A District Magistrate or Sub-divisional Magistrate, or any other Executive Magistrate empowered by the State Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the *Indian Penal Code (45 of 1860)* , or any special or local law.

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1. Scope of s. 143.—

This section corresponds to s. 143 of the *old* Code.

C.—Urgent cases of Nuisance or Apprehended Danger

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

S. 144
Power to issue order in urgent cases of nuisance or apprehended danger.

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte* .

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof :

***Provided* that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under**

this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order, and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

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1. Scope of the Section.—

1. Section 144 provides for the issue of temporary orders in urgent cases of nuisance or apprehended danger. It confers full power on certain Magistrates to take prompt act ion in cases of emergency when immediate prevention or speedy remedy is desirable. [79] The gist and basis [80] of the action under this section is urgency of the situation. [81] *Section 144 of Code of Criminal Procedure* . is intended to serve public purpose and protect public order. This power vested in the executive is to be invoked after the satisfaction of the authority that there is need for immediate prevention or that speedy remedy is desirable and directions as contemplated are necessary to protect the interest of others or to prevent danger to human life, health or safety or disturbance of public tranquility or a riot or an affray. These features must co-exist at a given point of time in order to enable the authority concerned to pass appropriate orders.[82]

2. Even though the Magistrate gives a hearing to parties except when as *ex parte* order has to be made in cases of emergency, the order under s. 144 is not a judicial or quasi-judicial order, but is made by a Magistrate in the performance of an executive function, namely, the maintenance of the public peace. [83]

2. Constitutionality.—

1. Section 144 has been held to be not violative of Art. 19(1)(a)- (b), [84] , [85] (c)-(d); [86] excepting the second part of *old* s. 146(6), [87] which, however, has been remodelled in *new* s. 144.

2. But though the section itself may be valid, an order issued under it might be unconstitutional if it offends against a fundamental right. Thus, an order to shoot a person for violation of a curfew order may be violative of Art. 21 if there is no specific law to sanction such executive order. [88]

3. Sections 107 and 144.—

See under s. 107,*ante* . Where successive orders are required, s. 107 should be preferable. [89]

4. Sections 144 and 145.—

See under s. 145,*post* .

5. General principles relating to exercise of the power under s. 144.—

The Supreme Court has summarised [90] the following general principles relating to s. 144 :

(i) An order under s. 144 can be made only to prevent dangers to life, health, safety, peace or tranquillity of members of the public [91] [sub-section (1)].

(ii) It may be directed to a particular individual or to the public generally when frequenting or visiting a particular place [sub-section (1)]. [92]

(iii) It is a temporary [93] order which cannot last beyond 2 months, subject to the Proviso to sub-section (4).

(iv) Questions of title cannot be decided under this section at all. [94]

(v) Though the power is vested in an Executive Magistrate; it has been held to be a quasi-judicial power, involving a reasoned order after a quasi-judicial inquiry, and subject to an opportunity to the aggrieved person to have the order rescinded by the Magistrate himself [sub-section (5)] or a superior Court. [95]

(vi) The order may be prohibitory or mandatory, provided it is likely to prevent or tends to prevent, some undesirable happenings as mentioned in sub-section (1). [96]

(vii) The Magistrate must be a District Magistrate, Sub-Divisional Magistrate or any other specially empowered Executive Magistrate. If the order is made by a Magistrate who is not specially empowered, his order would be void, under s. 461(j), *post* .

6. Conditions precedent for the exercise of power under s. 144(1).—

1. The Magistrate must be satisfied that act ion under this section is necessary in order to effect an *immediate* prevention or speedy remedy in relation to the mischiefs aimed at by the section, *e.g.* , danger to human life, health or safety or a disturbance of public order. [1] His decision on this point is the foundation of his jurisdiction to make an order under this sub-section. [2]

2. No overt act on the part of the person or persons concerned is, however, necessary to justify an order under s. 144. All that is necessary is a reasonable apprehension of a breach of the peace and the necessity of such order to prevent it. [3] Even the subsequent conduct of the persons may show that the Magistrate act ed on ample materials and his opinion was justified. [4]

3. The Magistrate must record an order stating the material facts [5] and also his finding that there were sufficient grounds for proceeding under the section.

A superior Court may interfere—

(a) If the facts set out in the order show that there was no urgent necessity for taking such action; [6] or

(b) If it appears from the order so recorded that the Magistrate was taking the act ion not only to prevent disturbance of the public order *etc.* , but also for some purpose outside the section. [7] Prevention of 'obstruction, annoyance...' is required in the interest of public order. [8]

A mere reproduction of the language of s. 144(1) in the order is not a sufficient foundation of the order. [9]

4. Though the sub-section does not expressly require any inquiry to be made before making an order, it would not be possible for the Magistrate to set out the facts without making an inquiry except where he is satisfied about the facts from his personal knowledge or on a report made to him which he *prima facie* accepts as correct; [10] or the facts were patent or admitted. [11]

5. Since the order is open to revision, the Magistrate must give his reasons, whether for granting or refusing [12] relief under s. 144, so that the superior Court may appreciate that he applied his mind to the relevant materials and considerations.

6. He should also consider that the urgency of the situation is such that the purpose may not be served by resorting to some other provision, such as Sections 107, 133, 145. [13]

7. He should try to maintain private rights as far as possible [14] (see *post*).

8. If any cause of action arose by reasons of a threat of possession at the hands of the co-sharer or at the hands of third party, the recourse to legal act ion could always be taken and even for that purpose a proceeding under *Sections 144 and 145 Cr.P.C.* would be maintainable.[15]

7. Power under s. 144 when can be exercised and when not.—

1. *Section 144 Cr.P.C.* is intended for temporary orders only in case of emergency. It is directed against those who attempt to prevent the exercise of legal right by others or imperil public safety and health. It cannot attribute permanent or semi-permanent character by issuing repeated orders.[16]

2. When there is no material to show that the Magistrate had been satisfied on the basis of the records about imminent danger and emergency as required under *s. 144 Cr.P.C.* , the order of the Magistrate is without jurisdiction.[17]

3. Ordinarily, the order is directed against a particular individual but when a number of persons is involved, there may be occasion to direct the order against the general public. [18]

4. Before passing an order under *s. 144 Cr.P.C.* , the Magistrate has to be satisfied that immediate prevention or remedy is necessary.[19]

5. When he fails to record his satisfaction regarding the breach of peace and passed the order on the basis of the police report, the order is illegal. [20]

6. With drawing up a proceeding under *s. 144 Cr.P.C.* , the Magistrate cannot come to a finding that the opposite party is a bargadar and legal help be given to him.[21]

7. By an order under *s. 144 Cr.P.C.* the Magistrate may order restriction on the right of trade. Such an order cannot be said to be invalid by reason of infringement of the fundamental right guaranteed under *Article 19(1)(g) of the Constitution* .[22]

8. When the holding of the public meeting is likely to disturb public peace, tranquility and orderliness, the prohibitory order under *s. 144 Cr.P.C.* may be issued against holding such meeting.[23]

9. The District Magistrate in purported exercise of power under *s. 144 Cr.P.C.* cannot order the Station House Officers of the District to direct deposit of fire arms from the licence holders. It is only when the competent authority is satisfied that during election, there is a chance of misuse of the weapons, it can issue appropriate order in writing to the licensee concerned. Such general order by the District Magistrate delegating the power to S.H.O. is illegal.[24]

10. The *Drugs and Cosmetics Act* along with the Rules have been enacted to regulate the sale and distribution of medicines. As such, issuance of notification under *s. 144 Cr.P.C.* to regulate sale and distribution of medicines by the District Magistrate under the general law would be void as it would tantamount to encroach upon the filed enacted by the Special Act. So, the *Drugs and Cosmetics Act* would prevail over the provisions of *Cr.P.C.* , latter being the general law.[25]

8. Nature of the order.—

1. There has been some controversy as to whether the order under s. 144 is a judicial [26] or an administrative [27] order. This much is clear that under the Code of 1973, this order is made by an Executive Magistrate, in the performance of his duty to maintain the public peace, [28] and there is no *lis* as to the rights of the parties to be adjudicated upon. [29]

2. Nevertheless, it has certain vestiges of a judicial procedure—

   (a) Except in cases of emergency, when an *ex parte* order can be made, it is usually made after hearing the parties. [30]

   (b) The Magistrate must apply his mind and come to his own conclusion as to the sufficiency of the grounds for proceeding under the section. [31] He cannot, therefore, act solely upon the instructions or report of another person, such as the District Magistrate or the Police, [32] or the complaint of one

party, [33] but he can depute another Magistrate to make an inquiry. [34] [As to 'emergent' cases, *see* under sub-section (2), *post*].

(c) The section does not require the Magistrate to take any evidence before making the order. [35] But if he does,—he cannot take evidence or hold investigation at the back of the parties. [36]

(d) Though the opinion as to the necessity of an order under this section must be that of the Magistrate concerned, it cannot be challenged on the ground that he acted upon advice from the State Government, particularly when there was a general upheaval in the State, which concerned the State Government. [37]

3. The undesirable happenings which an order under s. 144(1) may be issued to prevent are of three categories:

(i) Obstruction, annoyance or injury to any person lawfully employed;

(ii) danger to human life, health or safety;

(iii) a disturbance of the public tranquillity; riot or affray. [38]

The expression 'public tranquillity', in this context, is wider than 'public order' and includes absence of all act s which disturb the security of others. [39] A Division Bench of the Allahabad High Court [40] has upheld its application in a case of serious irregularities in the affairs of a School, which affected the students and their guardians. [41]

4. The order must not be vague or indefinite but must precisely state who and what act is prohibited. [42]

9. 'Abstain from a certain act '.—

These words indicate that under s. 144, the Magistrate can make only a prohibitory order, [43] to prevent a person from doing some (definite) Act, and not a mandatory order rewiring a person to do particular things, [44] even in the garb of a negatively framed order. [45]

[A mandatory order (not amounting to a mandatory injunction) can be made under the next category—'to take certain order...'] [46]

A. The Magistrate is competent, under this section, to make orders as follows:

(i) To abstain from interference with the management of a temple or its property, [47] or the conduct of service therein. [48]

(ii) To prohibit an assembly, [49] a meeting [50] , [51] or procession [52] as might cause a breach of the peace, but not so as to interfere with the lawful exercise of a legal right. [53]

(iii) To prohibit uttering of 'provocative slogans' as might lead to a breach of the peace, [54] or to use loudspeakers. [55]

(iv) To prohibit carrying of arms or weapons. [56]

(v) To prohibit inciting labourers to dissociate from work or closing of educational institutions. [57]

(vi) To prohibit a person from entering into a State or a particular area. [58]

(vii) To prevent taking of water for irrigation from a reservoir. [59]

B. On the other hand, orders such as the following, cannot be made under s. 144, directing the Respondent—

(i) To fill up the excavation. [60]

(ii) To leave a particular place.

(iii) To stop all music in a procession while passing by certain place of worship. [61]

10. 'To take certain order with respect to property in his possession'.—

1. Though these words are wide and vague, it has to be construed with reference to the preceding words and along with the following words 'in his possession or under his management'.
2. There is some uncertainty as to whether these words would enable the Magistrate to enjoin the opposite party to do some positive act, in order to prevent obstruction, *etc.* The general view is that the order of the Magistrate can only be prohibitory and, further, that he cannot make any order in the nature of a mandatory injunction, *e.g.* , to direct a party to rebuild a collapsed building. [62]

   But, as pointed out earlier, the Supreme Court has, in *Madhu Limaye's case* , [63] observed that under s. 144(1), the Magistrate has the power to make mandatory order as well, where that is necessary in order to prevent any of the undesirable happenings mentioned in s. 144(1). It is to be noted that a similar controversy under s. 147(3),*post* , has been obviated by the Legislature by adding the words 'including, in a proper case, an order for the removal of any obstruction...'. Though no such amendment has been made to clarify the controversy under s. 144(1), a power of removal may be implied under s. 144(1) also, if the reasoning of the Full Bench of the Allahabad High Court [64] [which the Legislature has adopted under s. 147] is reiterated under s. 144(1), as well, namely, that the Magistrate would have the power to direct removal of an obstruction where that is necessary for the effective enforcement of a prohibitory order, [65] *e.g.* , where the obstruction *etc.* is of a continuous nature and immediate measure is needed to prevent a breach of the peace [*see, further* , under s. 147(3),*post*].

3. What the Magistrate can do under this expression is to direct a party to take a certain order as to property and not to assume to himself extraordinary powers which the Code does not vest in him. Thus,—

(i) The Magistrate cannot pass an order of attachment [66] of property or to appoint a receiver, [67] which he can make under s s. 145-146(1).

(ii) He cannot seize property in the possession of any person and take it into his custody. [68]

(iii) He cannot put a person out of possession to be put in possession of a property or authorise him to harvest the crops. [69]

(iv) He cannot direct the division of crops between two rival claimants. [70]

11. Power to interfere with the lawful exercise of private rights.—

1. On this question, the position of the Magistrate stands between two conflicting principles:

I. The duty of the Magistrate being to maintain law and order, he should act in defence of the *lawful* rights of parties and not to suppress them, as far as possible. [71]

II. On the other hand, the present section imposes upon the Magistrate a duty to prevent a breach of the peace, injury to human life, health and the like in any case, and empowers him to make an *ex parte* order [sub-section (2)], in case of emergency where the situation is such that the apprehended injury cannot be prevented if an inquiry as to the rights of the parties were to be undertaken before making the prohibitory order. Hence, there is no bar under this section to interfere even with the *lawful* exercise of private rights, [72] in such cases of emergency. [73]

2. It follows that an order restraining the lawful exercise of private rights (including the fundamental rights of religion) [74] may be made under this section by a Magistrate, subject to the following considerations:

(i) It may be made only in an emergency, where there is no sufficient time to inquire into the rights of the parties or to ascertain which of them is in the wrong, [75] and the Magistrate is satisfied that the apprehended injury cannot be prevented by making any other order. [76]

(ii) The duration of such order should be limited to the emergency [77] which justifies the exercise of such extraordinary power, subject to *new* sub-section (4).

(iii) Such order should be altered or rescinded as soon as an inquiry can be made under sub-sections (4)-(5). [78]

(iv) Interference with private rights should not go beyond what is required to meet the situation; [79] otherwise the validity of the order may be questioned as an unreasonable restriction on a fundamental right under Art. 19(1). [80]

3. In short, as to when a Magistrate should be justified in interfering with the *lawful* exercise of private rights, no hard and fast rules can be laid down. [81] The Magistrate has to exercise this power according to the circumstances existing in each case at a particular time and at a particular place, subject to these two broad considerations:

(a) If any community or sect is disposed to transgress the rights of another habitually, and the public peace or the other objects mentioned in s. 144(1) are *not* in danger, the Magistrate cannot act

under s. 144. [82] In such a case, he may refer the parties to a civil suit, in which an injunction is available. [83]

(b) If, on the other hand, public safety *etc. are* in danger, the Magistrate has the power to take proper act ion under s. 144, irrespective of the question of title, [84] even if the question of title has already been decided by a competent Civil Court. Of course, where there is such a decision, the Magistrate will respect that decision *in making* an order under s. 144, in determining *who* should be allowed to exercise his legitimate rights. [85] Nevertheless, the Magistrate would not be fettered by considerations as to individual rights in determining what order should be reasonably necessary or expedient in a situation of which he is the best judge. [86]

Thus, it may sometimes happen that a person may be prevented from doing something upon his own property where the doing of a perfectly legal act constitutes a danger to human life *etc.* , *e.g.* , where a person shouts provocative slogans from his own house top. [87] But it is only where it is not practicable to allow a person to do something which is quite legal, having regard to the state of excited feelings of persons living in an area or frequenting a locality, that act ion may be taken under s. 144 which may interfere with what are, otherwise, completely legal and permissible conduct and speech. [88]

However, such power under *s. 144 Cr.P.C.* can only exercised emergency. The Magistrate's order relating to religious processions imposing two conditions, namely, (1) non-playing from musical instruments and (2) the procession must pass out of the mosque area before a particular hour is valid and does not offend *Article 25 of the Constitution* .[89]

But when in the matter of religious processions, the police sanctioned routes for different communities the party aggrieved may move High Court under *Article 226 of the Constitution* . [90]

12. Landlord and tenant dispute.—

When there is tenancy dispute between the landlord and tenant, the Magistrate issued a prohibitory order against the tenant restraining him from entering the tenanted premises in a petition filed by the landlord for possession of the premises under *s. 144 Cr.P.C.* solely on the basis of the averments in the petition and without calling for records from the Police. In spite of interim order passed by the High Court in a petition filed by the tenant, the High Court passed interim order of status quo but the possession had not been handed over to the tenant by the landlord who had entered into it by breaking open the lock. The order passed by the Magistrate being illegal and arbitrary interfering with lawful relationship between the landlord and tenant, the High Court set aside the order of the Magistrate.[91]

13. No adjudication as to title or legal rights.—

1. The sole object of an order under s. 144 being the maintenance of the public peace, in cases of urgency, there is no *lis* between the parties as to their legal rights, and in case of any conflict between their private rights and the public interest, the latter must prevail. [92]

2. But even though s. 144 does not confer any power on the Executive Magistrate to decide any question of title or disputes of a civil nature, where such questions have already been adjudicated upon by a Court of competent jurisdiction, the Magistrate must have regard to such established rights and take care that his order is in aid of the lawful exercise of such established rights rather than of the wrong-doer who threatens the lawful exercise thereof. [93]

14. Ban on sale of lotteries.—

So far as the sale of lotteries organized by the State, the same cannot be banned by the Magistrate in exercise of the power under *s. 144 Cr.P.C.* Even in case of lotteries authorized by the State, the same can be banned under *s. 144 Cr.P.C.* , if there is a proper legislation to that effect.[94]

So, when the petition was selling the State organized lottery tickets, the same cannot be banned by the Police Commissioner, Delhi by taking recourse to *s. 144 Cr.P.C.* as a camouflage in order to overreach the provisions of law and thereby prevent trade and commerce of the petitioner.[95]

However, in another decision, the Delhi High Court has held that since the business of sale of lottery tickets is of a pernicious nature, no person has any legal or fundamental right in it. The District Magistrate in its administrative domain on the authority of *s. 144 Cr.P.C.* may ban such sale if the conditions for such ban under the provision of *s. 144 Cr.P.C.* are justified.[96]

15. Service of the order.—

1. An order under s. 144(1) is to be served in the manner provided for in s. 134,*ante* , *i.e.* , by personal service or when such service is not possible, by proclamation.

2. Such service is required even where the order itself has been made *ex parte* , under sub-section (2), *i.e.* , in 'emergent' cases, in order to enable the affected party to exercise his right to obtain rescission of the order under sub-sections (5)-(6). [97]

16. Sub-section (2) : Ex parte order, when can be made.—

1. The present sub-section empowers the Magistrate to make an *ex parte* order under sub-section (1), in any of the following contingencies: [98]

   (a) In a case of emergency;

   (b) Where the circumstances do not admit of sufficient time to serve a notice upon the person against whom the order is directed. [1]

2. In view of the right of the party ordered to rescind the *ex parte* order under *new* sub-section (5), the Magistrate, after making an *ex parte* order, must issue a notice upon the party ordered, in the same terms as in the order itself. [2] , [3]

3. In *Madhu Limaye's case* , [4] The Supreme Court has approved of the view, [5] that in case of emergency, an *ex parte* order may be made without taking any evidence. The validity of an *ex parte* order would, therefore, depend on the urgency and gravity of the situation. [6] If such a situation exists, sub-section (2) itself warrants an *ex parte* order being issued without a notice being issued upon the other party, because "the circumstances do not admit of the serving in due time of a notice...."

4. It is essential, therefore, that the *ex parte* order should record the existence of such emergent circumstances which do not admit of notice upon the opposite party. [7] While seeking remedy against such order by rescission, revision or otherwise, the party aggrieved shall be entitled to show that this statement in the Magistrate's order as to the existence of emergent circumstances was wrong. [8]

17. Sub-section (3) : Order against the public generally.—

1. This sub-section empowers an order under sub-section (1) to be made against members of the public generally, provided it relates to their (i) frequenting or visiting (ii) a particular place or area,—which means a well-defined area, with clear boundaries,—so that the public may have no doubts as to what the prohibited area is. [9] That the area is large does not vitiate the order if it is well-defined. [10]

2. In case of grave emergency even a general order may be made *ex parte* , under sub-section (2), though innocent persons may possibly be affected by such order. [11]

3. No order can be made under this sub-section if it has no relation to the right of the public to frequent or visit a particular place, *e.g.* —

   (i) An order prohibiting the publication or circulation of a false report. [12]

   (ii) An order prohibiting obstruction to the catching of stray dogs. [13]

   (iii) An order prohibiting the holding of a caste-dinner. [14]

4. Where a general order under s. 144 is made because of the number of persons sought to be restrained, it is not possible to serve the order personally. A general proclamation duly published would be enough to impute knowledge to the persons against whom the order has been made, for purposes of prosecution under s. 188, I.P.C., for violation of the order. [15]

Since the constitutional validity of the order under *s. 144 Cr.P.C.* rests on its temporary character and since sub-section (4) of *s. 144 Cr.P.C.* clearly lays down that the order was not remain in force for more than two months subject to State Government's power to extend it upto a period of six months, it follows that the order which has the effect of perpetual injunction or has the effect of beyond a period of two months is invalid.[16]

Successive orders under

s. 144 Cr.P.C. in respect of the same subject matter should not be issued. In such a case, recourse may be taken to *Sections 107* and *145 Cr.P.C.* [17]

The Magistrate cannot be exercising the power under *s. 144 Cr.P.C.* direct the Electric Supply Corporation to restore supply of electrical energy to a defaulting municipality because the direction would continue even after the expiry of two months.[18]

Section 144 Cr.P.C. is intended for temporary orders only in case of grave emergency. It is directed against those but attempt to prevent to exercise a legal right by others of imperil public safety and health. It cannot be attributed permanent or semipermanent character by issuing repeated notification.[19]

The Magistrate cannot make successive orders in respect of the same subject matter even if other persons may be added in such subsequent application. [20]

18. Sub-section (5) : Rescission or alteration of order made under sub-section (1). —

1. An order made under sub-section (1) may be rescinded or altered by—

   (a) That Magistrate who made the order;

   (b) A successor-in-office of that Magistrate;

   (c) A superior Magistrate to whom that Magistrate is subordinate.

2. An order under this sub-section can be made only after complying with the procedural requirement of sub-section (7), *post* .

3. Since the jurisdiction under this sub-section is neither appellate nor revisional but of a special kind, an exercise or non-exercise of this jurisdiction would not bar a revision. [21]

19. 'Rescind or alter'.—

1. The powers of any Magistrate who seeks to exercise the power under this sub-section are co-terminous with those of the Magistrate who made the order under sub-section (1) even though he may be a superior Magistrate. Hence, he cannot use his appellate or revisional power, if any, to substitute an order of his own; he can only rescind or alter that order. [22]

2. A Magistrate exercising the power under this sub-section cannot, therefore,—

(i) Transfer an application for rescission to another Magistrate; [23]

(ii) He cannot delegate the power to another; [24]

(iii) He cannot make an interlocutory order staying or suspending the operation of that order. [25]

20. Sub-section (6) : Rescission or alteration of order by State Government.—

1. This sub-section has been engrafted by the *new* Code in order to obviate the objections levelled against *old* sub-section (6) by the Supreme Court [26] against the second part of that sub-section, under which the State Government had the untramelled power to make an order under this section for an unlimited duration of time, without any provision for representation, appeal or revision against that order by the aggrieved party.

2. Under the *new* section, the two-months-limit imposed by sub-section (4) can be extended by the State Government, for the reasons specified in the Proviso to sub-section (4), for another period *not exceeding 6 months* . This power of extension, therefore, is no longer unlimited. *Secondly* , the *new* sub-section (6) gives a right to the party aggrieved, to make an application to the State Government to rescind or alter such order of extension made by the State Government itself. Of course, power has also been given to the State Government to revise its order *suo motu* .

21. Sub-section (7) : Procedure relating to sub-sections (5)-(6).—

1. The procedure laid down in this sub-section [which corresponds to *old* sub-section (4)], governs the disposal of an application for rescission *etc.* under sub-section (5) or (6), and it has been held to be mandatory. [27]

2. The requirements are twofold :

(a) Giving opportunity to show cause to the applicant against the order made under sub-section (1);

(b) Recording the reasons, in case of rejection of the order.

3. It is to be noted that sub-section (7) only requires that, opportunity must be given to the applicant who desires rescission. There is no provision for hearing the opposite party in whose favour the order under s. 144(1) may have been made. [28] But in case the Magistrate takes on the application for rescission, he cannot take it in the absence of either party. [29]

4. If the application for rescission is rejected, reasons must be given in the order.

22. Remedies of the person aggrieved.—

A person aggrieved by an order under s. 144 has the following remedies open to him [30]:

(a) Rescission under sub-section (5) or (6).

(b) Revision.

(c) A petition under *Art 226 of the Constitution* .

23. Revision.—

1. An order under s. 144 is subject to revision under s. 397 (*post*), [31] provided it has not in the meantime exhausted itself. [32]

2. Right to move in revision would not be lost by reason of failure to apply for rescission under sub-section (5) or (6). [33]

3. Where the opposite party without filing show cause to rescind the order as provided in the Code straightway files a revision, the revision would not be maintainable. [34]

24. Scope of Revision.—

1. The powers of the High Court in revision from an order of a Magistrate under this section are wide enough to interfere on the ground of propriety as well as the legality of the order though in examining the propriety of the order the High Court will give due weight to the opinion of the Magistrate who is the man on the spot and responsible for the maintenance of public peace. The High Court would quash an order which cannot be supported by the materials upon which it is supposed to be based. [35]

2. The High Court also interferes where there is no reasonable connection between the act prohibited and the danger apprehended to prevent which the order was passed; [36] or any other manifest error of law or defect in procedure which has resulted in a miscarriage of justice. [37]

3. But the Court of revision would not interfere on the mere ground—

   (i) that the order was passed without taking any evidence; [38] , [39]

   (ii) that the Magistrate has, in his order, given the substance of the case instead of stating the facts in detail. [40]

   (iii) where the order complained of is interlocutory, [41] *e.g.* , an order issuing notice for a hearing, with a temporary order. [42]

The state has no authority to shoot at sight anyone for a mere breach of curfew order under *s. 144 Cr.P.C.* and executive directions issued to that effect, in so far as they direct threat and such act ions are void and unlawful and can be remedied in revision.[43]

No overt act is necessary to justify arrest by the Magistrate for breach of the order under *s. 144 Cr.P.C.* All that is required is reasonable apprehension of breach of the piece and the necessity to prevent it.[44]

When there is no material to show that the Magistrate had been satisfied on the basis of the records about imminent danger and emergency as required under *s. 144 Cr.P.C.* , the order of the Magistrate is without jurisdiction and liable to be set aside in revision.[45]

25. Two months period when commences.—

The order passed under *s. 144 Cr.P.C.* which continues for two months commences from the date of the prohibitory order issued and not from the date of passing of the order on which such order is confirmed.[46] So, when the prohibitory order under *s. 144 Cr.P.C.* was passed after two months of the date of initiation of the proceedings under *s. 144 Cr.P.C.* , such final prohibitory order is without jurisdiction.[47]

26. Remedy under Arts. 32 and 226.—

1. A Petition under Art. 226 for an appropriate writ would lie [48] , [49] in cases of illegality or absence of jurisdiction in making an order under s. 144 or arresting for violation of such order; [50] or where the purposes cited for the order are outside or in excess of those specified in s. 144(1). [51]

2. But where the purposes for several directions are severable, the order will not be struck down *in toto* , but only in so far as it is unconstitutional or *ultra vires* . [52]

3. A petition under Art. 32 may also lie where a fundamental right has been affected, [53] , [54] by the order or the law. [55]

4. An order passed under *s. 144 Crpc* by the Magistrate on proper material should not be disturbed by the High Court, by invoking inherent power to direct possession of the property to other party on wrong appreciation of evidence.[56]

27. Suit.—

A declaratory suit with consequential relief, such as injunction, lies for a declaration of the right, the exercise of which has been interfered with by an order under s. 144,*e.g.* , a right to continue a *hat* [57] (market) and to hold it on particular days; to erect buildings on one's land; [58] to conduct a procession along a

public highway. [59]

28. Punishment for violation of order under s. 144.—

1. Prosecution under s. 188, I.P.C., shall lie for violation of an order under s. 144, on proof that it was duly promulgated by lawfully empowered authority; [60] , [61] that the violation of the order causes or tends to cause obstruction, annoyance, danger to human life *etc.* , [62] and that the accused had knowledge of the order which he violated. [63]
2. On such charge, the person accused of violating an order under s. 144 may be arrested. [64]
3. When a person is prosecuted under s. 188, I.P.C., he may challenge the validity of the order under s. 144 or the section itself at such trial. [65]

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79 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 ; *Gulam v. Ibrahim,* AIR 1978 SC 422 [*LNIND 1977 SC 347*](para 3) : (1978) 1 SCC 226 [*LNIND 1977 SC 347*] : 1978 Crlj 496 .

80 *Gulam v. State of U.P.,* AIR 1981 SC 2198 [*LNIND 1981 SC 425*](paras 23, 26) : (1982) 1 SCC 71 [*LNIND 1981 SC 425*] : 1981 Crlj 1835 .

81 *Madhu Limaya v. S.D.M.,* (1970) 3 SCC 746 [*LNIND 1970 SC 501*] (para 24).

82 *In Re Ramlila Maidan Incident v. Home Secretary, Union of India,* (2012) 5 SCC 1 : 2012 Cri LJ 3516 SC .

83 *Gulam v. State of U.P.,* AIR 1981 SC 2198 [*LNIND 1981 SC 425*](paras 23, 26) : (1982) 1 SCC 71 [*LNIND 1981 SC 425*] : 1981 Crlj 1835 .

84 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 .

85 This conclusion may be reached only if all the words such as 'annoyance', 'injury', are interpreted with reference to the permissible ground of 'public order' under Art. 19(2)- (3).

86 *Madhu Limaya v. S.D.M.,* (1970) 3 SCC 746 [*LNIND 1970 SC 501*] (para 24).

87 *State of Bihar v. Misra,* (1969) 3 SCR 337 .

88 *Jayantilal v. Eric,* (1975) Crlj 661 (para 15) (Guj) DB.

89 *Taturam v. State of Orissa,* (1953) Crlj 731 (para 5) Or.

90 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 .

91 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 .

92 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 .

93 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 ; *Gulam v. Ibrahim,* AIR 1978 SC 422 [*LNIND 1977 SC 347*](para 3) : (1978) 1 SCC 226 [*LNIND 1977 SC 347*] : 1978 Crlj 496 .

94 *Babulal v. State of Maharashtra,* AIR 1961 SC 884 888 : (1961) 3 SCR 423 : (1961) 2 Crimes 16 .

95 *Madhu Limaye v. S.D.M.,* (1970) 3 SCC 746 [*LNIND 1970 SC 501*] (paras 24).

96 *Madhu Limaye v. S.D.M.,* (1970) 3 SCC 746 [*LNIND 1970 SC 501*] (paras 24).

1 Vide the interpretation of the different expressions used in the second paragraph of sub-section (1) in *Babulal Poozate v. State of Maharashtra,* AIR 1961 SC 884 [*LNIND 1961 SC 14*]: (1961) 2 Crimes 16.

2 Vide the interpretation of the different expressions used in the second paragraph of sub-section (1) in *Babulal Poozate v. State of Maharashtra,* AIR 1961 SC 884 [*LNIND 1961 SC 14*]: (1961) 2 Crimes 16; *Emp. v. Turab,* AIR1942 Oudh 39 41.

3 *Dange v. State of U.P.,* (1970) 3 SCC 218 (220) : 1971 SCC Cr 36.

4 *Garg v. Supdt.* (1970) 3 SCC 227 (para 8) : 1971 SCC Cr 45.

5 *Dhanaula Municipality v. D.M.,* AIR1968 P&H 303 (305).

6 *Chandra Nath v. E.I. Ay.,* 19 Crlj 951.

7 *Dhanaula Municipality v. D.M.,* AIR1968 P&H 303 (305); *Chandra Nath v. E.I. Ay.,* 19 Crlj 951.

8 *Dange v. State of U.P.,* (1970) 3 SCC 218 (220) : 1971 SCC Cr 36.

9 *Dhanaula Municipality v. D.M.,* AIR1968 P&H 303 (305).

10 *Babulal Poozate v. State of Maharashtra,* AIR 1961 SC 884 [*LNIND 1961 SC 14*]: (1961) 2 Crimes 16.

11 *Dange v. State of U.P.,* (1970) 3 SCC 218 (220) : 1971 SCC Cr 36.

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49 Cf. *Madhu Limaye v. S.D.M.,* AIR 1971 SC 2486 2496 : (1970) 3 SCC 746 : 1971 Crlj 1720 ; *Garg v. Supdt.,* (1970) 3 SCC 227 : 1971 SCC (Cr) 45.

50 *Dange v. State of U.P.,* (1970) 3 SCC 218 : 1971 SCC (Cr) 36.

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61 *Papayya v. State,* (1975) Crlj 1784 (AP) .

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63 Cf. *Garg v. Supdt.,* (1970) 3 SCC 227 (para 6) : 1971 SCC (Cr) 45.

64 *Ram Manohar v. State,* AIR 1968 All 100 [*LNIND 1967 ALL 30*](para 8).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

B.—Public nuisances

A. [66] [S. 144- Power to prohibit carrying arms in procession or mass drill or mass training with arms.

(1) The District Magistrate may, whenever he considers it necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, by public notice or by order, prohibit in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding of, or taking part in, any mass drill or mass training with arms in any public place.

(2) A public notice issued or an order made under this section may be directed to a particular person or to persons belonging to any community, party or organisation.

(3) No public notice issued or an order made under this section shall remain in force for more than three months from the date on which it is issued or made.

(4) The State Government may, if it considers necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, by notification, direct that a public notice issued or order made by the District Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which such public notice or order was issued or made by the District Magistrate would have, but for such direction, expired, as it may specify in the said notification.

(5) The State Government may, subject to such control and directions as it may deem fit to impose, by general or special order, delegate its powers under sub-section (4) to the District Magistrate.

Explanation. **—The word "arms" shall have the meaning assigned to it in section 153 -AA of the *Indian Penal Code (45 of 1860)* .].**

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1. Section 144A.—

The notes on Clause 16 which has been enacted as s. 16 of the ode of Criminal Procedure (Amendment) Act, 2005 and incorporated as s. 144A of the main Code reads as follows :

> "In order to curb, the militant activities of certain communal organization need has been felt to strengthen the lands of the State Authorities for effectively checking communal tension and foster a sense of complete security in the minds of members of the public. This clause, therefore, seeks to insert a new s. 144A in the Code to enable the District Magistrate to prohibit mass drill (or training) with arms in public places."

By virtue of *Sections 144A of the Code of Criminal Procedure* , which was introduced by Act 25 of 2005, the District Magistrate has been empowered to pass an order prohibiting, in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organizing or holding of any mass drill or mass training with arms in any public place, where it is necessary for him to do so for the preservation of public peace, public safety or maintenance of the public order.[67]

Section 144A has not yet been brought into force.

2. Object.—

The object of s. 144A is to enable the District Magistrate in order to curb communal act ivities of certain communal organization either to issue public notice or make an order—

for the preservation of public peace or public safety or for maintenance of public order prohibiting in any area within his jurisdiction the carrying or arms in (i) any procession or (ii) or holding of, or taking part in any mass drill or mass training in any public place.

3. Against whom notice to be issued or order made.—

The District Magistrate under sub-section (2) of s. 144A may issue such notice or such order of prohibition to any particular individual or to persons of a particular community. So, it cannot be issued to the members of general public which power the District Magistrate has in respect of an order passed under *s. 144 Cr.P.C.*

4. Period of notice or order.—

Any public notice issued or order made under *s. 144A Cr.P.C.* shall have the validity of three months from the date on which public notice issued or order made. So, the order under *s. 144A Cr.P.C.* shall remain in force for three months as against an order under *s. 144 Cr.P.C.* , which remains in force for a period of two months.

5. Sub-section (4).—

Sub-section (4) of s. 144A is the same as the proviso to sub-section (4) of *s. 144 Cr.P.C.* The State Government may, if it considers necessary so to do for the preservation of public peace or public safety or for maintenance of public order made by the District so may extend further period not exceeding six months from the date of the issue of public notice or making of the order issued by the District Magistrate originally.

So, the State Government may extend the period of such public notice or order made by the District Magistrate for another period not exceeding three months more.

6. Sub-section (5).—

S ub-s. (5) of s. 144A was not in *s. 144 Cr.P.C.* By Virtue of this sub-section, the State Government by any general or special order, may, subject to such control and directions as to impose, delegate its powers under sub-section (4) to the District Magistrate.

7. The definition of arms.—

The ‘arms’ as mentioned in s. 144A shall have the same meaning as it is given in *s. 153AA of the Indian Penal Code* which explanation to Sections 153AA of the Code which has been inserted in the *Indian Penal Code* by the *Code of Criminal Procedure* (Amendment) Act, 2005. It defines the expression ‘arms’ which means articles of any description designed or adopted as weapons for offence or defence and includes fire arms, short-edged weapons,*lathis, dandas* and sticks.

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66 New Section 144-A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 16 (effective date to be notified).

67 *In Re Ramlila Maidan Incident v. Home Secretary, Union of India,* (2012) 5 SCC 1 : 2012 Cri LJ 3516 SC .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

D.—Disputes as to Immovable Property

S. 145
Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute :

Provided **that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before**

the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6)

(a) If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10)

Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.

STATE AMENDMENT

Maharashtra. — *The following amendments are made by Maharashtra Act 1 of 1978, S. 2 (w.e.f. 15-4-1978).*

S. 145. —In its application to the State of Maharashtra—

(i) in S. 145(1), for the words "Whenever an Executive Magistrate", read "Whenever in Greater Bombay, a Metropolitan Magistrate and elsewhere in the State, an Executive Magistrate".

(ii) for S. 145(10), substitute the following:—

"(10) In the case of an Executive Magistrate taking act ion under this section nothing in this section shall be deemed to be in derogation of his power to proceed under Section 107. In the case of a Metropolitan Magistrate taking action under this section, if at any stage of the proceeding, he is of the opinion that the dispute calls for an act ion under Section 107, he shall after recording his reasons, forward the necessary information to the Executive Magistrate having jurisdiction to enable him to proceed under that section."

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1. Scope of s. 145.—

this section corresponds to *old* s. 145, with the following changes : [68]

2. Sub-section (1).—

(i) While under the *old* section, the power was vested in the specified superior Magistrate under the *new* sub-section, the power will belong to *all* Executive Magistrates,—the Judicial Magistrates being excluded altogether, inasmuch as the power is preventive, or 'police' [69] in nature.

(ii) The *date* and *time* fixed for attendance of the parties should be specified in the order under this sub-section.

3. Sub-section (4).—

(i) The procedure prior to the 1955 amendment has been restored, for determining the factum of possession. In order to shorten the procedure, the 1955 amendment provided for affidavits to be taken instead of oral evidence. Since this procedure did not work satisfactorily, resulting in unreliable evidence, the Commission recommended that the pre-1955 amendment position should be restored, [70] and hence, it has been provided that the Magistrate should determine the question of possession on the basis of oral evidence [71] taken by him and tested by cross-examination on behalf of the parties. For this purpose, sub-sections (1) and (4) have been amended, and Proviso (1) to *old* sub-section (4) has been omitted.

(ii) The two-months time limit for disposal of the inquiry under *old* sub-section (4) has been omitted, for, the words 'as far as practicable' indicated that this time-limit was merely directory. [72]

(iii) The *new* Proviso of sub-section (4), lays down a presumption on the question of possession on the date of the order under sub-section (1), with this change: Under the *old* Proviso, the presumption was made in favour of the party who had been forcibly and wrongfully dispossessed within 2 months prior to the date of the order under sub-section (1). The Commission [73] pointed out that this was unfair to the party dispossessed if more than 2 months lapse between the date when the Magistrate receives police-report or other information as to the dispute and the date when he is in a position to make his order under sub-section (1), owing to the Court's delay; in such a case, if the party aggrieved was dispossessed at any time after the police-report or information but beyond 2 months previous to the date of the order, he could not invoke the *old* Proviso in his favour.

Under the *new* Proviso, the period of two months shall be counted from the date of receipt by the Magistrate of the police report or other information, which starts the proceeding under sub-section

(1). [74]

(iv) Proviso 3 to *old* sub-section (4) has been transposed to *new* sub-section (1) of s. 146.

4. Sub-section (6).—

Apart from verbal changes Cl. (b) has been added, in order to make it clear that an order under sub-section (6) shall be served in the manner laid down in sub-section (3).

5. Sections 107 and 145.—

See under s. 107,*ante* , and sub-section (10) *below* .

6. Sections 144 and 145.—

1. The words 'may' in s. 144(1) and 'shall' in s. 145(1) make it clear that while s. 144(1) is in general terms and confers a *discretion* to exercise it for the purposes specified therein, it is *obligatory* on the Magistrate to start a proceeding under s. 145(1) if he is satisfied as to the likelihood of a breach of the peace relating to *land* or *water* . [75]

2. Hence, in a case where the ingredients of both Sections 144 and 145 are present, it would be proper to proceed under s. 145. [76]

3. The provision in s. 145 is made obligatory because so long as the rights of the parties are not finally settled by a Civil Court, disputes relating to possession are likely to arise again and again, which should be settled by the Criminal Court, in order to maintain the peace. [77] It follows, therefore, that even subsequent to a proceeding under s. 144, finding one party to be in possession, the Magistrate may make an order under s. 145, provided he is satisfied, on fresh materials, that a breach of the peace is likely unless a proceeding under s. 145 is initiated. [78] Of course, it would be otherwise, where, after the expiry of 2 months under an order under s. 144, the Magistrate drawn up a proceeding under s. 145, without any fresh materials. [79]

4. If after initiating a proceeding under s. 144, the Magistrate finds that the conditions of s. 145(1) are satisfied, he may convert the proceeding under s. 144 into one under s. 145, which would practically constitute a fresh proceeding, [80] the validity of which will have to be determined with reference to the facts and circumstances existing on that day, and not with reference to those which existed when the conditional order under s. 144(1) had been made. [81] It follows that where the requirements of a fresh proceeding under s. 145(1) are not complied with, a conversion of a proceeding under s. 144, after the expiry of the period of the order made thereunder, into a proceeding under s. 145 would be illegal. [82] This would not mean that for being satisfied as to likelihood of a breach of the peace under s. 145(1), the Magistrate cannot look into the Police Report received in the proceeding under s. 144(1) which has been converted. [83]

5. Where a proceeding under s. 145 is initiated, on a fresh application, after the termination of an order under s. 144, the finding of possession in the proceeding under s. 144 may be a circumstance in deciding actual possession, but it would not have any material evidentiary value, under s. 145(4); [84] , [85] and would not be binding as against fresh materials. [86]

6. When the Magistrate converted the proceedings under *s. 144 Cr.P.C.* into one under

s. 145 Cr.P.C. by an order which did not disclose the grounds of satisfaction of the Magistrate nor did it disclose as to why the dispute was treated to be a dispute which was likely to cause breach of peace, the Magistrate was not justified in drawing up the proceedings under *s. 145 Cr.P.C.* and the same is invalid.[87]

7. Sections 145 and 147.—

See under s. 147,*post* .

8. Object of s. 145.—

1. Section 145 is intended to provide a speedy remedy for the prevention of a breach of peace arising out of a dispute relating to immovable property, by maintaining one or other of the parties in the possession which the Magistrate finds he had, before the dispute arose, [88] until the rights of the parties are determined by a Court of competent jurisdiction. The orders of the Magistrate under s. 145 are merely 'police orders'. [89]
2. The object is to maintain the public peace and not to decide disputes between contending parties, or adjudicate upon the rights of the parties to possession. [90]

   A proceeding under s. 145 is not for eviction of a person from any land but for the prevention of breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted therefrom in due course of law. Although the party who forcibly and wrongfully dispossessed the other party attracting the application of the Proviso to sub-section (4) has to be factually and physically evicted from the property, by a legal fiction it is only for the purpose of treating him in possession on the date of the preliminary order. [91]

3. The order passed under s. 145 is a temporary order to prevent a breach of the peace, *irrespective of the rights of the parties* . [92]
4. The section cannot be used by a party with the object of getting an advantage over the other side by getting into possession of the property and driving the other side to figure as a plaintiff and prove his title. [93]
5. The jurisdiction under *s. 145 Cr.P.C.* of the Magistrate is an exceptional one and the provisions of the section have to be strictly followed while taking act ion on it. The object of this section is not to provide parties with an opportunity of brining their civil disputes before the criminal court or for maneuvering for possession of subsequent civil disputes but to clothe the Magistrate with the power to maintain peace within his local area.[94]

9. Dispute purely civil in nature.—

When the dispute is purely civil in nature, *s. 145 Cr.P.C.* is not attracted. So, when the sole proprietor inducted a partner into his business and the inducted partner claimed co-tenancy over the business property with intention to grab the whole property of the firm, such a dispute as to tenancy right relating to immovable property being a dispute purely of civil nature, the Magistrate has no jurisdiction to interfere under

s. 145 Cr.P.C. So, the initiation of the proceedings under *s. 145 Cr.P.C.* by the Magistrate has been quashed by the High Court.[95]

A civil suit has been filed by the sons of the respondent No. 2 for permanent injunction restraining the Respondent No. 2 from dispossessing the plaintiff from the house in question and also from entering into dealing relating to that property with any other persons. The Respondent No. 2 initiated the proceedings against his sons and daughters under *s. 145 Cr.P.C.* complaining of apprehension of the breach of peace occasioned because of the dispute over the possession of the property. It is held that it is purely civil dispute pure and simple which has been given colour of a criminal case. So, the proceedings have been quashed by the Supreme Court.[1]

The rights of the parties have been settled by a compromise decree by the Civil Court and even after such civil dispute has been settled finally, the proceedings under *s. 145 Cr.P.C.* is an abuse of the process of Court. If any party in possession in terms of the compromise decree seeks any protection, it is for that party to approach the Civil Court and get an appropriate order.[2]

10. Dispute not with regard to possession of land.—

When the proceedings under *s. 145 Cr.P.C.* have been initiated over the dispute regarding stoppage of supply of water from the joint well for irrigation, and final order passed, it is held that such an order is illegal as the proceedings under *s. 147 Cr.P.C.* has to be initiated and a proceeding under *s. 145 Cr.P.C.* is misconceived. So, the final order was set aside.[3]

11. Nature of the jurisdiction under s. 145.—

1. The sole object of a proceeding under this provision is prevention of a breach of the peace, arising out of a dispute concerning land or water; [4] and to provide a speedy remedy. [5]

2. The Criminal Court can, under this section, only make a temporary order, pending settlement of the rights of the parties by a competent Civil Court. [6] The Magistrate has no jurisdiction to decide a party's title or *right* to possession. [7] He acts on the foundation of act ual possession; read with the Proviso to sub-section (4). [8]

3. It follows that pendency of proceedings under s. 145 or any order passed therein does not affect the title of the parties to the disputed property, though it reflects the factum of possession. [9]

4. It is desirable that the Magistrate should decline to make an order under s. 145 when the matter can be fully and finally determined by the Civil Court and there is time enough for the party to go to the Civil Court; [10] or where civil litigation is already pending. [11]

12. Conditions for the application of s. 145.—

1. Before initiating a proceeding under s. 145(1), the Magistrate must be satisfied as to the existence of the following conditions:

   (i) There must be a 'dispute' relating to land or water or the boundaries thereof, [12] , [13] on the date when he initiates the proceeding.

   (ii) The Magistrate must be satisfied, from a police-report or other information, that the dispute is likely to cause a breach of the peace. [14]

   (iii) The land or water must be situated within the jurisdiction of the Magistrate. [15]

2. Once he is satisfied as to all [16] the foregoing conditions, he is to pass a *preliminary order* under sub-section (1) and thereafter make an *inquiry* under sub-section (4) and pass a *final order* under sub-section (6), on the basis of that inquiry. [17] It is not necessary that at the time of making the final order, the apprehension of breach of peace should continue. [18]

3. So, condition precedent for invoking the jurisdiction by the Magistrate under *s. 145 Cr.P.C.* is the dispute or controversy in respect of actual possession. When one party claims right to possession and other party claims act ual possession, the proceeding under *s. 145 Cr.P.C.* is liable to be dropped.[19]

   But the jurisdiction to initiate proceedings over the dispute as to the actual possession over the land or water arises when much dispute is likely to cause breach of peace. So, when the Magistrate is satisfied that there was apprehension of the breach of peace over the dispute as to the possession of land or water, the proceedings cannot be dropped. [20] This is mandatory. [21]

4. The Magistrate may arrive at such satisfaction either from the police report or from other information. That does not mean that the Magistrate must act solely on police report or on the application made by the party. He may issue notice to all the parties and hear both the parties on the question of likelihood of the breach of peace. [22]

13. Sub-section (1) : 'Satisfied'.—

1. The condition precedent to initiation of proceedings under s. 145(1) is that the Magistrate must be satisfied as to the existence of a dispute concerning land or water which is likely to cause a breach of the peace. He may be so satisfied either from the report of a police-officer or other information, but the satisfaction must be his. [23]

2. No hard and fast rule can be laid down as to the sufficiency of material for his satisfaction. Hence, a Court of revision should not go into the question of sufficiency of the material which has satisfied the Magistrate. [24] But the superior Court can examine whether the Magistrate has applied his mind to the materials before him. [25]

3. The satisfaction is that of the Magistrate and it is his discretion whether or not to initiate proceedings under this section. [26] If, therefore, on perusing the information or other materials produced before him under sub-section (1), he is *not* satisfied as to the existence of any dispute likely to cause a breach of

the peace, he would not be required, nevertheless, to make a conditional order. [27] If, however, after a conditional order has been issued, it appears to the Magistrate at any later stage that there is no longer any likelihood of any breach of the peace, he can cancel the conditional order and drop the proceedings, under sub-section (5), *post* , but only after recording a finding that no such dispute exists or existed. [28]

4. The satisfaction of the Magistrate must be on sufficient material. Satisfaction must not only be reasonable but also must be honest. [29]

5. Merely because there may be dispute between the private parties, a proceeding under *s. 145 Cr.P.C.* cannot be drawn up unless the Magistrate is satisfied that this private dispute may disturb the peace and tranquility of the area.[30]

14. 'Other information'.—

1. This expression is wide enough to include an application by a private party, so that if, after having examined the applicant on oath, the Magistrate is satisfied as to the existence of a dispute and the likelihood of breach of the peace, there is no bar against his acting under s. 145(1), without calling for a Policereport. [31] Conversely, it is not necessary that the information should be received from any particular person. [32]

2. It is obligatory but competent for the Magistrate to hear the parties. On the other hand, he is not bound to issue notice upon the other party where he is satisfied from the Police report or on the application of the party or other information that there is a dispute likely to cause breach of the peace. [33]

3. If there are proper materials for the satisfaction of the Magistrate, the Magistrate's order is not vitiated merely because—

(a) the application of the private party is not signed by the party but by his or her pleader; [34]

(b) that the application is not supported by affidavit. [35]

15. 'Dispute .....concerning land, water or boundaries thereof'.—

1. Though this expression is wide enough, it has been held that the words ' *actual* possession of the subject of dispute', in sub-section (1) indicate that s. 145(1) will *not* be attracted unless both parties claim exclusive possession to the same property, *e.g.* —

(i) Where one party claims act ual possession and the other party merely claims a right to possession [36] or a public right of *user* . [37] In case of this type, the Magistrate may convert the proceedings under s. 147(4),*post* . [38]

(ii) In a case of joint property, unless one co-sharer asserts a claim to exclusive possession. [39]

The real question for the application of s. 145 is whether there is an apprehension of breach of the peace between two parties, whether they are co-sharers or strangers. [40]

2. When dispute is with regard to the opening of the windows on the opposite party's land, there is no dispute in respect of actual possession of any piece of land. The proceeding under *s. 145 Cr.P.C.* is not maintainable.[41]

3. When the dispute is not with regard to the land but with regard to the use of water from the well, *s. 145 Cr.P.C.* does not lie, but a proceeding under *s. 147 Cr.P.C.* would lie.[42]

4. To attract *s. 145 Cr.P.C.* dispute must relate to immovable property. The dispute between two parties of the firm relating to right to carry on partnership business in the shop is with regard to movable property. *s. 145 Cr.P.C.* is not attracted.[43]

5. An order under *s. 145 Cr.P.C.* with regard to a mini bus is illegal and has been set aside.[44]

16. 'Likely to cause a breach of the peace'.—

1. the mere existence of a dispute is no ground for application of the section unless the Magistrate is satisfied that there is a likelihood of breach of the peace. [45] It is the Magistrate who is to be satisfied and the apprehension of the party or of the Police is not enough. [46]

2. Such likelihood must exist at the date on which the Magistrate makes his initial order under sub-section (1). Hence, he cannot make such order on the strength of a police-report which is old, [47] nor on the apprehension that a breach of the peace may happen at a future point of time, say, two months from the date of the order. [48]

17. 'Land or water'.—

See under sub-section (2), *post* .

18. 'Shall'.—

Though this word makes sub-section (1) mandatory, sub-section (10) makes it clear that even where the Magistrate is satisfied that there exists a dispute relating to immovable property, he has a discretion to proceed either under s. 107 or under s. 145 or under both [*see* under sub-section (10), *post*].

19. 'Stating the grounds of his being so satisfied'.—

1. The Magistrate, in his order under sub-section (1), should not only record that he was satisfied of the likelihood of breach of the peace, but must also record the grounds for such satisfaction. [49]

But the observations of the Supreme Court in *Bhutani's case* [50] suggest that the order of the Magistrate will not be vitiated for failure to expressly state the ground, if from the records it appears that he was satisfied from the facts stated in the application under s. 145(1), and the examination of the applicant on oath. In short, the order will not be struck down on revision where it has caused no prejudice, [s. 465] [51] *e.g.* , where the second party has taken part in the proceedings notwithstanding such defect in the preliminary order, submitted his statement and produced evidence. [52]

2. The object of stating the grounds is to inform the parties of the case they have to meet. [53]

3. It follows that though a Court of revision will not interfere with a final order, in the absence of prejudice, on the ground that the preliminary order did not state the grounds of his satisfaction, the Court would readily interfere at the stage of the preliminary order on this ground, [54] in the absence of which it is not possible to predicate that the Magistrate applied his mind to the materials before him, [55] leaving it to the Magistrate to make a fresh order in accordance with the law, if he is satisfied that the conditions laid down in s. 145(1) for the preliminary order exist. [56]

4. No reasons need be given where the Magistrate rejects the application under s. 145, because s. 145 would not be attracted so long as there is no dispute and no threat to a breach of the peace. [57]

20. 'Parties concerned in such dispute'.—

1. Sub-section (1) imposes a duty upon the Magistrate to require the parties concerned in the dispute to appear before him. He has, therefore, to ascertain who are the parties concerned in the dispute. This does not, however, mean that his order would be without jurisdiction, merely because he has not made sufficient inquiry [58] in the matter or because all the persons who are interested in or claim a right to the property in dispute, are not brought on the proceedings.

2. The expression 'parties concerned' should not be so narrowly construed as to mean only the persons act ually disputing but should be extended to persons who are concerned as claiming to be in possession, [59] at the date of the conditional order. [60]

3. It does not again mean that the actual proprietors must appear before the Magistrate even though they are not resident within his jurisdiction. [61] Ordinarily, a mere servant [62] or chowkidar [63] or manager [64] or Receiver [65] is not a party concerned within the meaning of the section but where the act ual proprietor is resident outside the jurisdiction of the Magistrate, a person who claims to be in possession of the disputed land as agent to or manager for the proprietor, may be allowed to be the party for the purposes of this section. [66]

In some cases, [67] it has been held that a proceeding under s. 145 is not vitiated merely because the owner or landlord has been represented by an officer [68] or agent. [69]

It is true that in a proceeding under *s. 145 Cr.P.C.* only the parties concerned in the dispute are required to attend the Court and contest the proceeding. But sub-section (5) of *s. 145 Cr.P.C.* provides that any party so required to attend or any other person interested to show that no such dispute was existing or has existed may appear and contest the case and in such a case, the Magistrate shall cancel the order passed under s. 145(1)

Cr.P.C. on being satisfied with the contention of that person. Further, if in any order passed by the Magistrate under s. 145(1) *Cr.P.C.* several persons are named or there is indication that in addition to the persons named in the order, there are others concerned in the dispute, then it will be open to that person mentioned in that order to be impleaded in the case and to contest it.[70]

21. 'Actual possession'.—

1. These words have been used to make it clear that the section is intended to protect the person who is in actual possession of the land, irrespective of his title or right to possess it. [71]
2. The nature of act ual possession will, of course, vary with the nature of the subject-matter of dispute, [72] and the manner in which acts of possession may be exercised over such property. [73] Thus,—

   (a) In the case of unworked minerals [74] or forest land, [75] the person who is in a position to work or use them at any moment is the person in act ual possession.

   (b) In the case of tenanted land, the party under whom the tenant in possession claims, is the party in actual possession. [76] , [77]

   (c) In the case of a market, possession can be exercised only by collecting tolls. [78] , [79]

   (d) Similarly, the possession of an agent [80] or servant is that of his principal or master. Hence, an agent or servant cannot plead his possession in a proceeding under s. 145 against his own principal or master. [81]

3. Delivery of symbolical possession (under O. 21, R. 35, C.P. Code, 1908) operates as 'actual possession' as against the judgment-debtor, [82] and for the purpose of s. 145, the decree-holder must be deemed to have got act ual possession on that date, and the presumption will be that such possession continued unless the opposite party establishes by evidence that the decree-holder has subsequently been dispossessed. [83]

22. Possession, Actual possession : meaning.—

Possession referred to in *s. 145 Cr.P.C.* must be act ual and exclusive possession of the subject matter of the dispute,[84] not occasional possession, such as, holding of *hat* on particular day of the week. [85]

A partner of the partnership firm being entrusted with the management of the firm may be in exclusive possession of the partnership property, but he cannot invoke *s. 145 Cr.P.C.* against other parties.[86]

Sporadic acts of trespass by a party does not amount to possession of the trespasser for which he cannot invoke *s. 145 Cr.P.C.* against the lawful owner.[87]

But a trespasser may maintain his possession against a third party. [88] An agent is act ual possession of the land of the principal may protect the possession against anybody except the principal. [89]

The licensee in possession may invoke *s. 145 Cr.P.C.* against any person other than the licensor.[90] Dispute as to the management of the Church is not a dispute within the meaning of *s. 145 Cr.P.C.* [91]

The nature of the possession must vary with the nature of subject matter of dispute and manner in which acts of possession may be exercised over such property. [92]

23. Effects of non-compliance with sub-section (1).—

1. In view of the confusing thicket of decisions, it would be proper to deal with the different ingredients of sub-section (1) separately, because the object behind each of these requirements is not identical.
2. The different requirements of this sub-section (1) are—

(i) The Magistrate must be satisfied as to the existence of a dispute likely to cause a breach of the peace, concerning land or water.

(ii) He must make an order in writing.

(iii) That order must state the grounds of his being so satisfied.

(iv) The order must require the parties to attend his Court on a specified date and time and to put in written statements as to act ual possession of the subject of dispute.

(v) The subject of dispute must, therefore, be described in the order.

3. Let us now advert to the consequences of non-compliance with each of the foregoing requirements; [93]

(i) *Absence of satisfaction.*— The foundation of the jurisdiction to proceed under s. 145 is the satisfaction of the Magistrate as to the existence of a dispute as referred to in sub-section (1). If he initiates a proceeding without being so satisfied or without applying his mind to this requirement, his order would be without jurisdiction and liable to be set aside as a nullity. [1]

(ii) *Omission to make an order in writing.*—

1. Sub-section (4) has been amended by the *new* Code in such manner that it is now clear that a final order under sub-section (6) can be made only if the Magistrate makes an inquiry as to possession of the disputed property "at the date of the order made by him under sub-section (1)". An order in writing made under sub-section (1) is thus the pivot of the subsequent proceedings under this section. Hence, it would be reasonable to hold *now* that the omission to make a preliminary order under sub-section (1) would go to the root of the proceedings, so

that even the final order would be set aside if there is no order under sub-section (1) at all. [2] Sub-sections (3)-(4) are also dependent upon an order under sub-section (1), [3] signed by the Magistrate. [4]

2. It is no order under s. 145 if the Magistrate leaves it to the Police to direct the parties to appear before him if the Police was satisfied that there was a likelihood of breach of the peace. [5]

3. It would follow that where a Magistrate issues notice on parties under s. 107[6] or under s. 147[7] and, on their appearance, converts the proceedings into one under s. 145, without making any preliminary order under sub-section (1) of s. 145, the subsequent proceedings would be without jurisdiction. [8]

> The mandatory requirements of s. 145(1) *Cr.P.C.* is the passing of preliminary order under s. 145(1) *Cr.P.C.* and then issuing of notice to the opposite party. So, non-passing of preliminary order vitiates the entire proceedings. Merely sending of notice to the opposite party is not itself sufficient to comply the mandatory requirements of s. 145(1) *Cr.P.C.*
> [9]

(iii) *Omission to give particulars.*— If, however, there is a written order, but it omits to record the requirements of the sub-section, there is a consensus of opinion that it is an irregularity committed in the exercise of jurisdiction but does not render the order without jurisdiction. [10] This principle may now be illustrated with reference to the prevailing shade of judicial opinion.

(iv) *Omission to record satisfaction.*— While the initiation of the proceedings by a Magistrate without being satisfied as to a dispute as referred to takes away the foundation of the jurisdiction of the Magistrate, if he omits to record that satisfaction, [11] or the grounds of his satisfaction, it has been treated as a defect of jurisdiction or an irregularity, [12] , [13] which is curable under s. 465 [*old* s. 537], in the absence of prejudice to the party aggrieved. [14]

In the result—

(a) If there are materials on the record on which the Magistrate could be satisfied, (*e.g.* , the order refers to the Police report which contains the relevant material), [15] and the parties did not find any difficulty in making their defence for want of the grounds of satisfaction, [16] , [17] the omission to state the factum of satisfaction or the grounds therefor would not vitiate the subsequent proceedings or take away the jurisdiction of the Magistrate.

(b) But when there is no such material on the record and when there is no indication that this aspect of the question was considered by the Magistrate, the very foundation of his jurisdiction is affected. [18]

(v) *Non-service of copy of order* .—See under sub-section (3).

(vi) *Defects in specification of the property* .—

1. If the final order is made with reference to a property which was not mentioned in the preliminary order, the final order will fail *pro tanto* , and will be set aside in revision, [19] except where the parties knew very well the subject-matter of the dispute. [20]

2. But once the Magistrate has initial jurisdiction to proceed under sub-section (1), being satisfied as to the existence of a dispute, the mere specification in the preliminary order of additional land, subsequent to its being made, would not render the proceedings without jurisdiction. [21]

3. The description of the property must be sufficiently definite [22] to locate it. [23]

(vii) *Effect of non-joinder of parties.—*

1. Non-joinder of all interested persons does not invalidate an order under s. 145. If some necessary parties are not impleaded, they will not be bound by the order, but the order will be valid so far as the parties actually before the Magistrate are concerned. [24]
2. A person who files written statement after affixation of the order under sub-section (3) shall be bound by the order, even though not mentioned in the original report of the Police Officer or the conditional order. [25]

24. Sub-section (2) : 'Land or Water'.—

This sub-section amplifies the meaning of the expression 'land or water', used in sub-section (1), irrespective of the definition of 'immovable property' in other Acts, such as the *Transfer of Property Act* or the *General Clauses Act* . But the definition given in sub-section (2) itself is an inclusive definition, so that there may be other objects comprehended within the expression besides buildings, markets *etc.* , which are mentioned in sub-section (2). But it would *not* include movables. [26]

It would be useful to refer to the cases which deal with different items of property as *included* within the expression, alphabetically:

Buildings.— Section 145 would be applicable where the dispute is with respect to the *possession* of a building, [27] *e.g.* , a temple, [28] but not a dispute regarding the right to offerings given by worshippers at a temple [29] or other religious place; [30] or corrugated sheets removed from a building. [31]

A mill attached to the earth would come under the expression. [32]

Crops.— Crops or other produce of land come within the expression when standing on the land, [33] or kept on the disputed land [34] but *not* when they are severed and kept at a place which was not the subject-matter of the dispute. [35]

25. 'Educational institution'.—

Since an educational institution is not excluded from the purview of s. 145, there is no bar to proceedings under this section in respect of possession [36] of immovable property belonging to such institution, but the Criminal Court cannot make any order as to its administration or management, for which the proper forum is the Civil Court. [37]

Ferry.— While a right to ferry itself would fall under s. 147,[38] it may come under s. 145 when the dispute is regarding such right together with the land or water upon which the right to ferry is exercised. [39]

Fishery or jalkar .—When a person or persons is or are in possession of a *jalkar* , exercising the right to fish in the *jalkar* belonging to another person, the former is entitled to maintain their limited right to possess for fishing against the owner, until the order under s. 145(6) is set aside by revision, suit or other appropriate proceeding. [40]

26. 'Rents or profits' of land or water.—

A. The following have been held to fall under this part of the definition in sub-section (2), when the dispute concerns the right to possession of such rents or profits:

   Right to collect tolls from a market, [41] but not where the dispute relating to such right is as between joint owners and there is no dispute as to possession of the market itself. [42]

B. On the other hand, the following have been held *not* to come under the expression; Right to collect fees from pilgrims. [43]

Right to collect fees for the mooring of boats, apart from any dispute regarding the site. [44]

Right to the goods and business in a shop. [45]

Right to animals apart from the possession of the forest. [46]

Shrine .—The explanation in sub-section (2) is wide enough to include a dispute as to possession of a shrine; [47] a right to receive offerings at a shrine. [48]

Trees.— Standing trees [49] would come within 'land and its produce'.

27. Sub-section (3) : Service of copy of order under sub-section (1).—

A copy of the preliminary order is to be notified in two ways—

a. Service on the parties concerned, as a summons [s. 62,*ante*); and

b. Publication by affixing a copy at or near the subject-matter of dispute.

(a) Non-service of the notice invalidates the proceedings so far as the person who has not been served is concerned, [50] except where the person appears inspite of non-service, and raises no objections; [51] or the person served may be held to represent [52] the person not served.

But if the person appears and raises objection on the ground of non-service and the Magistrate proceeds without considering such allegation, the subsequent proceedings would be vitiated, [53] so far as that person is concerned.

(b) The object of publication being to inform all interested parties, non-publication will not invalidate the proceedings unless it is shown that someone who is interested in the subject-matter of dispute has been materially prejudiced. [54] , [55]

28. 'Upon such persons as the Court may direct'.—

Though there is nothing in the *Cr.P.C.* corresponding to O. 1, r. 8, C.P. Code, it has been held that the words 'such person or persons as the Court may direct' indicate that in a proper case,*e.g.* , a dispute concerning two communities, [56] the Court need not serve the order on all 'the parties concerned' [which expression is used in sub-section (1)], but only on some of them as may he held to represent the rest.

29. 'Sub-section (4) : History'.—

1. In the Code of 1898, there was no provision for receiving affidavits. The provision was *'receive the evidence produced by them'* .....

2. By the Amendment Act of 1923, the foregoing words were substituted by the words—"receive *all* such evidence as *may* be produced by them...." The effect of this change was that the Magistrate had no business to compel the attendance of witnesses, and would examine only such witnesses as were produced by the parties; but, on the other hand, he had no discretion to refuse to examine any of the witnesses so produced by either party. [57]

3. By the Amendment Act of 1955, the parties were required, in the first instance, to put in 'affidavits' and 'documents', in order to save time. The examination of witnesses was left to the discretion of the

Magistrate by empowering him to summon and examine any of those persons who had filed affidavits, by the first Proviso which said—

> *"Provided* that the magistrate may, if he so thinks fit, summon and examine any person whose affidavit has been put in as to the facts contained therein."

The words 'receive all such evidence as may be produced by them respectively' occurring after the words 'hear the parties' in sub-section (4) were omitted.

In the result, while prior to the amendment of 1955, the Magistrate was bound to examine all witnesses who were produced, under the amended sub-section, it was not obligatory upon the Magistrate to examine any witnesses at all. He might proceed to his decision only upon a perusal of the statements, documents and affidavits.

4. *Changes made by the new Code.* —The *new* Code has discarded the 1955 Amendment and restored the *old* sub-section (4) as amended in 1923, which was—

> "receive all such evidence as may be produced by them respectively, take such further evidence (if any) as he may think necessary...."

It is clear that on the obligation of the Magistrate to take all such evidence as may be adduced by the parties, the case-law between 1923 and 1955 would be relevant in the interpretation of the *new* sub-section (4):

(a) The Magistrate has no discretion to refuse any evidence produced by the parties, which would be relevant to the question of possession he is to determine under the sub-section. [58]

(b) The Magistrate cannot, therefore, make his order under sub-section (4) act ing merely upon the written statements of the parties [59] or upon his local inspection; [60] or personal knowledge; [61] or the report of a subordinate Court, [62] or of the Police. [63]

(c) The evidence must be recorded [64] , [65] (except in the case of admissions [66]) and considered [67] by the Magistrate himself.

(d) There has been some controversy as to what the Magistrate should do if either party or both fails or fail to appear at the hearing under sub-section (4) and to tender evidence. The answer to the question depends on the text of sub-section (4) as it now stands. The proper perspective appears to be as follows:

(i) There is no 'complainant' in a proceeding under s. 145, so that such proceeding cannot be dismissed for default. [68]

(ii) Once the Magistrate issues the conditional order under sub-section (1), after being satisfied that there is a reasonable apprehension of breach of the peace, it is no longer a business of the private party but that of the Magistrate, to maintain the public peace. [69] Hence, he must proceed further irrespective of the parties.

(iii) An order under sub-section (6), *i.e.* , the final order, cannot be passed unless he can 'decide' which party was in possession on the date of his conditional order. But if he is unable to decide that question, he is to make an order of attachment under s. 146(1), leaving the parties to resort to the Criminal Court. He cannot cancel the conditional order except under sub-section (5).

(iv) Sub-section (4) does not make it obligatory upon the Magistrate to come to a decision on the question of possession in any eventuality; the language is: ' *if possible* , decide whether...'. But he must make an honest effort to come to a decision in the circumstances before him:

(a) Even where both parties are absent, he must peruse the statements, which is a mandatory term of the sub-section. [70]

(b) If one of the parties is present, he can have the advantage of hearing arguments on his behalf, [71] and proceed ex parte against the other party. [72]

(c) The words 'take such further evidence, if any, as he thinks necessary' suggest that even where neither party is present nor asks for aid of the Court under sub-section (9) to summon witnesses, the Court may itself call for evidence [s. 311, post] as might be material in deciding that question. He can also examine the party who is present and take his evidence into consideration under the expression 'such further evidence'. [73]

30. 'Evidence'.—

1. Evidence includes all kinds of evidence admissible under the *Evidence Act* , namely,—

(a) Statements on oath of parties and their witnesses.

(b) Documents, including those admissible under *s. 35, Evidence Act* . [74]

(c) Admissions, whether contained in the written statement or otherwise. [75]

(d) A collateral decree which is evidence of possession, *e.g.* , a rent decree. [76]

(e) A finding as to possession in a previous criminal proceeding, which is evidence under *s. 13, Evidence Act* . [77]

(f) An entry in a crop statement made by a Revenue Officer under statutory provision. [78]

(g) Statements made in a proceeding under s. 107. [79]

2. But it would not include—

(i) the report of a police officer;

(ii) an order under s. 111 in a previous proceeding under *s. 107,Cr.P.C.* ;[80]

(iii) affidavits, [81] which, according to s. 296 [*old* s. 510A], can be substituted for oral evidence of a witness only where his evidence is of a ' *Formal* character', and not where it is substantive evidence, as under *new* sub-section (4). [82]

31. 'Decide'.—

1. From this word, *inter alia* , it has been held [83] that in an order under sub-section (4), the Magistrate must give reasons for his decision, and that in the absence of such reasons, the order becomes invalid. But such reasons need not be detailed, if it shows that he has applied his mind to the statements and evidence. [84]

2. The decision of the Magistrate must be based on the evidence recorded under sub-section (4) together with the statements put in by the parties. Where he has done so, his decision cannot be assailed on the ground that he has not given reasons why he has rejected the police-report. [85]

32. Appreciation of evidence on possession by the Magistrate.—

It is necessary for the Magistrate to consider all the evidence on record placed before him by the parties. When the Magistrate based on the finding of the Sessions Judge acquitting the opposite party and others of the offence under s. 447 and s. 379 I.P.C. in which the possession of the accused in the premises was found by the Sessions Judge on the accused, the High Court on considering the whole evidence produced by the party has held that the Magistrate was not justified on solely relying on the judgment of the Sessions Judge and ignoring other reliable evidence adduced by the petitioner for proving his possession. So, the High Court set aside the order of the Magistrate and declared the possession of the petitioner and has directed the Magistrate to restore the possession to the petitioner under proviso to s. 145(1) *Cr.P.C.* [86]

No reason was given by the Magistrate for reaching the conclusion that the possession of the property was with the respondent. That apart the finding of the act ual possession of the respondent was with reference to the preliminary order which is not the relevant date contemplated by *s. 145 Cr.P.C.* So, the Supreme Court set aside the order of the Magistrate and directed him to reconsider the matter afresh.[87]

The order under *s. 145 Cr.P.C.* was passed in favour of the opposite party declaring his possession. But the contention was raised that the order was passed without fair trial. Though the witnesses were produced by the petitioner on the date fixed for hearing, they were not examined by the Magistrate. So, the petitioner was neither given opportunity for adducing evidence nor was given opportunity of hearing. So, the order of the Magistrate has been set aside for the Magistrate not holding enquiry regarding actual possession fairly.[88]

33. 'Whether any and which of the parties...in possession'.—

From the words 'the fact of act ual possession' in sub-section (1), and the words 'without reference to...a right to possess' in sub-section (4), it is clear that the decision of the Magistrate under s. 145(4) must be confined to the factum of actual possession, as distinguished from the question of title or legal right to possess. It follows from this—

(a) No evidence as to title shall be received except where: (i) the property admits of no act ual physical possession; or (ii) the evidence as to possession is equally balance. [89]

(b) The Magistrate must make his order under sub-section (6) in favour of the person found to be in actual possession even though such possession is wrongful or against a declaration of title by a Civil Court, [90] except in a case of 'forcible dispossession' which would attract the Proviso to s. 145(4).

(c) Some difficulty arises where the possession of one of the parties is 'derivative', *i.e.* , derived from the other party, as an agent, servant, licensee or the like. The principles which may be gathered from decided cases are:

(i) Where the derivative possession confers an independent legal interest or right, *e.g.* , that of a licensee, [91] or a Pujari, [92] such person may successfully maintain a proceeding under s. 145 against the owner of the property.

(ii) Since, however, the possession of an agent or servant is, at law, the possession of the principal or master, the agent or servant cannot pursue a proceeding under s. 145 against the principal or master; [93] though he can maintain it against a third party, because even a trespasser can maintain his possession against a third party, under s. 145. [94]

34. Nature of enquiry.—

After issuing preliminary order and after serving the copy of the order passed under s. 145 (1) *Cr.P.C.* , the Magistrate shall receive all such evidence as may be produced by the parties and to take such other evidence, if any, if he thinks fit and proper. A final order under s. 145(6) *Cr.P.C.* cannot be passed unless he can decide which party was in possession on the date of conditional order. But if he is unable to decide such question he is to make an attachment under s. 146(1) *Cr.P.C.* leaving the parties to resort to the Civil Court. He cannot cancel the preliminary order except under sub-section (5) of *s. 145 Cr.P.C.* Sub-section (4) of *s. 145 Cr.P.C.* does not make it obligatory on the part of the Magistrate to come to a decision on the question of possession in any eventuality. The expression 'if possible' he has to make an honest effort to come to the decision in the facts and circumstances disclosed before him. If both the parties are absent, he must peruse the statement which is a mandatory term under sub-section (4) of *s. 145 Cr.P.C.* If one of the parties be present, he can ask that party to produce evidence and can take advantage of the argument adduced by that party and then can proceed *ex parte* against that party who is absent. [1]

The expression 'take such further evidence, if any, as he thinks fit' make it clear that when neither party is present nor asks the help of the Court to summon any witnesses under sub-section (9) of *s. 145 Cr.P.C.* , the Court may itself call witnesses and can also

examine the party present in the Court and take his evidence into consideration. After the above exercise is over, the Magistrate has to take a decision on the basis of the evidence recorded under sub-section (4) of *s. 145 Cr.P.C.* together with the statement of witnesses. Such a decision shall be a reasoned one. However, it is not necessary that such reasons shall be detailed one. It would only show that he has applied his mind to the fats disclosed. The decision of the Magistrate must be confined to the facts of act ual possession as distinguished from the question of title or legal right. No evidence as to the title shall be received except when the property does not admit of physical possession or when the evidence of the parties is equally balanced.[2]

35. Local inspection by the Magistrate.—

1. Under s. 310,*post* , a Magistrate has, at any stage of an inquiry, the power to make a local inspection of the disputed property, 'for the purpose of properly appreciating the evidence given at such inquiry'.
2. This provision has been held applicable to an inquiry under s. 145(4), provided it is made and used subject to the conditions and limitations under s. 310,*e.g.* —

(i) The memorandum of inspection held by the Magistrate or his observations made therein cannot be treated as evidence in the proceeding; it can be used only for the purpose of appreciating the evidence recorded under s. 145(4). [3]

(ii) He must record a memorandum of facts observed at such inspection and supply a copy thereof, free of cost, to either party; and also afford to the parties opportunity to rebut the statements made in the memorandum. [4]

On the other hand—

According to the Guwahati [5] and Patna [6] High Courts, no local inspection under s. 310 is permissible in a proceeding under s. 145 but only local enquiry under s. 148. According to them, s. 310 refers to a local inspection which can be held by a Judge or a Magistrate at any stage of enquiry, trial or other proceeding for appreciating the evidence in the trial. This relates to procedure relating to *trial* and this procedure cannot be taken recourse to in a proceeding under s. 145.

36. Local inquiry by a subordinate Magistrate.—

See under s. 148(1),*post* .

37. Scope of the Proviso.—

1. This Proviso corresponds to the second Proviso to *old* s. 145(4), with this vital change that under the *new* Proviso the two-months period may be computed from the date when the Magistrate received information from the Police or other source, under sub-

section (1), *i.e.* , from a date even earlier than that of his making the conditional order under sub-section (1), in case of any time-gap between the receipt of information and the making of the conditional order, [7] owing to negligence of the Court or otherwise. [8] The *new* Proviso ensures that the aggrieved party should not suffer for any laches on the part of the Court. [9]

2. The Proviso is founded on the principle that forcible and wrongful possession is not to be recognised under the criminal law. [10]

3. The word 'may' suggests that it is *discretionary* with the Magistrate to apply the fiction contained in this Proviso and that it does not vest any right in the party who has been dispossessed within the specified period. [11] Thus, if the Magistrate is of opinion that it is the rightful owner who has dispossessed a trespasser within two months before the date of information or complaint to him, [12] he may properly refuse to take notice of the dispossession. [13]

4. Where a proceeding under s. 144 is converted into one under s. 145(1), the crucial date for computing the period of 2 months in the Proviso to s. 145(4) would be the date of such conversion and not the date of initiation of the proceeding under s. 144. [14]

38. 'Forcibly and wrongfully dispossessed'.—

1. 'Forcibly' does not mean that actual force or violence should be used. Show of force [15] or improper threats [16] or eviction under an illegal process of Court [17] makes the dispossession forcible.

2. 'Wrongfully' means otherwise than in due course and would include the case of a rightful owner recovering possession otherwise than peacefully. [18] , [19]

39. 'Dispossessed'.—

This word means 'to be out of possession, removed from the premises, ejected or excluded'. [20] It cannot be contended that where the dispossession has been a completed act and there has been no further acts of violence thereafter, the jurisdiction under s. 145 shall cease, because that would be giving up an advantage to the wrongdoer. [21] Of course, there would be no 'forcible' dispossession where the wrongdoer commits only a *fugitive* act of trespass.

40. Restoration of possession.—

The restoration of possession can be granted by the Magistrate only when a valid proceeding under *s. 145 Cr.P.C.* could be initiated. When the landlady sought for restoration of possession by filling a petition under *s. 145 Cr.P.C.* alleging that the tenant or licensee after being asked to vacate did not do so, but made construction on the portion of the property in his possession constructing a wall and dividing the said portion from the portion in occupation of the landlady. it is held such a proceeding cannot be initiated which shall have the effect of evicting the tenant or the licensee. No police report was received by the Magistrate that the landlady lost possession within two months of the date of application as contemplated by the proviso to s. 145(4) *Cr.P.C.* Therefore, no order of restoration of possession can be granted by the Magistrate against the tenant or licensee in possession in a proceeding under *s. 145 Cr.P.C.* could be intiated.[22]

41. Sub-section (5) : Cancellation of the order made under sub-section (1).—

1. Apprehension of a breach of the peace being a condition to give jurisdiction to the Magistrate under s. 145,*as soon as he is satisfied* that there is no such dispute, he is bound to cancel his order made under sub-section (1) and stay his hands. [23] The preliminary order may, accordingly, be cancelled *at any stage* of the proceedings before a final order under sub-section (6) is made. [24]

2. The satisfaction of the Magistrate may be due to information received from any source, *e.g.* , police report, [25] or from the evidence recorded. [26] But he cannot act without any materials before him, *e.g.* , on the mere assumption that since a long time has elapsed from the date of the initial order, there is no longer any likelihood of a breach of the peace. [27] Similarly, the mere institution of a suit in the Civil Court is not by itself sufficient to infer that there is no longer any danger of breach of the peace. [28]

3. The parties or even other persons who are interested are entitled to show that no dispute likely to cause a breach of the peace exists or has existed. [29] But it is not obligatory for the Magistrate to take any evidence before cancelling the order under the present sub-section, if he is satisfied from information received from other sources that there is no further likelihood of breach of the peace. [30]

4. But the question under sub-section (5) goes to the root of the Magistrate's jurisdiction to proceed under s. 145. Hence, whenever any such question is raised, the Magistrate cannot proceed to a final order under sub-section (6) without giving a definite finding in writing, rejecting the plea. [31] His satisfaction under sub-section (1) for purposes of the preliminary order cannot be deemed to be an answer to the plea under sub-section (5). [32]

5. Sub-section (5) does not enumerate the circumstances under which the Magistrate may conclude about the non-existence of any dispute likely to cause a breach of the peace, but the following have been suggested :

   (i) Where the parties state that they have settled the dispute. [33]

   (ii) Where the Opposite Party states that he has no claim nor has the intention to assert claim to the possession of the property; but even a statement of both parties that there was no apprehension of breach of the peace would not suffice where they do not give their respective claims. [34]

   (iii) The circumstances having changed, there is no longer any reasonable apprehension of breach of the peace. [35]

   But the following are not good grounds for cancellation of the order, under sub-section (5):

   (a) Mere default in appearance of the parties. [36]

   (b) Merely because, in countering the plea under sub-section (5), the applicant has not tendered evidence to show that the dispute likely to cause apprehension of breach of the peace is continuing. [37]

6. So, under sub-section (5) of *s. 145 Cr.P.C.* the Magistrate, at any stage, be from the final order is passed under sub-section (6) of *s. 145 Cr.P.C.* order cancellation of the conditional order, so as soon as he is satisfied that no such dispute likely to cause breach of peace exists or has existed. However, this satisfaction of the Magistrate must be obtained on the basis of showing by any person required to attend a proceeding or any person interested that no such dispute exists or has existed. The order may be cancelled when the Magistrate is satisfied that the circumstances have, in the meantime, changed.[38]

If before the final order is passed, the other party shows by clear evidence that there is no longer a dispute resulting in likelihood of breach of peace, the Magistrate shall record a finding to that effect and cancel the preliminary order and drop the proceedings. [39]

42. Any other interested person.—

Sub-section (5) enables not only the person required to attend but also any other person interested to show that no such dispute, as alleged exists or has existed. In such a case, the Magistrate shall cancel his order passed under sub-section (1) of s. 145. Further, if in any order passed by the Magistrate under s. 145(1) several persons are named or there is indication that in addition to persons named in the order there are others concerned in the dispute, then it will be open to the person not mentioned in the order to be impleaded in the case and to contest it. [40]

43.Effects of order under sub-section (5).—

1. Once the Magistrate is satisfied that there is no apprehension of breach of the peace he must cancel his initial order under sub-section (1). He cannot thereafter go into the merits in order to give a finding as to title or possession, [41] or make an order to direct delivery to the property or its sale-proceeds to one party or to allow him to reap the crops to the exclusion of the other. [42] The proper course would be to order the retention of the property or its sale-proceeds in Court until one of the parties obtains an order from the Civil Court. [43]

2. If, however, the record itself shows that possession has been taken from any party, it is competent for the Court, under its inherent powers to make an incidental direction to restore *status quo ante* ; [44] even though such cancellation has taken place subsequent to the inquiry under sub-section (4). [45]

44. Sub-section (6) : Final order.—

1. Sub-section (6) provides for the final order to be passed by the Magistrate on the result of the inquiry as to possession made under sub-section (4). It contemplates two eventualities; [46]

   (i) Where the Magistrate finds that one of the parties is in actual possession but *not* as a result of forcibly or wrongfully dispossessing another party within 2 months previous [as specified in the proviso to sub-section (4)]—in such a case the proper order would be to declare his right to be in possession until evicted therefrom in due course of law and forbid other parties from disturbing his possession; [47] or

   (ii) Where the Magistrate finds that a party was in possession but has been forcibly or wrongfully dispossessed by another party within two months previous [as specified in the Proviso to sub-section (4)]—in such a case the proper order would be to declare the party, so dispossessed, as being entitled to possession until evicted therefrom in due course of law and to forbid the other parties from disturbing his possession. [48]

2. An order under sub-section (6) is a sequel to the inquiry made under sub-section (4). While under sub-section (1), the Magistrate can make a conditional order only upon being satisfied as to the existence of a dispute which is likely to disturb the peace,—for the purpose of making the final order under sub-section (6), it is *not* necessary to find that the apprehension of breach of the peace should *continue* or exist till then, [49] for, that question has already been decided under sub-section (4).

   Of course, if before the final order is passed, the other party shows by clear evidence [50] that according to sub-section (5) there is no longer any dispute resulting in a likelihood of breach of the peace, he must record a finding to that effect, cancel the preliminary order and drop the proceedings under s. 145. [51]

3. No order under sub-section (6) can be made, without recording a definite finding that the particular party in whose favour the order is made was in possession at the material date, *i.e.* , the date of the preliminary order or such earlier date as is mentioned in the Proviso to sub-section (4). If he is unable to come to such finding, he must make an order of attachment under s. 146(1). [52]

4. But it is not necessary to record in the final order that there was apprehension of breach of the peace on *that* date. [53]

5. Clause (b) of sub-section (6) applies sub-section (3) to the service of the final order.

6. Therefore, the final order contemplated under sub-section (6) of *s. 145 Cr.P.C.* is the order declaring the party found to be in act ual possession to remain in possession until evicted by due course of law and forbid others from disturbing his possession.[54]

7. When the Magistrate finds that a party was in possession but has been disforcibly or wrongfully dispossessed by the other party within two months previous to the date on which the report of the police officer and other information was received by the Magistrate or after that date and before the date of order passed under sub-section (1) of *s. 145 Cr.P.C.* , proper order would be to declare the party, so dispossessed as being entitled to possession until evicted therefrom in due course of law and forbid others from disturbing his possession.[55]

8. But no such order can be passed by the Magistrate, if the Magistrate fails to come to a definite finding as to who was in actual possession on the material date. In such a case, he shall pass an order of attachment under sub-section (1) of *s. 146 Cr.P.C.* and refer the party to the Civil Court for adjudication of their dispute.[56]

9. When the question of possession was decided on the basis of the affidavits or written statement alone without giving any opportunity to examine and cross-examine the witnesses, the order deciding the question of possession is illegal and must be set aside. [57]

10. When the final order declaring one party to be entitled to retain the possession of the property in dispute was passed without following the mandatory procedure of *s. 145 Cr.P.C.* , namely, without passing any preliminary order, without notice on the opposite party and without holding any enquiry, the same is illegal and invalid. It is also found that the Civil Court has already granted an interim injunction in favour of one of the parties to the proceedings. So, the final order passed by the Magistrate has been quashed by the High Court.[58]

11. When the witnesses were produced by the petitioner on the date fixed and they were not examined by the Court and the petitioners were neither given opportunity for adducing evidence nor was given opportunity of hearing the order passed in favour of the opposite party is liable to be set aside. [59]

12. *Death of party, pending proceedings.*— Once the proceeding has started under *s. 145 Cr.P.C.* , if must be proceeded with until

question of possession has been determined. If a party dies, the proper procedure is to implead his legal representatives. An order dropping the proceedings on the death of the party is *ultra vires* . [60]

13. When the proceedings under *s. 145 Cr.P.C.* was initiated and the Magistrate ordered attachment of the property, but on being informed by one of the sons of the petitioner No.1 that his father died, the Magistrate did not take any steps to implead his legal representatives in his place and proceeded with the case. But on being so informed, that one of the petitioners is dead, he ordered the disputed property to be released from attachment and to be handed over to the opposite party. The Session Judge in revision rightly quashed the said order and remanded the matter to the sub-divisional Magistrate for impleading the legal representatives of the deceased and then to proceed further with the matter.[61]

45. 'Entitled to possession'.—

1. This expression must be understood in the context of the words 'actual' possession in sub-section (1); the words 'without reference to ...a right to possess' in sub-section (4) and the provision in the Proviso under sub-section (4), the result of which has been explained.

2. The party in whose favour an order under s. 145(6) has been made cannot be dispossessed until there is a decree of a competent Civil Court to the contrary. [62]

This has now been expressly provided also in *new* s. 146(1),*post* , when a proceeding under s. 145 culminates in an order of attachment. As regards such suit, *see further* under s. 146(1),*post* .

46. Joint possession of the parties.—

The foundation of a proceeding under s. 145 is the existence of a 'dispute' between the parties which is likely to cause a breach of the peace. [63] Hence, it would be too wide to assert that s. 145 cannot have any application in respect of property belonging to co-owners. The question has to be answered with reference to (a) the jurisdiction to entertain an application as between co-owners; (b) the effect of a finding that the property is in act ual joint possession of the parties to the proceeding under s. 145:

A. *Jurisdiction to entertain an application in cases of joint ownership.*—

1. Where the applicant claims *exclusive* possession, the proceedings under s. 145 cannot be terminated instantly, merely because the other party *pleads* joint possession, if the Magistrate is satisfied that there is a likelihood of breach of the peace. [64]

2. In a case of such pleading, the inquiry has to proceed until the Magistrate arrives at a finding whether the applicant is in exclusive possession or both parties are in joint possession. [65]

   If he finds that the applicant is in exclusive possession, he has to issue an order under sub-section (6), declaring him to be entitled to possession until evicted in due course of law and forbidding all disturbance to such possession, [66] , [67] even though the parties may be co-owners

in title, and the possession of the applicant is *adverse* . [68]

B. *Effect of finding of joint possession of the parties.—*

1. But if the Court *finds* that the contesting parties are actually in joint possession of the property in dispute, no declaration under s. 145(6), can be made, and the proceedings under s. 145 must be dropped. [69] , [70]
2. There has, however, been a controversy on the question whether, after such finding of joint possession under s. 145, the Magistrate is competent to make an attachment under s. 146(1), if he is satisfied that the likelihood of breach of the peace is continuing inspite of the joint possession of the parties. There have been some changes in the contents of s. 146(1), under the *new* Code.

   Whatever might have been the doubts on this point the *old* Code, it would seem that the answer to the foregoing question should now be in the *affirmative* , in view of the following reasons—

   (a) A case of joint possession would come under the clause "if he decides that *none* of the parties was then in *such* possession *as is referred to in s. 145"* , in *new* s. 146(1); because both sub-sections (4) and (6) of s. 145 speak of ' *one* of the parties' being in possession. Hence, where the finding is as to their joint possession, it would be a case coming under s. 146(1).

   (b) Where parties are in joint possession, but still there is a dispute between them, such dispute can be eliminated only by a decree for partition or other relief from a Civil Court. But it is the duty of the Magistrate, in a proceeding under s. 145, to *prevent breach* of the peace, so long as such decree cannot be availed of. Since that would take time, either of the aggrieved parties would be entitled to have an order that the property be attached pending appropriate orders from a competent Court.

      The Orissa High Court has, however, held [71] that where the Magistrate holds that the proceeding under s. 145 is not maintainable, and directs the parties to the Civil Court, he cannot at the same time declare one of the parties to be in possession or to make an order of attachment under s. 146(1).

47. Effect of Civil Court decree.—

1. Criminal Court should drop the proceedings when there is a valid order as to possession by the Civil Court. [72]

2. So, when the question of possession has been resolved by the Civil Court, the Criminal Court should not proceed to decide that question again under *s. 145 Cr.P.C.* This is because the Civil Court decree relating to possession renders such dispute to come to an end. In such a case, the Magistrate has the duty to maintain such possession of the party successful in the Civil Suit and not to allow the other party to invoke *s. 145 Cr.P.C.* to neutralize the effect of the Civil Court decree.[73]

3. So when a party has taken delivery of possession from the Civil Court, the finding of the Magistrate, if made under *s. 145 Cr.P.C.* , must be in accordance with the decisions of the Civil Court.[74]

4. The correct decision for the Magistrate in such a case is that no order should be made after a Civil Court has decided the question of title or possession. [75]

5. However, there may be cases where the decree is not a recent one. In such a case, the Magistrate can assume jurisdiction to enter into the question as to who is in act ual possession at the time when the proceeding was initiated. So, if in such a case, he finds that the party other than the party in whose favour the possession was declared by the Civil Court is now in actual possession, the Magistrate can declare the possession of that party in spite of the earlier Civil Court decree in favour of other. [76]

6. Of course even when there has been symbolical possession only by the Civil Court, the Magistrate must acknowledge that the decree holder got possession on that date and the presumption of law is that the possession continued in the absence of the evidence to the contrary so that it would be for the other party to show that subsequently the decree holder had been dispossessed. [77]

7. So merely because there is a Civil Court decree, even if followed by delivery of possession, a Magistrate is not bound to give his finding in accordance with the decree regardless of the act ual evidence as to possession on the date of preliminary order of the Magistrate. If the evidence satisfied him that the other party is in actual possession even in spite of Civil Court decree against him, he is bound to declare the possession of that party despite the decree of Civil Order. [78]

8. The decree of Civil Court or the order of delivery of possession is only a piece of evidence and it is open to the other side that the decree holder's possession ceased after the delivery of possession. [79]

9. The proper view is that the Magistrate in a proceeding under *s. 145 Cr.P.C.* cannot overlook the possession which in sub-section (4) refers to the act ual possession mentioned in sub-section (1) of s. 145Cr.P.C and the Magistrate under s. 145(4) is enjoined to decide 'without reference to the merits of the claims of any of the parties to a right to possession', the subject matter of dispute. Hence, the principle that possession follows, title has no application under s. 145(4) *Cr.P.C.*
[80]

10. So, whether in view of the Civil Court decree the Magistrate should or should not initiate the proceedings under s. 145(4) *Cr.P.C.* and decide as to who was in actual possession in spite of the Civil Court decree is a matter to be decided in facts and circumstances of each case. If the delivery of possession of the Civil Court is of recent origin and not remote, it is the duty of the Magistrate to maintain the right of the party declared by the Civil Court to be in possession and the successful party would be given all protection by proceedings under *s. 107 Cr.P.C.* against the unsuccessful party.[81]

11. If only a few days or month of being permanently restrained by the party against whom such decree for permanent injunction was passed, such party files a petition under *s. 145 Cr.P.C.* , such proceeding is *mala fide* and liable to be dropped. [82]

48. Pendency of civil suit, no bar to jurisdiction under s. 145.—

1. The case where s. 145 proceeding is instituted during the *pendency* of a suit in the Civil Court should be distinguished from a case where there has been an *adjudication* by the Civil Court of the rights of the parties, culminating in a decree.

2. There is a body of opinion that the mere fact that a civil suit is pending (even it a temporary injunction had already been granted by the Civil Court), [83] does not bar the jurisdiction of the Criminal Court to proceed under s. 145 of the Code, [84] provided the conditions for application of that section are present and the Magistrate is satisfied that there is a reasonable apprehension of breach of the peace unless prompt measures are taken to prevent the same. [85]

So, it is clear that mere pendency of the civil suit does not exclude the jurisdiction of the Magistrate to invoke *s. 145 Cr.P.C.* [86]

Unless there is an order or decree binding on the parties mere filing of civil suit at an earlier point of time would not oust the jurisdiction of the Magistrate to initiate the proceedings if the conditions for invoking *s. 145 Cr.P.C.* have been satisfied.[87]

However, the Supreme Court quashed a proceeding under *s. 145 Cr.P.C.* in respect of the possession of the same property when the civil suit over the same is pending.[88]

When the opposite party has filed a civil suit under *Sections 6 of the specific Relief Act* , a proceeding under *s. 145 Cr.P.C.* is barred.[89] When there is a longstanding litigation between the parties over the possession of the land and different proceedings have already been initiated under *Sections 144* , *145* and *107* *Cr.P.C.* and the Civil Suit over the same matter is pending which has been contested and the question of appointing a Receiver by the Civil Court is pending for consideration, the Magistrate rightly dropped the proceedings under *s. 145 Cr.P.C.* [90]

If the Civil Court has already passed an order relating to the possession or for protection of subject matter of dispute, initiation of fresh proceedings under s. 144 or *s. 145 Cr.P.C.* is not maintainable.[91]

When a party has already moved civil court in respect of the property and prayed for interim order of maintenance of status quo but the same has been rejected, such party cannot invoke *s. 145 Cr.P.C.* [92]

When the landlady forcibly dispossessed the tenant and the tenant filed a petition under *s. 145 Cr.P.C.* subsequent filing of the suit for eviction by the landlady against the tenant would not debar a Magistrate from proceeding under *s. 145 Cr.P.C.* and if satisfied that the landlady forcibly evicted the tenant, he can order restoration of possession.[93]

A sale of property by the power-of-attorney holder was made to a purchaser. But both the purchaser and owner filed the suits for permanent injunction. When such suits were pending, the Magistrate at the instance of the purchaser initiated the proceeding under *s. 145 Cr.P.C.* and thereafter issued attachment order under *s. 146 Cr.P.C.* The High Court quashed the proceedings but embarked upon the deciding the question of title. The Supreme Court has upheld the order of quashing the proceeding but did not approve the act ion of the High Court embarking upon the decision on the question of title.[94]

49. Interim order passed by the Civil Court and initiation of the proceedings under s. 145 Cr.P.C.—

When a person has been restrained by an order of temporary injunction by the Civil Court, it is improper for him to approach the Magistrate under *s. 145 Cr.P.C.* [95] A person obtaining an order of temporary injunction cannot also approach the Magistrate under s. 145(6) *Cr.P.C.* So, he cannot approach the Magistrate by alleging apprehension of breach of peace. He can initiate a proceeding under s. 107 Cr P.C. against the other party.[96]

However, apprehending dispossession the party obtaining temporary injunction order from the Civil Court may approach the Magistrate under *s. 145 Cr.P.C.* [97]

It has been held by the Allahabad High Court that where the dispute regarding the possession of the agricultural land is pending before the Civil Court and the Civil Court has already refused interim injunction to the petitioner, at the instance of such a petitioner, initiation of the proceedings under *s. 145 Cr.P.C.* would not be proper.[98]

50. Status quo order of the Civil Court.—

When Civil Court issues maintenance of status quo order, it postulates that it is not sure in whose favour the possession of the property is. In this backdrop, the Magistrate may initiate a proceeding under *s. 145 Cr.P.C.* if conditions for invoking *s. 145 Cr.P.C.* are fulfilled to ascertain who is in actual physical possession.[99] In another decision it is need that when over the self-same property the Civil Court directed the parties to maintain status quo, then the Magistrate cannot initiate a proceeding under *s. 145 Cr.P.C.* in respect of the self-same property.[1]

However, when after the Magistrate issued the preliminary order under s. 145(1) *Cr.P.C.* the status quo order was passed by the Civil Court, it does not debar the Magistrate from proceeding with said proceeding.[2]

Delhi High Court has held that when the Magistrate is satisfied that there is imminent danger to peace and tranquility in the area, the Civil Court's order of maintenance of status quo would not oust the jurisdiction of the Magistrate to initiate a proceeding under *s. 145 Cr.P.C.* [3]

51. Appointment of receiver.—

When the Civil Court has appointed a receiver in respect of the property in question and the Receiver is in seisin of the said matter, there can be no apprehension of the breach of peace for the Magistrate to initiate the proceeding under *s. 145 Cr.P.C.* [4]

52. Final order passed and subsequent civil suit.—

When the Magistrate has passed a final order under s. 145(6) *Cr.P.C.* and unsuccessful party has filed a Civil Court, the High Court has no jurisdiction to quash the order of the Magistrate because the order of the Magistrate is in respect of the possession and the unsuccessful party has the obligation to file a suit for declaration for better title to possession.[5]

53. Property in respect of which order may be made.—

1. The words 'said subject' in sub-sections (4) and (6) mean the 'subject of dispute' [sub-section (3)], referred to in sub-section (1). In the result, a final order under sub-section (6) can be made only in respect of the property which was included in the preliminary order under sub-section (1). [6]

2. If, however, the land which is not covered by the preliminary order is separable, the Magistrate's order will be without jurisdiction only in respect of such excess area and the order will not be invalid as a whole. [7]

3. A Division Bench of the Nagpur High Court [8] has held that once a valid preliminary order is made, it is competent for the Magistrate to specify *additional* lands as the subject of dispute and a final order including such property shall not be without jurisdiction. At any rate, if the parties contest the proceedings with notice of the subsequent specification of such additional lands the fact that such lands were not specified in the initial order at most constitutes an irregularity which does not affect the validity of the proceedings. [9]

54. Final order, upon whom binding.—

1. The final order is binding upon—

   (a) the parties to the proceeding;

   (b) the representatives of the parties; [10]

(c) those who claim through the parties; [11]

(d) those who have got notice of the proceedings through the publication under sub-section (3) [12] or were otherwise aware of the proceedings and act ed in collusion with a party to the proceeding. [13]

2. But it would not bind a mere witness examined in the proceeding. [14]

55. Whether fresh proceedings under s. 145 maintainable in respect of the same property.—

1. It is clear from the above that so long as an order under s. 145 remains in force, no fresh proceedings under s. 145 can be initiated, when the person who disturbs the possession of the successful party is bound by the final order. [15]

2. But the order under s. 145 not being a judgment *in rem* , there is nothing to bar a fresh proceeding at the instance of a different party who is not bound by the previous order. [16]

3. But after a conditional order is cancelled under sub-section (5), there is no bar to bring a fresh proceeding in respect of the same land, provided there are fresh materials. [17]

56. Order as to costs.—

See under s. 148(3),*post* .

57. Breach of the final order.—

1. When an order under s. 145(6) has been made, it is the duty of the Magistrate to maintain the rights of the successful party, so long as it subsists. [18]

2. In case of a threat of breach of the order, action under s. 107 may be taken. [19]

3. Taking forcible possession in violation of the order under s. 145(6) constitutes an offence under s. 188, I.P.C. [20]

4. A willful violation of the order under s. 145(6) may also constitute ‘civil contempt’ under s. 2(b) of the Contempt of Court Act, 1971.

5. But there is no provision in the Code authorising the Magistrate to initiate proceedings in the nature of execution to enforce his order under s. 145(6),[21] except to restore possession to the party who may have been dispossessed within the period of 2 months prior to the proceeding, as referred to in the Proviso to sub-section (4),—and which is specifically provided for in sub-section (6) itself.

6. The question is what would happen if, subsequent to an order under s. 145(6), the successful party is dispossessed by the other party who was bound by that order. In a group of cases, [22] it has been opined that the Court has an inherent power to enforce its order under s. 145(6), by directing a Police or Revenue Officer to restore possession to the successful party, because there would be no end to proceeding under s. 145 if successive proceedings against the same party who is bound by a previous order are entertained.

58. Remedies of person aggrieved by order under s. 145(6).—

No review . A Final order under sub-section (6) cannot be reviewed by the Magistrate or his successor. [23]

59. Revision.—

1. Under s. 397 of the *new* Code (*post*), revision lies from an order under s. 145 to the High Court *or* the Sessions Judge not only on the ground of want of jurisdiction but also on the ground that the order is illegal or erroneous. [24]
2. But the High Court would not lightly interfere [25] with an order made by a Magistrate, having jurisdiction in view of the fact that the object of the order is the maintenance of the peace and is made by the Magistrate upon whom lies the burden of maintaining the public peace, and also of the fact that the aggrieved party has his remedy in a civil suit. [26] Thus, the High Court will *not* interfere—

   (a) On the ground of insufficiency of the materials, [27] where there are *some* materials to justify the initiation of the proceedings under s. 145. [28]

   (b) The Court of revision would not interfere with findings of fact upon a reappreciation of the evidence, except where it is perverse, tainted with errors of law or non-consideration of material documents. [29]

   (c) On the ground of mere irregularities in the order, particularly when the party has already started civil proceeding in respect of the property in dispute. [30]

3. On the other hand, the High Court may interfere, on the following grounds, *inter alia* , of illegality or perversity—

   (a) That the Magistrate has not given reasons for his order under sub-section (4). [31]

   (b) That the Magistrate has not considered the written statements filed by the parties. [32]

   (c) If the Magistrate has refused to receive evidence produced by a party; [33] to summon a material witness. [34]

   (d) If the Magistrate arrives at his decision without considering relevant evidence on record, [35] or a material document, [36] or misreading the evidence and coming to a perverse conclusion, [37] or being influenced more by a consideration of title than actual possession. [38]

   (e) That the Magistrate has act ed upon evidence which is not legally admissible. [39]

   (f) Where the subject matter in dispute cannot be easily ascertained or exactly located from the Magistrate's order, [40] read with the materials on the record. [41]

   (g) If, and in so far as, the order relates to a property which was not the subject-matter of dispute. [42]

   (h) If he orders the property to be delivered to the possession of a party, without coming to a definite finding as to possession, as required by sub-section (6) of s. 145. [43] If he is unable to decide which of the parties is in possession, he should attach the property, under s. 146(1), pending a determination of the rights of the parties by a competent Court. But he cannot either drop the proceedings or deliver the property to either party, in such case. [44]

(i) If he does not apply his mind to the question of 'actual possession' and makes a final order without making a categorical finding that the first party was in actual possession. [45]

4. But the Revisional Court would not interfere where there has been a mere irregularity, not causing any miscarriage of justice [s. 465,*post*] or not going to the root of his jurisdiction, [46] *e.g.* —

(i) Merely because the application under s. 145(1) is signed not by the applicant but by his lawyer. [47]

(ii) Non-publication of the preliminary order near the subject of dispute, as required by sub-section (3). [48]

(iii) Where the final order of the Magistrate showed that his finding was that one party was all along in possession, his order cannot be quashed on the ground that in operative part of his order he did not give a clear finding as to who was in possession on the date of the preliminary order. [49]

5.

(a) Where there are materials on the record from which the Magistrate came to be satisfied as to the existence of a dispute and the likelihood of a breach of the peace to be caused by it, the Revisional Court would not inquire into the sufficiency of the material which has satisfied the Magistrate. [50]

(b) As to omission to mention in the preliminary order the grounds of the satisfaction of the Magistrate, the consensus of opinion is that—

(i) If the Revisional Court is moved in proper time and before the final order is passed, the Revisional Court would interfere and get the preliminary order rectified. [51]

(ii) But if the parties affected do not complain in time,—after the final order is passed,—not being a defect going to the root of jurisdiction of the Magistrate, [52] the Revisional Court would interfere only if such omission has caused prejudice, [53] *e.g.* , where the materials are all on the record [54] or the parties were fully cognizant thereof. [55] , [56]

6. Section 397(2), however, provides that no revision shall lie against an 'interlocutory' order. Controversy arises as to what is an 'interlocutory' order. According to the Supreme Court, what may be interlocutory for one purpose may be 'final' for another purpose. [57]

It has been held that revision would lie against the following orders, in view of their finality so far as a particular stage of the proceeding is concerned :

(i) An order of remand made by a Sessions Judge, in revision against order under s. 145(6), for purposes of revision before the High Court. [58]

(ii) An order of attachment under s. 146(1). [59]

7. In view of s. 397(3), the High Court shall not be entitled to exercise its revisional jurisdiction where the party has already moved the Sessions Court in revision, under s. 397(1). But s. 397(3) would not bar the inherent jurisdiction of the High Court to interfere, under s. 482,[60] where the conditions for the application of that independent power are satisfied. [61]

8. The Revisional Court can make any of the orders which could have been made by it as a Court of appeal [Sections 397, 401,*post*], *e.g.* —

   (i) stay execution of the order or delivery of possession as directed thereby; [62]

   (ii) convert the proceeding under s. 145 into one under s. 146 or 147; [63]

   (iii) set aside the order, [64] and direct the Magistrate to proceed according to law. [65]

9. When the Magistrate passed final order under *s. 145 Cr.P.C.* illegally, the Court of Revision can quash such order. So, when the order was passed by the Magistrate act ing without jurisdiction in a capricious manner or on wrong principles, the revisional court has power to correct the mistake.[66]

10. So, when without complying mandatory provisions of *s. 145 Cr.P.C.* , the question of possession has been decided by the Magistrate, the order is liable to be quashed by the Court of Revision or under *s. 482 Cr.P.C.* [67]

11. When the Magistrate declared possession of the opposite party without giving opportunity to the petitioner to examine the witnesses produced by the petitioner on the date of hearing, the order is liable to be set aside. But as the matter was pending for 15 years, the High Court without remanding the matter to the Magistrate for fresh hearing directed the party to go to the Civil Court to decide their dispute. [68]

60. Interference by High Court under inherent power.—

1. Section 482 (*post*) saves the ‘inherent power’ of the High Court to interfere, in any case, if it is necessary "to prevent abuse of the process of Court [69] or to secure the ends of justice", *e.g.* , where the impugned order is a nullity. [70] , [71]

2. On the aforesaid grounds, s. 482 has been used by the High Courts to interfere with the following orders under Sections 145- 146 :

Where, on receipt of a police report, the Magistrate made an order of attachment and appointment of a Receiver, without making a preliminary order in terms of s. 145; [72] or where s. 145(1) was not applicable because there was no *dispute* [73] regarding ‘possession’ between the two parties; [74] or where the Magistrate passed a final order without determining a jurisdictional question. [75] , [76]

61. No appeal.—

1. No appeal has been provided for against an order made under s. 145, because the party against whom such order is made has his remedy before the Civil Court. [77]

2. But the Supreme Court may grant special leave to appeal, under *Art. 136 of the Constitution* . [78]

62. Application under Art. 227 of the Constitution.—

1. An application under *Art. 227 of the Constitution* may lie to correct an error of jurisdiction, [79] or violation of natural justice, [80] or to cancel an apparent error of law, [81] provided the Petitioner has no other efficacious remedy under the Code. [82]

2. But the bars under s. 397(2)- (3) cannot take away the constitutional jurisdiction under Art. 227, provided the foundations for that jurisdiction are present. [83]

63. Effects of order under s. 145 being set aside.—

1. Where a proceeding under s. 145 is quashed by a superior Court, no residuary powers are left with the Criminal Court for making any reference to the Civil Court or otherwise. [84]

2. If any directions be necessary, the parties should detain them from a competent Civil Court. [85]

64. Nature of Civil suit to be filed after final order passed by the Magistrate.—

A party unsuccessful by an order under *s. 145 Cr.P.C.* would initiate civil proceedings in a competent Court to establish his entitlement to possession over the disputed property against the successful party. The party unsuccessful before the Magistrate in such a suit can dispute the correctness of the findings of the Magistrate. However, the burden lies upon him to prove before the competent Court, his possession or entitlement to possession. The expression 'until evicted therefrom in due course of law' in sub-section (6) of *s. 145 Cr.P.C.* means the eviction of the party successful before the Magistrate consequent upon the adjudication of title or right to possession by a competent Court but it does not necessarily mean an eviction decree. Ordinarily, for the relief of recovery of possession would be appropriate to be sought for but if the legal proceedings are initiated before a competent Court consequent upon the attachment under s. 146(1) *Cr.P.C.* , it is not necessary to seek recovery of possession.[86]

65. Order under s. 145(6) and decree in subsequent civil suit.—

1. Under s. 145(6), a Magistrate is authorised to issue an order declaring a party to be entitled to possession of a land until evicted therefrom 'in due course of law'. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The life of that order is coterminous with the passing of a decree by a

Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. [87]

2. Usually, the party aggrieved brings a suit under *Sections 34 of the Specific Relief Act*, for declaration of his title and recovery of possession.[88]

3. An order under s. 145(6) of the Code may also be displaced by a decree of a Civil Court in a possessory suit under *Sections 6 of the Specific Relief Act*.[89] A party aggrieved by an order of a Magistrate under s. 145(6) can bring a suit under *Sections 6 of the Specific Relief Act*, without having the order under s. 145(6) set aside.[90] If the Civil Court finds that the plaintiff was in possession within 6 months prior to the date of the suit and that the defendant has dispossessed him during that period, that suit would be decreed in favour of the plaintiff, and it will prevail over the order under s. 145(6), and would constitute 'due course of law' within the meaning of s. 145(6), to evict the defendant. [91] In such suit, the order under s. 145(6) is evidence on the point that there was a dispute as to possession between the parties but the finding of possession thereon is not binding on the Civil Court. [92]

4. It has been held in some cases [93] that the words 'due course of law' suggest that the final order under s. 145(6) is to subsist until the Civil Court makes its decree after deciding the question of title, so that the Civil Court cannot make an order of interim injunction so as to disturb the possession of the party in whose favour the final order under s. 145(6) stands or to disturb the order of the Criminal Court which is not 'subordinate' to the Civil Court before which the suit for title is instituted.

5. But, short of injunction, the Civil Court may possibly make appropriate arrangements for preserving the property, in suitable cases. [94]

6. The party aggrieved by the order passed by the Magistrate may move a revision petition and then file a suit in Civil Court. Institution of such suit is no bar to the continuance of the revision petition filed by him against the order under s. 145(6) *Cr.P.C.*
[95]

66. Evidentiary value of order under s. 145(6) in civil suit.—

1. In a subsequent suit for title or possession relating to the same land, an order under s. 145(6) is admissible, under s. 13, as evidence of the following facts; [96]

   (i) Who the parties to the dispute were;

   (ii) What the land in dispute was;

   (iii) who was declared entitled to retain possession.

2. The finding as to possession in the proceedings under s. 145 remains valid until it is reversed by a competent Civil Court. [97]

3. But the order of the Magistrate does not decide any question as to the right to possession nor does it purport to give possession to a party who was not act ually in possession on the date of his preliminary order. The order only *declares* which party was in actual possession on that date. Even in the case of a party who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, the Magistrate is only authorised to treat that party who is dispossessed as if he had been in possession on such date. [98]

4. Hence, even if the plaintiff had obtained in his favour an order of attachment under s. 146(1) [*old* s. 145(4), Proviso 3], it would be of no avail if it is found in the civil suit that the property did not belong to him in his personal capacity but to a Deity, under a public religious endowment. [99]

5. Now is an order under s. 145(6) sufficient to resist a suit for eviction under s. 180, U.P. Tenancy Act . [1]

67. Limitation for civil suit.—

1. Under the *Limitation Act* of 1908, there was a specific provision, namely, Art. 47, which prescribed a period of three years for a suit to recover the property comprised in an order under s. 145(6), the period being computed from the date of that order. Hence, a question arose whether a suit would be maintainable if it was brought within three years from the order under s. 145(6) but beyond 12 years from dispossession. [2]

2. The Supreme Court has held that under the *Limitation Act, 1963* even if no specific Article like Article 47 of the Limitation Act , 1908 is there, yet when the provisions of the *Limitation Act* are applicable to proceedings under *s. 145 Cr.P.C.* , the application for possession under s. 145(6) *Cr.P.C.* has to be made within three years from the date of the order under s. 145(4) *Cr.P.C.* in view of Article 137 of the Limitation Act . The Supreme Court has, therefore, upheld the order of the High Court applying Article 137 of the Limitation Act, 1963 , to such a suit and as the said suit has not been filed within three years of the order of the Criminal Court, the High Court has rightly held that such a suit is barred by limitation.[3]

68. Sub-section (8) : Order as to produce of property subject to speedy and natural decay.—

1. The conditions for the application of this sub-section are—

   (i) That there are standing crops [4] or other produce of the land or other property which is the subject-matter of the proceeding under s. 145.

   (ii) That such produce is subject to speedy and natural decay.

2. If the Magistrate is satisfied as to the preceding conditions, he may make—

   An order for the proper custody or sale of such property. This power would include the power—

   (i) to appoint a custodian or receiver of the said produce; [5]

(ii) the terms and conditions under which he is to function in respect of the property delivered to his custody; [6]

(iii) to direct such custodian to deposit in Court the sale-proceeds of the produce. [7]

3. An order of attachment under this sub-section can be made in the preliminary order under sub-section (1), [8] [*see,* further, under s. 146(1),*post*].

4. Where a Receiver has been so appointed in a proceeding under Art. 145, the same person may be appointed Receiver in a subsequent partition suit between the parties. [9]

69. Order of sale vitiated.—

The Magistrate passed the order of sale of standing crops from the disputed land on the prayer of the respondent under s. 145(8) *Cr.P.C.* directing the officer-in-charge of the Police Station to auction sale the standing crops. But the order was passed on the date previous to the date when the petition was fixed for hearing and without giving any opportunity to the petitioner of hearing. So, the High Court set aside such order.[10]

70. Remedy if the custodian fails to deposit the sale-proceeds.—

[*See* under s. 146(2),*post*].

71. Sub-section (10).—

1. Before the insertion of this sub-section in 1923, there was a difference of opinion as to whether it was competent to a Magistrate to proceed under s. 107 instead of under s. 145, where he was satisfied as to the existence of a dispute relating to immovable property likely to cause a breach of the peace in view of the word ‘shall’ in sub-section (1). The present clause makes it clear that the Magistrate has a discretion to proceed under either section, according to the circumstances of the case.

2. Nor is the Magistrate precluded from binding the parties under s. 107, if that is necessary to prevent breach of the peace, merely because proceedings have been initiated under s. 145, or an order under that section has been already made. [11]

3. Similarly, an order under s. 107 is no bar to a subsequent proceeding under s. 145, if the circumstances so require. [12]

37th Rep. of the Commission, para 357; 41st Rep., para 12.2.

69 *Dinomoni* *v.* *Brojomohini,* (1902) 29 Cal 187 (PC) .

70 41st Rep. of the Commission, paras 12.3-4.

71 Hence, any question relating to defective affidavits [as in *Chhotan v. Hari,* (1977) UJSC 46] will no longer arise.

72 Cf. *Moti v. State* , Crlj 1956 (para 8) HP.

73 41st Rep. of the Commission, para 12.5 : 37th Rep., paras 358-362.

74 *Roshanlal* *v.* *State,* (1976) Crlj 434 (paras 3-4) HP.

75 *Kauleshari* *v.* *Binda,* (1976) Crlj 649 (Pat) (para 4).

76 *Raja* *v.* *Ram,* (1975) Crlj 1268 (Pat) DB.

77 *Bujhawan* *v.* *Jogi,* (1977) Crlj 162 (NOC) (Pat) .

78 *Bujhawan* *v.* *Jogi,* (1977) Crlj 162 (NOC) (Pat) .

79 *Sushila v. Daibati,* (1972) BJLR 705.

80 *Raja* *v.* *Ram,* (1975) Crlj 1268 (Pat) DB.

81 *Bijendra* *v.* *Mohan,* (1978) Crlj 306 (Pat) DB.

82 *Raja* *v.* *Ram,* (1975) Crlj 1268 (Pat) DB.

83 *Raja* *v.* *Ram,* (1975) Crlj 1268 (Pat) DB.

84 *Kauleshari* *v.* *Binda,* (1976) Crlj 649 (Pat) (para 4).

85 *Sheobalak v. Kamaruddin,* (1922) 2 Pat 94 107FB.

86 *Turu* *v.* *State,* (1953) Crlj 908 (Cal) DB.

87 *Kaushal Mishra v. Rajkumar Mishra,* 2008 Crlj (NOC) 272 (Gau).

88 *Bhutani* *v.* *Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: 1969 Crlj 13 : (1969) 1 SCR 80 [*LNIND 1968 SC 3*]; *Krishna Kamini v. Abdul,* (1903) 30 Cal 155 (FB) .

89 *Dinomoni* *v.* *Brojomohini,* (1902) 29 Cal 187 (PC) .

90 *Chandu* *v.* *Sitaram,* AIR 1978 SC 333 [*LNIND 1977 SC 335*]: (1978) 1 SCC 210 : 1978 Crlj 356 .

91 *Chandu* *v.* *Sitaram,* AIR 1978 SC 333 [*LNIND 1977 SC 335*]: (1978) 1 SCC 210 : 1978 Crlj 356 .

92 *Bhinka* *v.* *Charan,* AIR 1959 SC 960 [*LNIND 1959 SC 77*]: 1959 Crlj 1223 : 1959 Supp (2) SCR 798.

93 *Gajadhar* *v.* *Chunni,* AIR 1949 All 621 [*LNIND 1949 ALL 50*].

94 *Indira* *v.* *Vasanta,* 1991 Crlj 1798 : 1990 TNLJ (Cri) 66 (Mad).

95 *Chandra Prakash v. District Magistrate, Saharanpur,* 1998 Crlj 2846 All .

1 *Mahar Jahan v. State of Delhi,* (2004) 13 SCC 421 : (2006) 1 SCC 320 (Cri) .

2 *Kunjbihari* *v.* *Balram,* (2006) 11 SCC 66 : (2007) 1 SCC 376 (Cri) .

3 *Edla Anjaiah v. Parumalla Malleshan,* 1998 Crlj 750 AP .

4 *Mohinder v. Dilbagh,* (1977) Crlj 1029 (P&H); *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*](para 8).

5 *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*](para 8).

6 *Mohinder v. Dilbagh,* (1977) Crlj 1029 (P&H).

7 *Nara v. Banchha,* AIR1968 Or 36.

8 *Nara v. Banchha,* AIR1968 Or 36.

9 *Sadhuram v. Pulin,* AIR 1984 SC 1471 [*LNIND 1984 SC 128*](para 62) : (1984) 3 SCC 410 [*LNIND 1984 SC 128*]; *Bhinka v. Charan,* AIR 1959 SC 960 [*LNIND 1959 SC 77*]: 1959 Supp (2) SCR 798 : 1959 Crlj 1223 .

10 *Bhaba v. Ramchandra,* (1987) Crlj 1155 (para 3) Gau.

11 *Ram v. State of U.P.,* AIR 1985 SC 472 [*LNIND 1984 SC 345*]: (1985) 1 SCC 427 : 1985 Crlj 752 .

12 *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*](para 8).

13 *Krishnakamini v. Abdul,* (1902) 30 Cal 155 199FB.

14 *Krishnakamini v. Abdul,* (1902) 30 Cal 155 199FB.

15 *Krishnakamini v. Abdul,* (1902) 30 Cal 155 199FB.

16 *Kulandaiswamy* *v.* *Sherfuddin,*
(1977) Crlj 2046 (Mad) ; *Qadir v. N.K.C.T.D.,*
(1977) Crlj 1190 (para 6) DB.

17 *Bhutani* *v.* *Desai,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3](para 8).

18 *Bhutani* *v.* *Desai,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3](para 8).

19 *Fateh Mohammed* *v.* *State of U.P.,*
(1986) 3 Crimes 274 (All) .

20 *Md. Kubar Ali* *v.* *Pinjira Begum,*
1995 Crlj 1754 Gau ; *Majid v. Ashoke,*
1985 Crlj 272 :
(1985) 2 Crimes 185 (All) .

21 *Satish Sardar v. Prithwiraj,* 1989 Crlj NOC 197Del .

22 *J.P. Shaw* *v.* *C.K. Udhwani,*
1986 Crlj 988 :
ILR (1986) Bom 705 .

23 *Bhutani* *v.* *Mani,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3]: 1969 Crlj 13 :
(1969) 1 SCR 80 [
LNIND 1968 SC 3] [overruling *Ganesh v. Venkateswara,*
(1961) 2 Crlj 100 (Mys)].

24 *Bhutani* *v.* *Mani,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3]: 1969 Crlj 13 :
(1969) 1 SCR 80 [
LNIND 1968 SC 3] [overruling *Ganesh v. Venkateswara,*
(1961) 2 Crlj 100 (Mys)].

25 *Gabrial* *v.* *Narayanan,*
(1977) Crlj 1870 (para 5) Ker; *Amarnath v. Joginder,*
(1976) Crlj 394 (HP) .

26 *Bhutani* *v.* *Mani,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3]: 1969 Crlj 13 :
(1969) 1 SCR 80 [
LNIND 1968 SC 3] [overruling *Ganesh v. Venkateswara,*
(1961) 2 Crlj 100 (Mys)].

27 *Ram* *v.* *Bhagelu,*
(1977) Crlj 462 (All) ; *Ghulam v. Meerajuddin,* AIR1964 J&K 1 (3-4).

28 *Ram* *v.* *Bhagelu,*
(1977) Crlj 462 (All) ; *Ghulam v. Meerajuddin,* AIR1964 J&K 1 (3-4).

29 *Shankarlal* *v.* *Alhaz,*
1991 Crlj 1556 :
(1991) 1 Crimes 659 [
LNIND 1990 KANT 391](Ker) .

30 *Ashok* *v.* *Khetra,*
1991 Crlj 1769 Gau .

31 *Bhutani* *v.* *Mani,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3]: 1969 Crlj 13 :
(1969) 1 SCR 80 [
LNIND 1968 SC 3] [overruling *Ganesh v. Venkateswara,*
(1961) 2 Crlj 100 (Mys)].

32 *Moti* *v.* *State,*
(1956) Crlj 1956 (para 6) HP.

33 *Jayantilal* *v.* *Chandu,*
(1986) Crlj 988 (Bom) .

34 *Madho v. Tilak,* AIR1934 Nag 194; *Madho v. Ladan,*
(1974) Crlj 1164 (Raj) .

35 *Madho* *v.* *Ladan,*
(1974) Crlj 1164 (Raj) .

36 *Konjengbam* *v.* *Sanakhomba,*
(1986) Crlj 1110 (paras 10-12).

37 *Govind* *v.* *State of* *U.P.,*
(1977) Crlj 2007 (para 3) All.

38 *Govind* *v.* *State of* *U.P.,*
(1977) Crlj 2007 (para 3) All.

39 *Nandkeswar v. Sita Saran,* (1932) 12 Pat 87; *Venkataraman* , AIR1930 Bom 172; *Agnikumar* ,

40 *Sachchida* *v.* *State of* *U.P.,*
(1987) Crlj 1366 (paras 6, 10) All.

41 *Ranjit Singh v. State of Bihar,* (2009) 1 Pat LJR 780 (Pat).

42 *E. Anjaiah v. P. Mallesham,* 1998 Crlj 750 AP .

43 *Chandra Prakash Arora v. District Judge,* 1998 CrLJ 2846 (2847) (All).

44 *Nightingle Engineering Industry (P) Ltd. v. Sibapada De,* 1995 Crlj 1573 Ori .

45 *Ashoka v. Khetra Mohan,* 1991 Crlj 1769 Gau .

46 *Velur v. Sambandamurthi,* AIR1952 Mad 531; *Behari v. Hari,* AIR 1932 Cal 60 ; *Shibnarayan v. Sat Yadeo,* AIR1943 Pat 44.

47 *Anadi v. Sukh Chand,* (1930) 34 CWN 899 (910).

48 *Stewart v. Hughes,* (1929) 33 CWN 509 .

49 *Bisse v. State of Mysore,* (1969) Crlj 1170 (Mys) ; *Mannadha v. Marappa,* (1969) Crlj 1410 (Mad) .

50 *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*](para 10) : (1969) 1 SCR 80 [*LNIND 1968 SC 3*] : 1969 Crlj 13 .

51 *Khudiram* , (1951) 56 CWN 608 ; *Chennapudayan* , (1906) 30 Mad 548.

52 *Gobinda* , (1893) 20 Cal 520 (526).

53 *Gulam v. Hari,* (1978) Crlj 299 (para 5) J&K; *Kapoor* , AIR 1933 All 264 (FB) .

54 *Khudiram* , (1951) 56 CWN 608 ; *Chennapudayan* , (1906) 30 Mad 548.

55 *Gabrial* *v.* *Narayanan,* (1977) Crlj 1870 (Ker) ; *Peria v. Marappa,* AIR1969 Mad 411 412; *Sri Chand v. Dhundi,* AIR 1955 All 56 [*LNIND 1954 ALL 60*].

56 *Gabrial* *v.* *Narayanan,* (1977) Crlj 1870 (Ker) ; *Peria v. Marappa,* AIR1969 Mad 411 412; *Sri Chand v. Dhundi,* AIR 1955 All 56 [*LNIND 1954 ALL 60*].

57 *Kulandaiswamy* *v.* *Sherfuddin,* (1977) Crlj 2046 (para 4) (Mad).

58 *Krishnakamini* *v.* *Abdulla,* (1902) 30 Cal 155 (193) (FB).

59 *Krishnakamini* *v.* *Abdulla,* (1902) 30 Cal 155 (193) (FB).

60 *Krishnakamini* *v.* *Abdulla,* (1902) 30 Cal 155 (193) (FB).

61 *Dhondai* *v.* *Follet,* (1903) 31 Cal 41 (FB) .

62 *Nagoji v. Subbarayulu,* AIR1917 Mad 742.

63 *Rupchand v. Bhaglu,* AIR1954 Assam 77.

64 *Behari* *v.* *Darbi,* (1893) 21 Cal 915 .

65 *Dunne* *v.* *Kumar,* (1902) 30 Cal 593 .

66 *Dhondai* *v.* *Follet,* (1903) 31 Cal 41 (FB) .

67 *Turu Majhi* *v.* *State,* AIR 1953 Cal 397 [*LNIND 1953 CAL 22*]; *Ratan v. Raghubir,* AIR1952 MB 165.

68 *Turu Majhi* *v.* *State,* AIR 1953 Cal 397 [*LNIND 1953 CAL 22*].

69 *Ratan v. Raghubir,* AIR1952 MB 165.

70 *Satrughana Nath v. Harish Chandra,* 1984 Crlj 149 Ori .

71 *Agni Kumar v. Mantazuddin,* (1928) 56 Cal 290 ; *Bhutani v. Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

72 *Mohan v. Kailash,* AIR1962 Pat 249; *Manick v. Rose,* AIR1963 Assam 31 37.

73 *Mohan v. Kailash,* AIR1962 Pat 249; *Manick v. Rose,* AIR1963 Assam 31 37.

74 *Ranchi Zamindari Co. v. Pratap,* (1939) 18 Pat 215.

75 *Bholanath* , (1905) 32 Cal 287 .

76 *Mohan v. Kailash,* AIR1962 Pat 249; *Manick v. Rose,* AIR1963 Assam 31 37.

77 *Venugopala v. Nilakantha,* AIR1945 Mad 255; *Padmaraju v. Padmaraju,* AIR1955 Andhra 99.

78 *Sachchida v. State of U.P.,* (1987) Crlj 1366 (paras 6, 10) All.

79 *Siem v. Lebanon,* AIR1963 Assam 38 41 [Opposite Party—a toll collector of a market on behalf of the applicant].

80 *Siem v. Lebanon,* AIR1963 Assam 38 41 [Opposite Party—a toll collector of a market on behalf of the applicant].

81 *Bajirao v. Dadibai,* AIR1926 Nag 286.

82 *Radhakrishna v. Ram,* AIR 1917 PC 197 .

83 *Rajendra v. Chintamani,* AIR1939 Pat 151.

84 *Rajendra v. Mohammed Azumammed,* 9 CWN 887.

85 *Nayan Manjari v. Fazle Haque,* 49 Cal 871.

86 *Radha Krishna v. State of U.P.,* 1975 Crlj 652 All .

87 *Sukdev v. Mangulu,* 1987 Crlj 758 : (1986) 1 Crimes 447 (Ori)

88 *Ghulam v. Hari,* 1978 Crlj 229 (J & K).

89 *Sukdev v. Mangulu,* 1987 Crlj 758 : (1986) 1 Crimes 447 (Ori) .

90 *Bhutani v. Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*].

91 *Samuel v. A.W.. Bishop,* 1980 Crlj 309 .

92 *Mohan v. Kailash,* AIR1962 Pat 249.

93 *See,* further, under 'Revision', *post* .

1 *Khosh Md. v. Nazir,* (1906) 33 Cal 68 (FB) .

2 Cf. *Pakamaraja v. Chidambara,* AIR1955 Mad 229; *Kondappa v. Ram,* AIR 1964 AP 168 [*LNIND 1963 AP 110*].

3 *Sri Ram v. State,* AIR1958 Punj 47.

4 *Ghulam v. Meerajuddin,* AIR1964 J&K 1 (3-4).

5 *Khangar v. Jhamman,* AIR 1950 All 734 [*LNIND 1950 ALL 194*].

6 *Banwari Lal* , (1905) 32 Cal 552 .

7 *Subramania* , 19 MLJ 18.

8 *Banwari Lal* , (1905) 32 Cal 552 ; *Subramania* , 19 MLJ 18.

9 *Thamaraiammal v. Executive Magistrate,* 2007 Crlj 1885 Mad .

10 *Bhutani v. Thani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

11 *Kapur v. Suraj,* (1933) 55 All 301 (FB) ; *Durga Prasad v. Rameswar,* AIR1959 Assam 54.

12 *Khosh Md. v. Nazir,* (1906) 33 Cal 68 (FB) .

13 *Kapur v. Suraj,* (1933) 55 All 301 (FB) ; *Durga Prasad v. Rameswar,* AIR1959 Assam 54.

14 *Bhutani v. Thani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

15 *Kapur v. Suraj,* (1933) 55 All 301 (FB) ; *Durga Prasad v. Rameswar,* AIR1959 Assam 54.

16 *Bhutani v. Thani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

17 *Yakub v. Basu,* AIR1949 Pat 146; *Nageswar v. State,* AIR 1953 All 471 [*LNIND 1952 ALL 54*].

18 *Ram Piari v. Danuka,* AIR 1949 All 402 .

19 *Ratan v. Raghubir,* AIR1952 MB 165.

20 *Ratan v. Raghubir,* AIR1952 MB 165.

21 *Ratan v. Raghubir,* AIR1952 MB 165; *State of M.P. v. Prem Lal,* AIR1957 Nag 27.

22 *Mahato* , (1972) Crlj 835 .

23 *Ghulam v. Meerajuddin,* AIR1964 J&K 1 (3-4).

24 *Bholanath v. Gour,* [AIR 1953 Cal 777 *LNIND 1953 CAL 142*].

25 *Leela* , AIR1967 Mys 169; *Chandi* , [AIR 1968 Cal 216 *LNIND 1966 CAL 167*].

26 *Mahd. Beg.* , AIR1945 Oudh 515; *Ramzan v. Janardhan,* (1902) 30 Cal 110 .

27 *Nazam-ul-Hussain v. R.,* AIR1950 Lah 132.

28 *Pandurang* , in re., (1900) 24 Bom 527.

29 *Ram Saran v. Raghunandan,* (1910) 39 Cal 387 .

30 *Ghullam v. Khaniz,* (1920) 57 IC 92 (Punj) .

31 *Amumacha v. Manimacha,* AIR1968 Mani 24.

32 *Abu v. Ahmed,* AIR1951 Mad 722.

33 *Sita v. Jaisari,* AIR 1927 All 99 .

34 *Rampus v. Subba Reddi,* AIR1950 Mad 658; *Annada* , 6 CWN 882.

35 *Deonandan v. Thakur,* AIR1949 Pat 58; *Kamaraju v. Surya,* AIR1953 Orissa 99; *Lakshmiah v. S.I.,* (1976) Crlj 398 (Knt) .

36 *Chandi Prasad v. Om Prakash,* (1976) Crlj 209 (All) .

37 *Muktanand v. State,* (1978) Crlj 1 (NOC) All ; *Onkar v. Ram,* (1973) Crlj 1885 (All) ; *Kirpal v. State of Punjab,* (1975) Crlj 1423 (P&H).

38 *Gujrat* , AIR 1936 All 320 .

39 *Hurballabh* ,
(1898) 26 Cal 188 .

40 *Brajasundar* *v.* *Moni,*
(1951) SCR 431 [
LNIND 1951 SC 23].

41 *Baldeo* *v.* *State,*
(1975) Crlj 1569 (All) ; *Kala v. Rai,*
(1958) Crlj 1554 (Tri) .

42 *Akaloo* *v.* *Mahesh,*
(1900) 36 Cal 986 .

43 *Narayan* , 3 Crlj 214.

44 *Kunjo v. Suraj,* AIR1939 Pat 206.

45 *Mahomed v. Ehsan,* AIR1941 Oudh 515.

46 *Kochunny* ,
(1911) 13 Crlj 222 .

47 *Hardev* *v.* *Ram,*
(1953) Crlj 828 (All) .

48 *Dhirendra* *v.* *Hrishikesh,*
AIR 1951 Cal 940 (FB) .

49 *Chhoti* *v.* *Sharafat,*
(1975) Crlj 1240 (Raj) ; *Godo v. Abinash,*
(1975) Crlj 1404 (Pat) ; *Ali v. Fakiruddin,*
AIR 1920 Cal 708 .

50 *Krishna* *Kamini* ,
(1902) 30 Cal 155 (FB) .

51 *Sukh* *Lal* *v.* *Tarachand,*
(1905) 33 Cal 68 78FB ; *Debi Prasad v. Sheodat,*
(1907) 30 All 41 .

52 *Paramatma* *v.* *State,*
AIR 1954 All 24 [
LNIND 1953 ALL 145].

53 *Sripaticharan* , (1904) 8 CWN 76 .

54 *Sukh Lal v. Tarachand,* (1905) 33 Cal 68 78FB ; *Debi Prasad v. Sheodat,* (1907) 30 All 41 .

55 *Bhure Khan v. Phakira,* AIR1924 Nag 171.

56 *Nanhe v. Jamil-ur Rahaman,* AIR 1925 All 316 .

57 Cf. *Hosanki v. State,* AIR 1956 All 81 85 [*LNIND 1955 ALL 166*].

58 *Wahib* , (1922) 24 Crlj 954 .

59 *Palani* , (1922) 24 Crlj 429 ; *Arumuga v. Venkata,* (1907) 31 Mad 82.

60 *Sahadat v. Taijuddi,* (1919) 46 Cal 1056 .

61 *Husain v. Hasan,* (1921) 23 Crlj 684 (Oudh) .

62 *Pitambar v. Sarda,* (1912) 13 Crlj 777 (All) .

63 *Harbir Singh v. State,* AIR1952 Pepsu 29.

64 *Palani* , (1922) 24 Crlj 429 ; *Arumuga v. Venkata,* (1907) 31 Mad 82.

65 *Husain v. Hasan,* (1921) 23 Crlj 684 (Oudh) .

66 *Mahomed v. Bikkan,* (1903) 30 Cal 918 .

67 *Kailash v. Jai Narain,* (1920) 21 Crlj 601 (Pat) .

68 *Anand v. Anant,* (1991) Crlj 1256 (para 6) Bom; *Babu v. Shyam,*

(1950) All 543 [
LNIND 1950 ALL 45]; *Sarat v. Guru,* (1970) Cut LT 1272 (1273).

69 *Anand* *v.* *Anant,*
(1991) Crlj 1256 (para 6) Bom; *Babu v. Shyam,*
(1950) All 543 [
LNIND 1950 ALL 45]; *Sarat v. Guru,* (1970) Cut LT 1272 (1273).

70 *Narayan* *v.* *Sekhara,*
AIR 1964 Ker 308 [
LNIND 1964 KER 356]; *Jamilur v. Abdul,* AIR1960 Pat 275.

71 *Keshab v. Somnath,* AIR1958 Or 79; *Dodda v. Narayana,* AIR1957 Mys 43; *Dhabari v. Gorakh,*
(1917) 19 Crlj 741 .

72 *Narayan* *v.* *Sekhara,*
AIR 1964 Ker 308 [
LNIND 1964 KER 356]; *Jamilur v. Abdul,* AIR1960 Pat 275.

73 *Keshab v. Somnath,* AIR1958 Or 79.

74 *Mangala* *v.* *Salge,*
(1974) Crlj 215 (Or) .

75 *Gangadharam* *v.* *Sankarappa,*
(1910) 12 Crlj 47 (Mad) ; *Mahomed v. Bikkan,*
(1903) 30 Cal 685 .

76 *Nandkishore* ,
(1921) 23 Crlj 200 (Cal) .

77 *Abdul Shukur v. Abu,* AIR1925 Pat 593; *Ram Kawal v. Dudhnath,* AIR1969 Pat 1197 (para 8).

78 *Yadeorao* *v.* *State* *of* *Maharashtra,*
(1976) Crlj 751 (753) Bom.

79 *Pritam* *v.* *Ranjit,*
AIR 1972 Raj 59 (para 16).

80 *Yudaorao* *v.* *State* *of* *Maharashtra,*
(1976) Crlj 751 (753) Bom.

81 *Adhikanda* *v.* *Dhaneswar,*
(1978) Crlj 265 (para 5) (Or).

82 *Adhikanda* *v.* *Dhaneswar,* (1978) Crlj 265 (para 5) (Or).

83 *Ishan* *v.* *Hridoy,* AIR 1925 Cal 1040 ; *Bansi v. Hari,* AIR 1956 All 297 303 [LNIND 1955 ALL 240].

84 *Daya Ram v. State of U.P.,* (1975) Crlj 885 (para 10) (All) FB.

85 *Karimullah* *v.* *Champa,* (1978) Crlj 30 (NOC) Pat .

86 *Harman Prosad v. State of Rajasthan,* 1998 Crlj 2421 Raj .

87 *Shamim Alam v. Sajjid Hossain,* (2005) 10 SCC 551 .

88 *Moti Ram v. Laxmi Narayan Jiashwal,* 2007 Crlj NOC 52 (Jhar).

89 *Gyan* , AIR 1949 All 144 ; *Depu* , AIR1952 Assam 185; *Gaindalal* , AIR1949 Punj 231.

90 *Yakub* , AIR1949 Pat 146; *Agni Kumar* , (1928) 32 CWN 1173 FB.

91 Cf. *Bhutani* *v.* *Desai,* AIR 1968 SC 1444 [LNIND 1968 SC 3]: (1969) 1 SCR 80 : 1969 Crlj 13 .

92 *Ghananand* *v.* *State,* (1976) Crlj 1217 .

93 *Islam* *v.* *Munir,* (1978) Crlj 202 (All) ; *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB.

94 *Dasarathi v. State of Orissa,* (1971) 37 Cut LT 276 (279-81); *Ghulam v. Hari,* (1978) Crlj 299 (para 8) J&K.

1 *Narayan* *v.* *Sekhara,* AIR 1964 Ker 308 [LNIND 1964 KER 356].

2 *Keshab v. Somnath,* AIR1958 Ori 79.

3 Cf. *Abdul* , (1974) Crlj 514 .

4 *Gopal v. Vishwanath,* (1977) Crlj 1762 (para 6) Pat.

5 *Nilakanta v. Uday,* (1983) Crlj NOC 121(Gau) .

6 *Deo Prasad v. Ravi,* 1990 Crlj 823 Pat .

7 *Roshanlal v. State,* (1976) Crlj 434 (435) UP.

8 The *new* Code thus adopt the liberal view taken in cases such as *Gangadhar v. Shyam,* AIR1958 Or 153; *Chunchu v. Karrapati,* AIR1951 Mad 500, rejecting the contrary view in cases like *Padmaraju v. Padmaraju,* AIR1955 Andhra 99; *Ganga v. Sukhdin,* AIR 1959 All 141 [*LNIND 1958 ALL 173*]FB .

9 The *new* Code thus adopt the liberal view taken in cases such as *Gangadhar v. Shyam,* AIR1958 Or 153; *Chunchu v. Karrapati,* AIR1951 Mad 500, rejecting the contrary view in cases like *Padmaraju v. Padmaraju,* AIR1955 Andhra 99; *Ganga v. Sukhdin,* AIR 1959 All 141 [*LNIND 1958 ALL 173*]FB .

10 *Bhutani v. Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

11 *Ganga Bux v. Sukhdin,* AIR 1959 All 141 145 FB; *Dhanbar v. Haripada,* (1976) Crlj 1924 (para 7) Gau.

12 *Roshanlal v. State,* (1976) Crlj 434 (435) UP.

13 *Ganga Bux v. Sukhdin,* AIR 1959 All 141 145 FB.

14 *Bikrama v. Bishwanath,* (1975) Crlj 1691 (Pat) ; *Athiappa v. Athiappa,* AIR1967 Mad 445FB ; *Kamapati v. Challapathi,* AIR 1961 AP 208 [*LNIND 1960 AP 169*]FB .

15 *Sitanath* , (1920) 25 CWN 601 .

16 *Amritlal v. Nageswara,* AIR1947 Mad 133 134.

17 *Amritlal v. Nageswara,* AIR1947 Mad 133 134.

18 *Bhutani* *v.* *Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

19 *Bai Jiba v. Chandulal,* AIR1926 Bom 91.

20 *Bhutani* *v.* *Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

21 *Bhutani* *v.* *Mani,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

22 *R.C. Patuck* *v.* *Fatima A. Kindasa,* AIR 1997 SC 2320 [*LNIND 1997 SC 804*]: (1997) 5 SCC 334 : 1997 SCC (Cri) 679 : 1997 Crlj 2756 .

23 *Khandu* *v.* *Sadakali,* AIR 1923 Cal 577 ; *Narasya v. Vankiah,* AIR1925 Mad 1252.

24 *Ghangadhar* *v.* *State,* AIR 1952 All 580 [*LNIND 1949 ALL 254*].

25 *Abdur Rahaman* *v.* *Dinesh,* AIR 1929 Cal 328 .

26 *Golla* *v.* *Beldari,* (1955) Crlj 169 .

27 *Sasthu* *v.* *Nathuni,* (1924) 26 Crlj 105 (108).

28 *Bishan v. Mayaram,* AIR1953 Nag 356.

29 *Khandu* *v.* *Sadakali,* AIR 1923 Cal 577 ; *Narasya v. Vankiah,* AIR1925 Mad 1252.

30 *Khandu* *v.* *Sadakali,* AIR 1923 Cal 577 ; *Narasya v. Vankiah,* AIR1925 Mad 1252.

31 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (paras 44-45, 59) FB; *Sarat v. Guru,* (1970) Cut LT 1272 (1273).

32 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (paras 44-45, 59) FB.

33 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (paras 44-45, 59) FB.

34 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (paras 44-45, 59) FB.

35 *Bishan v. Mayaram,* AIR1953 Nag 356.

36 *Sarat v. Guru,* (1970) Cut LT 1272 (1273).

37 *Abhoypada v. Dhanesh,* AIR1962 Pat 115 417.

38 *Bishan v. Maya Ram,* AIR1953 Nag 356.

39 *Moti Ram* *v.* *State,* 1976 Crlj 1956 ; *Sankatha v. Rahamuthulla,* 1973 Crlj 1091 .

40 *Satrughana* *v.* *Harish,* (1994) Crlj 148 (Or) (para 11).

41 *Delhi Cloth Mills* *v.* *Yograj,* AIR 1957 All 797 [*LNIND 1957 ALL 113*]; *Narasayya v. Venkaiah,* AIR1925 Mad 1252; *Daljit v. Tej Singh,* AIR1939 Oudh 284 295; *Murru* *v.* *State,* AIR 1955 All 95 [*LNIND 1954 ALL 106*]; *Golla v. Beldari,* (1955) Crlj 169 .

42 *Narasayya v. Venkaiah,* AIR1925 Mad 1252.

43 *Delhi Cloth Mills* *v.* *Yograj,* AIR 1957 All 797 [*LNIND 1957 ALL 113*]; *Narasayya v. Venkaiah,* AIR1925 Mad 1252; *Daljit v. Tej Singh,* AIR1939 Oudh 284 295; *Murru* *v.* *State,* AIR 1955 All 95 [*LNIND 1954 ALL 106*]; *Golla v. Beldari,* (1955) Crlj 169 .

44 *State v. Sheoratan,* AIR1951 Nag 201; *Jhabboo v. Laxmi,* AIR 1970 All 595 (para 17).

45 *Ramkirpal v. Ganesh,* AIR1952 VP 81.

46 *Khudiram v. Jitendra,* (1952) 56 CWN 608 (630). Mere acquittal of the A.P. in a case under ss. 427, 448, I.P.C. does not operate as 'eviction in due course of law' [*Krishna v. Paras,* (1978) Crlj 1424 (All)].

47 *Khudiram v. Jitendra,* (1952) 56 CWN 608 (630). Mere acquittal of the A.P. in a case under ss. 427, 448, I.P.C. does not operate as 'eviction in due course of law' [*Krishna v. Paras,* (1978) Crlj 1424 (All)].

48 *Khudiram v. Jitendra,* (1952) 56 CWN 608 (630). Mere acquittal of the A.P. in a case under ss. 427, 448, I.P.C. does not operate as 'eviction in due course of law' [*Krishna v. Paras,* (1978) Crlj 1424 (All)].

49 *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*](para 8) : (1969) 1 SCR 80 [*LNIND 1968 SC 3*] : 1969 Crlj 13 .

50 *Rajpati v. Bachan,* AIR 1981 SC 18 [*LNIND 1980 SC 286*](para 6) : (1980) 4 SCC 116 [*LNIND 1980 SC 286*].

51 *Sankatha v. Rahamatullah,* (1973) Crlj 1091 ; *Moti v. State,* (1976) Crlj 1956 (para 7) HP.

52 Cf. *Seetaram v. Addada,* (1975) Crlj 116 (Or) .

53 *Rajpati v. Bachan,* AIR 1981 SC 18 [*LNIND 1980 SC 286*](para 6) : (1980) 4 SCC 116 [*LNIND 1980 SC 286*].

54 *Krishna v. Paras,* 1978 Crlj 1424 Cal ; *Khudiram v. Jitendra,* 52 CWN 608.

55 *Krishna v. Paras,* 1978 Crlj 1424 Cal ; *Khudiram v. Jitendra,* 52 CWN 608.

56 *Sita Ram v. Addada,* 1975 Crlj 116 Ori .

57 *Lucas v. Bilavendum,* 1997 Crlj 1947 .

58 *Bheeravolu M. Reddy v. Sub-divisional Magistrate,* 1999 Crlj 744 .

59 *Moti Ram v. Laxmi Narayan,* 2008 Crlj NOC 52Jhar .

60 *Misil Mirdha v. Abdul Rahim,* AIR 1934 Cal 787 .

61 *Anil Kumar Jain v. R.K. Yadav,* 1998 Crlj 3061 .

62 *Bhinka v. Charan,* AIR 1959 SC 960 [*LNIND 1959 SC 77*]: 1959 Supp (2) SCR 798 : 1959 Crlj 1223 ; *Atmaram v. Prabhawatibai,* AIR1971 Boom 148.

63 *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB ; *Hanumappa v. Kondappa,* AIR1964 Mys 195 (para 19).

64 *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB ; *Hanumappa v. Kondappa,* AIR1964 Mys 195 (para 19); *Zafar v. Jugeswar,* AIR1940 Pat 135.

65 *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB ; *Hanumappa v. Kondappa,* AIR1964 Mys 195 (para 19).

66 *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB ; *Hanumappa v. Kondappa,* AIR1964 Mys 195 (para 19); *Zafar v. Jugeswar,* AIR1940 Pat 135.

67 *Sheoprasad v. Govindram,* AIR1940 Nag 265.

68 *Sheoprasad v. Govindram,* AIR1940 Nag 265.

69 *Radha Krishna v. State of U.P.,* (1975) Crlj 652 (All) DB ; *Hanumappa v. Kondappa,* AIR1964 Mys 195 (para 19); *Zafar v. Jugeswar,* AIR1940 Pat 135.

70 *Sheoprasad v. Govindram,* AIR1940 Nag 265.

71 *Manika v. Dandapani,* (1986) Crlj 287 (Or) .

72 *Harijan v. State of Andhra Pradesh,* 1981 Crlj 988 AP .

73 *B. Nayak v. P. Durgah,* 1979 Crlj 1200 : ILR (1979) 1 CUT 402 : (1979) 48 Cut LT 70.

74 *Sukdev v. Mangulu,* 1987 Crlj 758 : (1986) 1 Crimes 447 : (1986) 61 Cut LT 187 (Ori).

75 *Balkishen v. Khazana,* 1987 Crlj 1601 (P&H) .

76 *Hosanki v. State,* AIR 1956 All 81 [*LNIND 1955 ALL 166*].

77 *Rajendra v. Chintamani,* AIR1939 Pat 151.

78 *Kuber v. Chaturbhuj,* 1970 Crlj 1543 Ori .

79 *Yakub v. Bani,* AIR1949 Pat 146(FB) ; *Ramesh v. Chabi,* 1987 Crlj 758 Ori .

80 *Chandrabhan Singh v. State of M.P.,* 1974 MP LJ 17 .

81 *Hari Singh v. Rama Chandra,* 1989 NOC 166Ori : (1989) 67 Cut LT 589; *Khijar v. State,* 1972 Crlj 125 ; *Ram v. State of U.P.,* AIR 1985 SC 472 [*LNIND 1984 SC 345*].

82 *Annapurna v. Binayak,* 1987 Crlj 460 Ori : (1987) 67 Cut LT 26.

83 *Iqbal v. State of M.P.,* (1973) MPLJ 78 ; *Kuldip v. State of H.P.,* (1977) Crlj 1848 (HP) ; *Bhutani v. Desai,* AIR 1968 SC 1444 [*LNIND 1968 SC 3*]: (1969) 1 SCR 80 : 1969 Crlj 13 .

84 *Bhutani v. Desai,* AIR 1968 SC 1444 [LNIND 1968 SC 3]: (1969) 1 SCR 80 : 1969 Crlj 13 ; *Jagdish v. S.D.M.,* 1987 Crlj 1198 (P&H).

85 *Jagdish v. S.D.M.,* 1987 Crlj 1198 (P&H) .

86 *Mahant Ramratan Das v. Mahant Naryan Das,* 1989 Crlj NOC 138MP : 1989 MP LJ 293 .

87 *S.P. Nagarathinam v. S.D.M.,* 1993 Crlj 1285 Mad .

88 *Ram Sumer Puri v. State of U.P.,* AIR 1985 SC 472 [LNIND 1984 SC 345]: 1985 Crlj 752 : (1985) 1 SCC 427 [LNIND 1984 SC 345].

89 *Sushama Ram v. Ashutosh,* 1990 Crlj NOC 157Gau .

90 *Mohan Lal v. State of Bihar,* 1999 Crlj 4249 Pat .

91 *Mahaghana Mahanti v. Dwaraka Nath,* 2001 Crlj 2573 Ori .

92 *Ratan Singh v. State of Rajasthan,* 1994 Crlj NOC 415Raj .

93 *Shankar Lal v. State of M.P.,* 1995 Crlj 70 MP .

94 *Ranbir Singh v. Dalbir Singh,* (2002) 3 SCC 700 [LNIND 2002 SC 230] : 2002 SCC (Cri) 700 : AIR 2002 SC 1500 [LNIND 2002 SC 230]: 2002 Cr.LJ 2017.

95 *Mohammed Shahid v. State of U.P.,* (1986) 2 Crimes 380 [LNIND 1986 ALL 24](All) .

96 *Mangilal v. Bangmal,* 1988 Crlj 1908 .

97 *Jagdish Ram v. State of Haryana,* 1990 Crlj 1917 (P & H).

98 *Bhagwati Prosad v. State of U.P.,* 2008 Crlj (NOC) 1120.

99 *Amresh Tiwari v. Lalta Prasad,* AIR 2000 SC 1504 [*LNIND 2000 SC 2349*]: (2000) 4 SCC 440 : 2000 Crlj 2226.

1 *Hartez Singh v. Amarjit Singh,* 1999 Crlj 98 (P&H).

2 *Neelam Singh v. State of U.P.,* 1999 Crlj 90 All .

3 *Punj Lloyd (Pvt.) Ltd. v. State,* 1994 Crlj NOC 8Del .

4 *Chakrapani v. State,* AIR1967 Ori 39.

5 *Thunamal v. State of MP.,* AIR 1988 SC 1973 [*LNIND 1988 SC 410*]: (1988) 4 SCC 452 : 1989 Crlj 82.

6 *Ram Niranjan v. Kamdeo,* AIR1959 Pat 196.

7 *Ram Niranjan v. Kamdeo,* AIR1959 Pat 196.

8 *State of M.P. v. Premlal,* AIR1957 Nag 2.

9 *State of M.P. v. Premlal,* AIR1957 Nag 2.

10 *Thakurdas* , AIR1936 Nag 192.

11 *Jogendra v. Brojendra,* (1896) 23 Cal 731.

12 *Nathubhai* , in re., (1909) 11 Bom LR 277 ; *Raghunath* , AIR1966 Or 170.

13 *Satyacharan* , (1928) 33 CWN 1002 (1004).

14 *Kuppayar* , (1985) 18 Mad 51.

15 *Raghunandan v. Kishin,* AIR1922 Pat 210.

16 *Bindhyachal v. Madho,* AIR1946 Pat 330; *Krishnakamini v. Abdul,* (1903) 30 Cal 155 (FB) .

17 *Haripada* , AIR 1935 Cal 494 ; *Jyotish* , AIR1967 Pat 309.

18 *Argles v. Chhail Behari,* AIR1949 AIRLL 230.

19 *Parag* , AIR1943 Oudh 229; *Dulal v. Sukumar,* AIR 1958 Cal 474 [*LNIND 1958 CAL 98*](para 19).

20 *Dulal v. Sukumar,* AIR 1958 Cal 474 [*LNIND 1958 CAL 98*](para 19); *Jaswant v. State,* AIR 1951 All 828 [*LNIND 1951 ALL 127*].

21 *Ramendra* , (1909) 14 CWN 78 .

22 *Misri v. Nazir,* (1976) Crlj 924 (J&K); *Baburam v. Deo Narain,* AIR1958 Pat 222; *Ambika v. Emp.,* AIR1939 Pat 611; *Elimuddin* , AIR 1936 Cal 659 .

23 *Lallan v. Ram* , (1925 48 All 258 ; *Joynal* , (1947) 52 CWN 251 .

24 *Shibnarayan v. Satyadeo,* AIR1943 Pat 44 47.

25 *George v. Narayan,* (1984) Crlj 574 (para 9) Mad.

26 *Shibnarayan v. Satyadeo,* AIR1943 Pat 44 47.

27 *Rajpati v. Bachan,* AIR 1981 SC 18 [*LNIND 1980 SC 286*](para 6).

28 *Shibnarayan v. Satyadeo,* AIR1943 Pat 44 47.

29 *Thoudam* *v.* *Moirangtham,* (1977) Crlj 210 (NOC) (Gau) ; *Nathuni v. Mohd.,* (1987) Crlj 1239 (paras 9-10) Pat.

30 *George* *v.* *Narayan,* (1984) Crlj 574 (para 9) Mad.

31 *Bansi* *v.* *Hari,* AIR 1956 All 297 [*LNIND 1955 ALL 240*].

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34 *Surjakanta* , (1903) 30 Cal 509 .

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36 *Gyan* *Debi* , AIR 1949 All 44 .

37 *Sarju* , (1924) 25 Crlj 1066 ; *Tunabi v. Amuba,* (1975) 81 Crlj 172 (Gau) .

38 *Gyan* *Debi* , AIR 1949 All 44 .

39 *Govind* *v.* *State,* AIR 1969 All 405 [*LNIND 1967 ALL 154*](paras 3, 8).

40 *Gopal* *v.* *Vishwanath,* (1977) Crlj 1762 (DB) .

41 *Shreecdhar* *v.* *Kesho,* (1962) 2 Crlj 770 (Pat) DB.

42 *Ramkawal v. Dudhnath,* AIR1969 Pat 317 (para 12).

43 *Seetaram* *v.* *Addada,* (1975) 81 Crlj 116 (Or) .

44 *Seetaram* *v.* *Addada,*
(1975) 81 Crlj 116 (Or) .

45 *Konjengbam* *v.* *Sanakhomba,*
(1986) Crlj 1110 (Gau) .

46 *Jal* *Dhari* *v.* *Rudia,*
(1974) 80 Crlj 1216 (Pat) DB; *Puran v. Labhu,*
(1976) Crlj 71 (HP) .

47 *Madho* *v.* *Ladan,*
(1974) 80 Crlj 1164 (Raj) .

48 *Sukhdeo v. Hari* , (1976) Crlj (para 10) All FB; *Ratan v. Raghubir,* AIR1952 MB 165.

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50 *Bhutani* *v.* *Mani,*
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LNIND 1968 SC 3](para 9) :
(1969) 1 SCR 80 [
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51 *Khudiram* ,
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(1933) 55 All 301 .

52 *Vidyaram* ,
AIR 1953 All 455 [
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53 *Vidyaram* ,
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(1952) 56 CWN 608 (613-16)(DB) ; *Kapoor v. Suraj,*
(1933) 55 All 301 .

54 *Bhutani* *v.* *Mani,*
AIR 1968 SC 1444 [
LNIND 1968 SC 3](para 9) :
(1969) 1 SCR 80 [
LNIND 1968 SC 3] :
1969 Crlj 13 .

55 *Khudiram* ,
(1952) 56 CWN 608 (613-16)(DB) ; *Kapoor v. Suraj,*
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56 *Wazir* , AIR1950 Pat 372.

57 *Mohanlal* *v.* *State of Gujarat,* AIR 1968 SC 733 [*LNIND 1967 SC 376*] : (1968) 2 SCR 685 : 1968 Crlj 876 .

58 *Amarnath* *v.* *State of Haryana,* AIR 1977 SC 2185 [*LNIND 1977 SC 233*] : (1977) 4 SCC 137 : 1977 Crlj 1891 .

59 *Ishri* *v.* *Krishna,* (1977) Crlj 195 (NOC) (Pat) .

60 *Sarjoo* *v.* *Babadin,* (1975) Crlj 1562 .

61 *Sarjoo* *v.* *Babadin,* (1975) Crlj 1562 .

62 *Bansi* *v.* *Hari,* AIR 1956 All 297 303 [*LNIND 1955 ALL 240*].

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68 *Moti Ram v. Laxmi Narayan,* 2008 Crlj NOC 52Jhar .

69 *Baishnab* *v.* *Subol,* (1978) Crlj 1312 (para 7) Or; *Ashok v. Khetra,* (1991) Crlj 1769 (para 10) Gau.

70 *Sarjoo* *v.* *Babadin,* (1975) Crlj 1562 .

71 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (All) FB.

72 *Raju* *v.* *State of Karnataka,* (1977) Crlj 1544 (Knt) .

73 *Sarjoo* *v.* *Babadin,* (1975) Crlj 1562 .

74 *Govind* *v.* *State of U.P.,* (1977) Crlj 2007 (All) .

75 *Sarjoo* *v.* *Babadin,* (1975) Crlj 1562 .

76 *Gajraj* *v.* *Collector,* (1975) Crlj 1026 (All) FB.

77 *Balu* *v.* *Matiur,* (1974) 80 Crlj 1005 (Gau) .

78 *Chandu v. Sitaram,* (1978) UJSC 27.

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82 *Ramaprapannacharya* *v.* *State,* (1974) 80 Crlj 877 (HP) .

83 *Sashidhar* *v.* *Gadadhar,* AIR 1976 SC 232 : (1976) 2 SCC 868; *Bharat v. A.D.J.,* (1984) Crlj 1389 (paras 4-5).

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85 *Lake Hotel* *v.* *State of Rajasthan,* (1987) Crlj 518 (para 8) Raj.

86 *Shanti Kumar Panda v. Shakuntala Devi,* [AIR 2004 SC 115 : LNIND 2003 SC 935 : 2004 SCC (Cri) 320 : LNIND 2003 SC 935 : 2004 Crlj 1249] : (2004) 1 SCC 438 .

87 *Bhinka v. Charan,* [AIR 1959 SC 960 : LNIND 1959 SC 77 : 1959 Crlj 1223] : 1959 Supp (2) SCR 798 .

88 Cf. *Manzoor v. Sukhbasi,* AIR 1974 SC 706 .

89 *Atmaram v. Prabhawatibai,* AIR1971 Bom 148 (para 8).

90 *Atmaram v. Prabhawatibai,* AIR1971 Bom 148 (para 8).

91 *Atmaram v. Prabhawatibai,* AIR1971 Bom 148 (para 8).

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94 *Barkat-un-Nissa v. Abdul,* (1900) 22 All 214 .

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12 *Abbas v. Emp.,* (1911) 39 Cal 150 (FB) .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

D.—Disputes as to Immovable Property

S. 146
Power to attach subject of dispute and to appoint receiver.

(1) If the Magistrate at any time after making the order under sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof :

Provided **that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.**

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the *Code of Civil Procedure, 1908* (5 of 1908) :

Provided **that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate—**

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just.

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1. Changes made by the new Code.—

This section corresponds to *old* s. 146(1), with the following changes:

(i) The provision in the 3rd Proviso to *old* s. 145(4), empowering the Magistrate to make an order of attachment in case of 'emergency' has been combined in the *new* s. 146(1), with the other two contingencies for making such order, *viz.* —(a) inability to find which of the parties was in possession; or (b) finding that none of them was in possession.

(ii) Under the *old* Proviso to s. 145(4), the power to attach was exercisable 'pending his decision under this section', so that even after attachment on the ground of emergency, the Magistrate was to hold his inquiry under sub-section (4), so that under sub-section (4), or even earlier, [13] the other party had the opportunity of showing that the condition of 'emergency' did not exist, whereupon the *ex parte* order under Proviso 3 would be cancelled. There is no such opportunity of cancellation of the order of attachment made under *new* s. 146(1)..After the attachment, the jurisdiction of the Magistrate to proceed under sub-section (4) or any other part of s. 145 ceases, and the aggrieved party's remedy would lie before the Civil Court. [14] There is no provision for hearing when an application of attachment on the ground of emergency is made by a party, but the aggrieved party may move in revision against the *ex parte* order of attachment. [15]

(iii) It was held under the *old* Code that no order under s. 146(1) could be made until there was an inquiry under sub-section (4). [16] The *new* Code has added the ground of 'emergency' in s. 146(1), by lifting the provision in Proviso 3 to *old* s. 145. Hence, under *new* s. 146(1), an order under s. 146(1) can be made, in a case of emergency, at any time after the preliminary order under s. 145(1) and need not wait till an inquiry under s. 145(4). [17]

2. Abolition of reference to Civil Court.—

1. One of the major changes introduced in sub-section (1) of s. 146 is the abolition of reference to the Civil Court, in case of inability of the Magistrate to decide the factum of possession,—which procedure was introduced by the Amendment Act of 1955. As recommended by the Commission, [18] the *new* section reverts to the pre-1955 position because of the theoretical and practical difficulties raised by the procedure of reference to a Civil Court by the Criminal Court.

2. Instead of making such reference, the *new* sub-section empowers the Magistrate to make an order of attachment of the disputed property which is to subsist until a competent Civil Court has determined the *rights* of the parties, [19] , [20] —in any of the following contingencies, arising at any time after making the order under s. 145(1) :

(a) If the Magistrate considers the case to be one of emergency;

(b) If he comes to decides that none of the contending parties was in possession, within the meaning of sub-section (4) of s. 145.

(c) If [after inquiry under s. 145(4)] he is unable to satisfy himself as to which of the parties was in such possession.

3. Sections 144(1) and 146(1).—

1. A prohibitory order under s. 144(1) restraining a party from going upon the disputed property or from interfering with the possession of the other party, does not operate as an attachment of the property nor put it into the custody of the Court. Hence, if, notwithstanding the issue of such prohibitory order under s. 144(1), the party who is so prohibited dishonestly takes away the crops, he may be convicted of theft, under s. 379, I.P.C. [21]

2. When the property is attached under s. 146(1), the party in possession is deprived of his possession and the property is brought under the custody of the Court. Hence, the remedy for a removal of the crops of the attached property is not prosecution for theft, but a complaint under s. 188, I.P.C. [22]

4. Sub-section (1) : Conditions for an order of attachment.—

An order of attachment under this sub-section can be made only on the following conditions :

(a) That there is an order under s. 145(1). An attachment made in the absence of a valid [23] preliminary order under sub-sec. (1) would be invalid. [24]

(b) The Magistrate—

(i) comes to the decision that none of the parties was then in possession of the property; or

(ii) is unable to come to any decision as to which of the parties was then in possession; or

(iii) considers the case to be one of emergency. [25]

While the first two contingencies, as aforesaid, can arise only after completion of the inquiry under s. 145(4), an order of attachment on the ground of emergency can be made at any time after the making of a preliminary order under s. 145(1). [26]

(iv) So the Magistrate cannot summarily pass order under s. 146(1) *Cr.P.C.* without recording a preliminary order under s. 145(1) *Cr.P.C.* [27]

5. 'At any time after.... s. 145'.—

The *new* sub-section (1) makes it clear that the order of attachment, on the ground of emergency, can be made at any time after the passing of the preliminary order under s. 145(1). There is nothing in the section to warrant the view that the two orders must be written out separately [28] , [29] provided, of course, he has applied his mind [30] separately to the two questions and recorded his satisfaction on each of them, *viz.* , (a) apprehension of breach of the peace, required for the order under s. 145(1); and (b) emergency, required for the order of attachment under s. 146(1), the making of a combined [31] , [32] order under the two provisions will amount, at most, to an 'irregularity', curable under s. 465,*post* .

2. But a composite order would be bad if the procedure laid down in s. 145(1) has not been complied with. [33]

1. Only on the ground of emergency attachment under s. 146(1) *Cr.P.C.* could be made by the Magistrate. There must be subjective satisfaction of the Magistrate about the existence of emergency necessitating the attachment. The reasons for such satisfaction must also be recorded by the Magistrate.[34]

2. However, the order of attachment on the ground of emergency may be justified even if the order does not disclose the reasons, if from the records of the Magistrate it can be clear that he was justified about the existence of emergency to pass an order of attachment under s. 146(1) of the Code. [35]

3. The order of attachment on the ground of emergency, being an interlocutory measure, non-mention of emergency in the order of attachment cannot be interfered with in revision because no revision lies against the order of attachment, the order being interlocutory one. [36]

4. Powers under s *s. 145* and *146* *Cr.P.C.* are to be used only in emergent situation. The word 'emergency' means that the apprehensions of breach of peace is imminent and to fortify by preventive measure, attachment is necessary. But when the petitioner wanted to take possession of the disputed plot by dispossessing the actual occupant of longstanding possession, preliminary order under *s. 145(1) C.P.C.* and the order of an attachment under s. 146(1) *Cr.P.C.* on the ground of emergency is illegal and the Magistrate has act ed clearly without jurisdiction, or with gross irregularity or in capricious manner or on wrong principles. In such a case, the inherent power may be invoked to interfere and correct the mistake.[37]

5. When the High Court is satisfied that the attachment order under s. 146(1) *Cr.P.C.* of the Code on the ground of emergency is a abuse of process of the Court when there was no dispute as the possession of the land and it was a boundary dispute and there was no emergency so far as the possession of the land was concerned, the order of Magistrate being without jurisdiction and abuse in process of the Court, the High Court is competent to set aside that order by invoking the inherent jurisdiction even if the order being interlocutory order and no revision lies.[38]

6. When in respect of the School and Ashram existing on the disputed land it was in possession of the petitioner, but the Magistrate passed the order of attachment of the property and appointment of Receiver and the same was set aside by an interim order of the High Court and the possession was restored to the petitioner, though the proceedings under *s. 145 Cr.P.C.* were allowed to continue, the Magistrate passed a fresh order attaching the property and appointed a Receiver. The High Court has held that no circumstances were there showing the existence of an emergency and consequently the order of attachment is held to be illegal.[39]

7. An order of attachment passed by the Magistrate when the interim injunction order passed by the Civil Court is in force, is illegal and improper because there can be no question of emergency with respect to possession of the property when an interim injunction order is in force. [40]

8. Drawing of a proceeding under *s. 145 Cr.P.C.* is pre-requisite and *sine-a-qua-non* for invoking *s. 146 Cr.P.C.* for attachment of the disputed property.[41]

6. 'Unable to decide'.—

1. The inability of the Magistrate to determine which of the parties was in possession must arise only after the inquiry is complete, the parties have offered their evidence and the Magistrate has considered them. [42] , [43]
2. If follows that an order of attachment made without such inquiry or without applying his mind to the evidence before him [44] would be without jurisdiction, [45] , [46] except in a case of emergency, as introduced by the *new* sub-section.

A. The inability of the Magistrate may arise in any of the following ways, for instance—

(i) Both parties fail to file their written statements or to adduce evidence, [47] even after proper time is allowed for the purpose. [48]

(ii) The land being a jungle or waste land, it is difficult to have definite evidence as to possession. [49]

B. On the other hand, an attachment of the property being a desperate remedy in the nature of confiscation of the rights of both parties, [50] the Magistrate should be extremely reluctant to make such order, in the absence of 'emergency', unless and until he has made a genuine attempt to come to a judicial decision on the evidence on the record. [51] Hence,—

Where the land is cultivated from year to year, it would normally be possible for the Magistrate to ascertain which party was in possession, either on the evidence on the record or on

admission of further evidence. [52] In such a case, to express his inability to come to a decision merely because the evidence is conflicting, would be to betray his own weakness. [53] If he finds that the first party's evidence, though weak, is preferable to that of the 2nd party, it would be his duty to find in favour of the first party, instead of expressing his inability. [54] , [55]

3. The inability of the Magistrate to arrive at a definite conclusion regarding possession must be recorded. [56] He is not expected to make a detailed order commenting on all the evidence produced before him. [57] But his order should contain sufficient material to indicate to the Revisional Court that the Magistrate had applied his judicial mind and had made a genuine attempt to come to a decision. [58]

4. The inability of the Magistrate to determine which partly is in possession must arise only after the enquiry is complete and the parties have offered their evidence and the Magistrate have considered them and passed order of attachment. [59]

5. It, therefore, follows that the order of attachment made without such enquiry or without applying his mind to the evidence before him by the Magistrate would be without jurisdiction. [60]

6. When after issuing notice under s. 146(1) *Cr.P.C.* , the order of attachment was passed by the Magistrate on the ground that he was unable to satisfy as to which of the party was in possession on the relevant date, the order is final and not interlocutory in nature and revision lies against such order. When, in the instant case, order was passed before the date fixed for filing the written statement of claim and adducing evidence the order is illegal and without jurisdiction and liable to be set aside in revision.[61]

7. The composite preliminary order and attachment.—

1. A composite preliminary order under *s. 145 Cr.P.C.* and the order of attachment under *s. 146 Cr.P.C.* on the ground of emergency is illegal.[62]

2. According to the some High Courts, such composite order is a curable irregularity when the preliminary order under s. 145(1) and the order of an attachment under s. 146(1) on the ground of emergency is not separately recorded. [63]

8. 'Then in such possession'.—

It is evident from sub-section (4) of s. 145 that the material date for determining possession for purposes of that section is the date of the preliminary order under sub-section (1) or such earlier date as is mentioned in the Proviso to sub-section (4). [64] The word 'then' in s. 146(1), accordingly, refers to that material date. [65]

9. Whether movable property can be attached.—

1. Since under s. 146(1), only the "subject of dispute" in the proceeding under s. 145 (land or water) can be attached, it is evident that under s. 146, the Magistrate has no jurisdiction to attach movable property as such. [66]

2. But the question becomes more difficult when an immovable property contains movables, *e.g.* , a house or a land with standing crops, and it is not possible to attach the immovable property after removing the movable property. In such cases, it has been held that the effect of attachment of the immovable property extends to the movable property included in it so that during the subsistence of the attachment, neither party can go to the attached immovable property and remove the movables. [67]

10. When the attachment becomes effective.—

An order of attachment becomes effective either by taking actual possession or by making an explicit order prohibiting the parties from going upon the land which is to be served upon them or by delivery of possession to a receiver appointed by the Court under sub-section (2). [68] Until then, the property does not become *custodia legis* . [69]

11. 'Until a competent Court has determined'.—

1. As has been already pointed out, instead of the Magistrate himself making a reference to the Civil Court [*old* s. 146(1)], the *new* sub-section makes the order of attachment effective until it is superseded by the decree of a Civil Court which is competent to determine the 'rights of the parties'.

2. Though the word 'civil' has not been used to qualify the expression 'competent Court' in the *new* sub-section, it would refer to such Court, which according to the laws of the State, has the power to determine the rights of the parties to the disputed property, with a finality attached to it. [70]

3. Under *old* s. 146(1), it was held [71] that 'competency' of the Civil Court referred to its territorial jurisdiction only, because the summary nature of the decision on reference would lose its meaning if the Civil Court to which the reference was made were to embark upon an inquiry as to valuation for its pecuniary jurisdiction.

   But the foregoing view would not seem to be sound under the *new* sub-section, because there is no longer any question of a summary reference to guide the Criminal Court, but the decree of a Civil Court which can finally decide the right to possession of the disputed property, until the passing of which the order of the Magistrate shall remain in force. It is obvious that the plaintiff who brings such suit (for title or possession) must choose the proper forum which has not only territorial but also pecuniary jurisdiction to pass a decree to give the relief asked for in respect of the disputed immovable property.

4. The 'suit' referred to in s. 146(1) may be a suit for declaration of title or a mere possessory title. [72]

5. Once an order of attachment under s. 146(1) has been made, the jurisdiction of the Magistrate to proceed further under s. 145 ceases in view of the words 'until ... there'. [73] Hence, unless this order is set aside by revision or other appropriate proceeding, the Magistrate cannot ask the parties to proceed further with the proceedings under s. 145, ignoring the provision in s. 146(1),[74] even where the attachment under s. 146(1) has been made, on the ground of emergency, before the stage under s. 145(4) has arrived. [75]

6. The attachment will, however, continue, so long as it is not revoked under the Proviso to s. 146(1), when the Magistrate is satisfied that the likelihood of breach of the peace no longer exists; [76] or the competent Civil Court determines the rights of the parties. [77] The Proviso to s. 146(1) expressly makes an exception to the general proposition that after an order of attachment is made, the Magistrate shall not proceed further with the proceeding under s. 145(1). Since the Proviso itself does not say how the

Magistrate is to come to his conclusion that "there is no longer any likelihood of breach of the peace with regard to the subject of dispute", it is arguable that the procedure under sub-section (5) of s. 145 may be one of the alternative sources for the Magistrate's finding in this behalf. Hence, even after the attachment order is made, either party may show that no such dispute exists any longer. Of course, the text of sub-section (5) uses the word 'cancel' and such cancellation is a cancellation of the conditional order under s. 145(1); what the Proviso to s. 146(1) authorises is not cancellation of the order under s. 145(1), but 'withdrawal' of the 'attachment' made under s. 146(1). This leads to the conclusion that the inquiry, if any, under the Proviso to s. 146(1) shall not be an inquiry in terms of any part of s. 145, but something specifically directed to s. 146(1), and that the Magistrate may apply the Proviso to s. 146(1) even though none of the parties moves under s. 145(5).

7. After the competent Court gives its decision on the rights of the parties, it would be for the Magistrate, before whom the proceeding under s. 145 has been pending, to give effect to the decision of the Court, *e.g.* , to cancel the order of attachment, to discharge the Receiver, and to direct the latter to hand over possession of the land with the sale-proceeds of crops *etc.* , if any, to the party in whose favour the Civil Court has decided. [78] The proceedings under s. 145 should also be dropped. [79]

8. Pending the judgment, if the Civil Court itself makes appointment of a Receiver, the Magistrate must discharge the Receiver appointed by himself and make incidental orders as directed by the Proviso to s. 146(2). [80]

12. "Court of competent jurisdiction".—

This Court need not necessarily be a Civil Court. [81] This has been made clear in *new* s. 146(1) by omitting the word 'Civil'. It only means a Court of other authority which has the final jurisdiction to decide the question of *possession* . It has thus been held to include—

(a) a survey authority; [82] and

(b) a Revenue Court in mutation proceedings; [83]

(c) a suit under s. 180, U.P. Tendency Act . [84]

13. Proviso : Withdrawal of attachment.—

1. Even before the Civil Court comes to any decision, the Magistrate would be competent to withdraw the attachment made under s. 146(1), if at any time he comes to hold that there is no longer any likelihood of breach of the peace with regard to the subject of dispute. [85] In such a case, the proceeding under s. 145 itself shall have to be dropped, and no question of the Magistrate's deciding the question of possession would any longer arise. [86]

2. It would be reasonable to conclude that though there is no such explicit provision for withdrawing or modifying the preliminary order made under s. 145(1) itself, such order being a tentative order, can be cancelled or modified by the Magistrate at any stage prior to his inquiry under sub-section (4) if the Magistrate is satisfied that there is no longer any likelihood of breach of the peace regarding the subject-matter in dispute or any part thereof. [87] Sub-section (5) empowers the Magistrate to cancel the order under sub-section (1) if any person interested shows that no such dispute as referred to in sub-section (1) *ever* existed. There is nothing to prevent the Magistrate to drop the proceedings if he is subsequently satisfied that though there existed such dispute at the time he made the order under sub-

section (1), it has subsequently ceased to exist, [88] or that there is no longer any likelihood of breach of the peace. Such satisfaction may be based on information received from any source. [89]

3. On the other hand, the Magistrate would not be entitled to drop the proceedings arbitrarily, and a superior Court may interfere in revision if there is nothing on the record to show that the Magistrate had received any information from any source or that he had acted thereupon. [90]

4. There has been some controversy as to whether the Magistrate would be competent to make any further incidental orders after he has dropped the proceedings as aforesaid. There is no doubt that the dropping of proceedings or cancellation of the order under sub-section (1) of s. 145 would not amount to a 'completion' of the inquiry within the purview of sub-section (8) of s. 145 which provides for the disposal of the produce of the property or the sale-proceeds thereof. Nevertheless, it has been held in a number of cases that even in a case of dropping of proceedings, the Magistrate may make such orders under s. 452(1) [*old* s. 517], so as to restore the parties in the same position as they enjoyed prior to the making of an order under sub-section (1) or an order of attachment made in pursuance thereof. [91] Of course, after dropping the proceedings, he cannot enter into a fresh inquiry as to who was in possession of the property or the crops thereon when it was attached. [92] He can proceed to make consequential orders where there is already on the record evidence as to who was in possession of the land or the crops *etc.* at the time when the order under s. 145(1) or the attachment was made. [93]

14. Attachment order, when comes to an end.—

An attachment order under *s. 146,Cr.P.C.* , comes to an end as soon as the Civil Court passes even an interim order or appoints a receiver in a civil suit filed before it and, accordingly, the Magistrate must withdraw the attachment order in view of seizure of the matter by the High Court. Final decision by the Civil Court is not essential for cessation of the attachment order by the Magistrate and its consequent withdrawal.[94]

15. Effects of attachment under Sections 145- 146.—

1. The effect of attachment is to put the property in the custody and possession of the Court. [95]

2. Hence, if a party to the proceeding, being aware of the attachment, removes the crops, he would be guilty of the offences under Sections 188, 379 of the I.P.C. [96]

16. Sub-section (2) : Power to appoint Receiver.—

(A) Under the *old* Code, the power to appoint a Receiver on attachment was conferred by s. 146(2); but that provision was applicable only when the final order was made.

The 'emergency' power to attach was conferred by Proviso 3 to *old* s. 145(4), which could be exercised after the preliminary order, and inquiry into possession under sub-section (4). But no power to appoint a Receiver of the attached property was conferred by Proviso 3 to s. 145(4). In the absence of such express provision, a controversy arose as to whether the Magistrate had an implied power to appoint Receiver in respect of the property attached under s. 145(4), and contrary views were expressed by different High Courts and even by different Benches of the same High Court. [97]

(B) Under *new* s. 146, a Receiver may be appointed by the Magistrate whenever an order of attachment has been made by him under s. 146(1); in other words, in a case of emergency, an order of attachment and appointment of a Receiver may be made at any time after a preliminary order under s. 145(1) has been made and before holding an inquiry under s. 145(4). The only limitation is that the Magistrate cannot appoint a Receiver if a Civil Court has already appointed a Receiver in respect of the disputed property.

17. Scope of sub-section (2).—

1. This sub-section empowers the Magistrate to appoint a Receiver of the attached property if no Receiver has been appointed by a Civil Court. The Receiver so appointed shall be under the control of the Magistrate but the Magistrate is not empowered to make any orders relating to *third parties* , outside the purview of s. 145 itself. Thus, an order of the Magistrate for the recovery of damages for alleged waste committed by a lessee holding under the Receiver, is without jurisdiction. [98]

2. The object of appointment of Receiver is to see that the property is not wasted or lost to the detriment of persons eventually entitled to its possession. [99]

18. Effects of appointment of receiver.—

1. A receiver or custodian of the property, appointed by the Magistrate under s. 146(2) is a representative of the Criminal Court and is bound to render accounts of the property and of its sale proceeds, if any, to that Court and also to deliver them to such party as may be directed by the Court. [1]
2. If the Receiver or custodian fails to deliver the property or its sale proceeds or to render proper accounts, the Magistrate may—

   (i) Make a criminal complaint against such custodian for having committed criminal breach of trust; [2] or

   (ii) Hand over the case to the Police for investigation. [3]

3. There has been a difference of opinion as to what remedy the aggrieved party would have if the receiver or custodian defalcates or dissipates the property in his custody.

   A. The earlier view was that the *Cr.P.C.* does not empower the Magistrate to take any steps for recovery of money from the custodian, if he refuses to deliver it in breach of trust.[4] The aggrieved party may, in such a case, obtain relief only from the Civil Court which alone may determine the liability of the custodian. [5]

      According to this view, the only provision in the *Cr.P.C.* for recovery of money is in s. 431 [*old* s. 547], *post* . But that provision would be applicable only if the ‘money is payable by virtue of any order made under this Code’, *e.g.* , if the Magistrate had ordered the custodian to convert the crops and to pay the sale

proceeds as directed by such order. [6]

B.

1. Disagreeing with the foregoing view, a Division Bench of the Allahabad High Court [7] has held that—

   (a) It is implicit in Sections 145(8), 146(2) and 452(1) that where the custodian appointed by the Court converts the property and fails to deposit the money in Court, the money may be recovered from him as a fine, in view of *Sections 421*, *431* of the *Cr. P.C.*

   (b) It is needless to invoke the provisions of the *Civil Procedure Code* because of the wider principle laid down by the Supreme Court[8] that 'no one shall be prejudiced by the act of the Court'. When the Court appoints a receiver or custodian, the property remains in custody of the Court. Hence, if the property is lost owing to the default of that custodian, the Court should exercise inherent power to make good that loss. [9]

2. Even according to the orthodox view, [10] where the Criminal Court had, in its order, specified a definite sum to be deposited by the custodian, as the estimated value of the crops in his custody, there is no reason why the Criminal Court could not use its power under s. 431 [*old* s. 547] to recover the sum so ordered, as if it were a fine, and issue a warrant against the custodian for its recovery. [11]

19. Revision.—

1. An order of attachment under s. 146(1) is not an interlocutory order, since it terminates the proceeding under s. 145, subject to the decision of the competent Civil Court. Hence, revision lies against an order of attachment under s. 146(1) or appointment of Receiver under s. 146(2). [12]
2. The Revisional Court would quash an illegal order of attachment, where, for example—

   (i) The Magistrate has made an order of attachment under s. 146(1), without recording the reasons, *e.g.* , emergency, inability to come to a finding as to possession [13] or giving the materials which would show that he applied his mind to the evidence on the record before coming to a finding as to his inability to decide the factum of possession. [14]

   (ii) Where, after making an order of attachment under s. 146(1), on the ground of emergency, the Magistrate directs that the proceeding under s. 145 'shall continue'. [15]

   (iii) Where he makes an order of attachment under s. 146(1), without making a preliminary order under s. 145(1). [16]

3. On the other hand, the Revisional Court should not lightly interfere with an order appointing a Receiver for the management of the property attached, [17] because it has made the property *custodia legis* . [18]

20. Inherent power of High Court under s. 482.—

1. Since the inherent power under s. 482 extends to 'any order,' it is open to the High Court to interfere with an order under s. 146, (a) to prevent abuse of the process of Court; or (b) to secure the ends of justice. [19]

2. The power under s. 482 is not barred by anything in s. 397 or 399 of the Code. [20]

3. An order of attachment is a final and not interlocutory order for purposes of revision. [21]

4. But the High Court would not readily exercise this extraordinary jurisdiction, considering that an order of attachment under s. 146(1) is in the nature of an interim order and it should be left to the Magistrate to determine whether there is an apprehension of breach of the peace and an emergency, warranting attachment, [22] particularly when a suit has already been pending before the Civil Court.

5. Where the Magistrate on being satisfied that there does not exist a dispute likely to cause breach of peace withdraws the attachment, the High Court under *s. 482 Cr.P.C.* would not interfere with such an order.[23]

21. Suit.—

1. When a property has been attached by an order under s. 146, a suit lies, under *Sections 34 of the Specific Relief Act* , for a declaration of the title thereto of the person affected with consequential relief.[24]

2. When a Receiver has been appointed under s. 146(2) in respect of such attached property, and the property is taken in *custodia legis* , a declaratory suit as aforesaid cannot be thrown out on the ground that no consequential relief by way of recovery of possession has been prayed for. [25]

3. But no suit for damages would lie against the 1st Party or complainant for wrongful attachment. [26]

22. Application under Art. 227 of the Constitution.—

An order, purported to be made under s. 145 or 146 may be set aside under Art. 227 where it is without jurisdiction, *e.g.* , where the Magistrate after making an order of attachment under s. 146(1), inquires into possession and makes an order under s. 145(6). [27]

13 *Gulla* *v.* *Amin,*
(1975) Crlj 620 (J&K) DB.

14 *Syed Ahmad* *v.* *Rais,*
(1977) Crlj 450 (All) ; *Dandapani v. Madan,*
(1976) Crlj 2014 (Or) DB. *See* other cases under 'until a competent Court....', *post* .

15 *Syed Ahmad* *v.* *Rais,*
(1977) Crlj 450 (All) ; *Dandapani v. Madan,*
(1976) Crlj 2014 (Or) DB. *See* other cases under 'until a competent Court....', *post* .

16 *Radharaman* *v.* *Emp.,*
AIR 1936 All 177 .

17 *Mathura* *v.* *Bhanwar,*
AIR 1980 SC 242 [
LNIND 1979 SC 371]: (1979) 4 SCC 665 :
1980 Crlj 1 .

18 41st Rep., Vol I, para 12.9.

19 *Mathura* *v.* *Bhanwar,*
AIR 1980 SC 242 [
LNIND 1979 SC 371]: (1979) 4 SCC 665 :
1980 Crlj 1 .

20 Cf. *Shaukat* *v.* *Sadaqat,*
(1977) Crlj 460 (All) .

21 *Bhagwan* *v.* *S.D.M.,*
(1976) Crlj 1775 (para 4-6) Pat; *Dhirendra v. Nurul,*
AIR 1951 Cal 133 [
LNIND 1951 CAL 148].

22 41st Rep., Vol I, para 12.9.

23 *Laxman* *v.* *Bahimkhan,*
(1976) Crlj 1492 (para 11) Bom; *Manika v. Dandapani,*
(1986) Crlj 287 (Or) ; *Indina v. Vasantha,*
(1991) Crlj 1798 (para 10) Mad.

24 *Laxman* *v.* *Bahimkhan,*
(1976) Crlj 1492 (para 11) Bom; *Manika v. Dandapani,*
(1986) Crlj 287 (Or) ; *Indina v. Vasantha,*
(1991) Crlj 1798 (para 10) Mad.

25 *Ishri* *v.* *Krishna,*
(1977) Crlj 195 (NOC) (Pat) ; *Ram Swarup v. State of Bihar,*
2008 (3) Pat LJ 604 (Pat); *Ramesh v. VIITH A.S.J.,*
1998 Crlj 3794 All .

26 *Mathura v. Bhanwar,* AIR 1980 SC 242 [*LNIND 1979 SC 371*]: (1979) 4 SCC 665 : 1980 Crlj 1 .

27 *Madhusundananda Pari v. Assistant Commissioner,* 2008 Crlj (NOC) 320.

28 *Syed Ahmad v. Rais,* (1977) Crlj 450 (All) ; *Dandapani v. Madan,* (1976) Crlj 2014 (Or) DB. *See* other cases under 'until a competent Court....', *post* .

29 *Brajamohan v. Kesi,* (1984) Crlj 1112 (para 5) Or. [Contrary view in *Kotharathel v. State of Kerala,* (1982) Crlj 468 (Ker) does not appear to be sound].

30 *Laxman v. Bahimkhan,* (1976) Crlj 1492 (para 11) Bom; *Manika v. Dandapani,* (1986) Crlj 287 (Or) ; *Indina v. Vasantha,* (1991) Crlj 1798 (para 10) Mad.

31 *Syed Ahmad v. Rais,* (1977) Crlj 450 (All) ; *Dandapani v. Madan,* (1976) Crlj 2014 (Or) DB . *See* other cases under 'until a competent Court....', *post* .

32 *Theophil v. Chuyan,* (1977) Crlj 192 (NOC) (Or) .

33 *Laxman v. Bahimkhan,* (1976) Crlj 1492 (para 11) Bom; *Manika v. Dandapani,* (1986) Crlj 287 (Or) ; *Indina v. Vasantha,* (1991) Crlj 1798 (para 10) Mad.

34 *Susma Rani v. Ashutosh,* 1990 Crlj NOC 157Gau ; *Gandhari Lal v. State of Punjab,* 1980 Crlj 1150 (P & H).

35 *Mahendra Tiwari v. Lalpuri Debi,* 1987 Crlj 17 Pat .

36 *Murlidhar Das v. Dhruba Charan Das,* 1989 Crlj NOC 163Ori : 1998 Ori LR 465 .

37 *Ramesh Chandra Saxena v. Vth Additional Sessions Judge,* 1998 Crlj 3794 All .

38 *Poonam Chand v. State of Rajasthan,* 1998 Crlj 3407 Raj .

39 *Ramjee Singh v. State of Jharkhand,* 2007 Crlj 3079 Jhar .

40 *Radha v. Premi,* 1985 Crlj 1894 .

41 *Ismail Sheikh v. Bani Hussain,* 2008 Crlj (NOC) 227 (Gau).

42 *Anand v. State,* (1986) Crlj 2008 (para 6).

43 *Gurunath v. State,* AIR1954 Mad 325; *Sheo Balak v. Bhagwan,* (1913) 40 Cal 105 .

44 *Ramjilal v. Jawahar,* (1974) 80 Crlj 726 (Raj) .

45 *Anand v. State,* (1986) Crlj 2008 (para 6).

46 *Bani v. D.M.,* (1986) ALJ 1236 (DB) .

47 *Bejoy v. Chandrakant,* (1910) 14 CWN 80 ; *Keramat v. Abdul,* AIR1956 Assam 119.

48 *Bengali Parida v. Banchanidhi,* AIR1930 Pat 29.

49 *Ramjilal v. Jawahar,* (1974) 80 Crlj 726 (Raj) .

50 *Ram v. Rang Bahadur,* AIR1924 Pat 804.

51 *Ramjilal v. Jawahar,* (1974) 80 Crlj 726 (Raj) .

52 *Parmeshwar v. Sheo Moorat,* AIR 1952 All 918 [*LNIND 1952 ALL 33*].

53 *Parmeshwar v. Sheo Moorat,* AIR 1952 All 918 [*LNIND 1952 ALL 33*].

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58 *Daya Ram v. State of U.P.,* (1975) Crlj 885 (888-89)FB .

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66 Cf. *Nursing v. Suraj,* AIR 1951 All 826 [*LNIND 1951 ALL 121*].

67 Cf. *Nursing v. Suraj,* AIR 1951 All 826 [*LNIND 1951 ALL 121*]; *Bharat v. Ram,* AIR1916 Pat 42.

68 *Kailash v. Mahabir,* AIR1473 Pat 444 (para 5).

69 *Kailash v. Mahabir,* AIR1473 Pat 444 (para 5).

70 *Sagarmal v. Dilipsingh,* (1971) MPLJ 797 (800).

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72 Cf. *Dhyan Singh v. Chandradip Singh,* (1969) 1 UJSC 43 (para 5).

73 *Syed Ahmed v. Rais,* (1977) Crlj 450 (All) ; *Hakim v. Girwar,* (1976) Crlj 1915 (Del) .

74 *Syed Ahmed v. Rais,* (1977) Crlj 450 (All) ; *Hakim v. Girwar,* (1976) Crlj 1915 (Del) ; Contrary views taken in *Ram v. Shyama,* (1977) Crlj 453 (para 3) All and *D'Souza v. State of Maharashtra,* (1977) Crlj 2032 (Bom) DB, and *Kshetra v. Paran,* (1978) Crlj 936 (Gau) does not appear to be sound, because all the three contingencies in *new* Section 146(1) are governed by the concluding words 'until a competent Court... thereof; and, after property is attached and taken into custody of the Court through a Receiver [Section 146(2)], there can no longer be any apprehension of a breach of the peace. The change is *deliberate* because the case of 'emergency' has been transferred from *old* 3rd Proviso to Section 145(4) to *new* Section 146(1). [If the Legislature intends otherwise, Sections 145- 146 shall have to be amended]. The author, for the same reasons suggests that the contrary view taken by the Supreme Court in *Chandu Naik v. Sitaram B. Naik,* AIR 1978 SC 333 [*LNIND 1977 SC 335*](para 7) : (1978) 1 SCC 210 [*LNIND 1977 SC 335*] : 1978 Crlj 356 , without examining the text of *new* Section 146(1) and its Proviso, *requires a re-examination by the Court* .

75 *Dandapani v. Madan,* (1976) Crlj 2014 (Or) DB ; *Damodar v. Harihar,* (1977) Crlj 1392 (para 4) Or; *Hari v. Ram,* (1977) Crlj 254 (NOC) (Pat) .

76 Contrary views taken in *Ram v. Shyama,* (1977) Crlj 453 (para 3) All and *D'Souza v. State of Maharashtra,* (1977) Crlj 2032 (Bom) DB, and *Kshetra v. Paran,* (1978) Crlj 936 (Gau) does not appear to be sound, because all the three contingencies in *new* Section 146(1) are governed by the concluding words 'until a competent Court... thereof; and, after property is attached and taken into custody of the Court through a Receiver [Section 146(2)], there can no longer be any apprehension of a breach of the peace. The change is *deliberate* because the case of 'emergency' has been transferred from *old* 3rd Proviso to Section 145(4) to *new* Section 146(1). [If the Legislature intends otherwise, Sections 145- 146 shall have to be amended]. The author, for the same reasons suggests that the contrary view taken by the Supreme Court in *Chandu Naik v. Sitaram B. Naik,* AIR 1978 SC 333 [*LNIND 1977 SC 335*](para 7) : (1978) 1 SCC 210 [*LNIND 1977 SC 335*] : 1978 Crlj 356 , without examining the text of *new* Section 146(1) and its Proviso, *requires a re-examination by the Court* .

77 *Mansukh v. State,* (1977) Crlj 563 (para 6) Raj.

78 *Domodar* *v.* *Harihar,*
(1977) Crlj 1392 (Or) .

79 Cf. *Jala* *v.* *State* *of* *J&K,*
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80 Cf. *Jala* *v.* *State* *of* *J&K,*
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81 *Sheonath* *v.* *City* *Magistrate,*
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82 *Amblar* *v.* *Sami,*
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86 *Maslehuddin* *v.* *Salahuddin,*
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93 *Murru* *v.* *State,*
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95 *Deo* *Kuer* *v.* *Sheo* *Prasad,*
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96 *Bhagirathi* *v.* *Damodar,*
(1987) Crlj 631 (paras 7, 9, 11) Or.

97 *Deo* *Kuer* *v.* *Sheo* *Prasad,*
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98 *State* *v.* *Sivasankaran,*
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99 *Laxman* *v.* *Bahimkhan,*
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1 *Lakshmi* *v.* *Jhaboo,*
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9 *Basava* *v.* *State of Mysore,*
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10 *Kater* *v.* *Jahan,*
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11 *Kater* *v.* *Jahan,*
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12 *Dandapani* *v.* *Madan,*
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13 *Ram Naresh* *v.* *Emp.,*
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20 *Malamsingh v. State of Rajasthan,* (1977) Crlj 730 (Raj) .

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22 *Syed Ahmad v. Rais,* (1977) Crlj 450 (paras 8-9) All.

23 *Nathulal v. State of U.P.,* 2009 Crlj (NOC) 119 (All).

24 *Govindaswami v. Ramanathan,* AIR1926 Mad 164; *Bipat v. Kulpat,* (1933) 13 Pat 182.

25 *Administrator-General v. Bhagwan,* (1909) 15 CWN 758 ; *Habib v. Badi-ul-Zaman,* 141 IC 443.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

D.—Disputes as to Immovable Property

S. 147
Dispute concerning right of use of land or water.

(1) Whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statements of their respective claims.

Explanation. **—The expression "land or water" has the meaning given to it in sub-section (2) of Section 145.**

(2) The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible, decide whether such right exists; and the provisions of Section 145 shall, so far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such rights exist, he may make an order prohibiting any interference with the exercise of such right, including, in a proper case, an order for the removal of any obstruction in the exercise of any such right :

Provided **that no such order shall**

be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

(4) When in any proceedings commenced under sub-section (1) of Section 145 the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1);

and when in any proceedings commenced under sub-section (1) the Magistrate finds that the dispute should be dealt with under Section 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1) of Section 145.

STATE AMENDMENT

Maharashtra. — *The following amendments were made by Maharashtra Act 1 of 1978, S. 3 (w.e.f. 15-4-1978).*

S. 147. —In its application to the State of Maharashtra, in S. 147(1), for the words "Whenever an Executive Magistrate" read "Whenever in Greater Bombay a Metropolitan Magistrate and elsewhere in the State, an Executive Magistrate."

Saving of proceedings pending before Executive Magistrate in Greater Bombay under Sections 145 to 147 of Act 2 of 1974. —If any proceedings under Sections 145, 146 or 147 of the said Code are pending before any Executive Magistrate in Greater Bombay on the day immediately preceding the date of commencement of this Act, they shall be continued, heard and disposed of by that Magistrate, as if this Act had not been passed.

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1. Sections 107 and 147.—

1. The topic has been discussed at p. 476, *ante* .

2. In a case of dispute relating to user of land or water, the appropriate proceeding would be under s. 147; but a proceeding under s. 107 would not be without jurisdiction. [28]

3. But if, in such a case, the Magistrate proceeds under s. 107, he should obtain security from both the parties, [29] expect where the claim of one of the parties is a mere pretence. [30] Where the Magistrate proceeds against one of the parties only, whose claim is not a mere pretence, the Revisional Court would quash that order, with liberty to the Magistrate to draw up fresh proceedings under s. 107 or 147, against *both* parties, if the apprehension of breach of the peace still continues. [31]

4. Mere pendency of a proceeding under s. 107 would be no bar against resorting to s. 147. [32]

2. Sections 133 and 147.—

1. Section 133 is of a remedial nature while s. 147 is preventive; under s. 133 a proceeding can be initiated only when there is a question of removal of obstruction already there on a public place whereas a proceeding under s. 147 can be drawn up where there is no act ual obstruction as yet but there is an apprehension of interference with the right of *user* of any land or water. [33]

2. But there is no bar to the conversion of a proceeding under s. 133 into one under s. 147 when, after hearing the parties, the Court finds that it related to a dispute as to user of a public way, *etc.* [34]

3. Sections 145 and 147.—

1. Section 145 applies where the apprehension of breach of the peace arises out of a dispute relating to *possession* of immovable property, while s. 147 applies if such dispute relates to *user* of immovable property.

2. By reason of *new* sub-section (4) of s. 147, a proceeding under s. 145(1) may be converted into a proceeding under s. 147(1)[35] , [36] and *vice versa* , [37] in accordance with the subject-matter of the dispute as appears during the proceedings.

3. The provisions of s. 145(4) are applicable to an inquiry under s. 147(2) [*see,* further, under s. 147(2),*post*].

4. The procedure under Sections 145 and 147 is almost identical.

4. Right of management of college.—

Where the dispute was concerning the mangement and fund of the college, *s. 145 Cr.P.C.* is not attracted. The Magistrate, if satisfied, may take proceedings under *s. 147 Cr.P.C.* or he can proceed under *s. 107* / *117 Cr.P.C.* [38]

5. Scope of s. 145 Cr.P.C.—

The proceedings under *s. 145 Cr.P.C.* , can be initiated when a dispute exists concerning any land which is likely to cause breach of peace, whereas the proceedings under *s. 147 Cr.P.C.* can be initiated when a dispute exists regarding the user of any land which is likely to cause breach of peace. Though distinction between the two is subtle, it is real. Sometime, the latter may overlap the former and at some other times that may be the cause for the other and is yet at other times, the latter may be the genesis which eventually lead to the other.[39]

6. Distinction between s. 133 and s. 147 Cr.P.C.—

When the dispute between the parties is to the right of user of public pathway in respect of which there is apprehension of the breach of peace, proceeding under s. 147 and not *s. 133 Cr.P.C.* can be drawn up.[40]

7. Sub-section (1) : Conditions precedent for the power.—

The following conditions must be satisfied before the Magistrate can make an order under s. 147(1) :

I. The Magistrate must be satisfied that there is a dispute likely to cause a breach of the peace. [41]

II. Such dispute must relate to an alleged right of user of any land or water within the Magistrate's local jurisdiction.

8. Explanation : 'Land or Water'.—

The interpretation given to these words under s. 145(2),*ante* , will apply under the present section as well.

'*Right of user of land or water* '. The word 'user' connotes user of a legal *right* relating to a land as distinct from the use of the land as owner. [42]

A. The following have been held to be rights of user coming under this expression, under s. 147—

(i) Right to worship in a temple or other public religious place. [43]

(ii) Right of entry into a temple, [44] or to sit at a particular spot [45] of a religious place.

(iii) Right to function in an office attached to a mosque [46] or other religious place.

(iv) Right to bury in a public burial ground. [47]

(v) Right to pass through a highway; [48] or through the land of another. [49]

(vi) Right to graze cattle in any forest or field. [50]

(vi) Right to fish in a reservoir. [51]

B. On the other hand, the following have been held *not* to constitute a right of user to any land or water, within the purview of this section—

A right to worship or to exercise any other religious right, generally, having no inseparable connection with the use of a land or building. [52]

9. Easement of otherwise.—

The expression 'easement or otherwise' makes it clear that in order that the case may be bought within *s. 147 Cr.P.C.* , it is not necessary for the party aggrieved to establish a right of easement nor is the Magistrate called upon to decide any question of title or possession. If there is a dispute likely to cause breach of peace, it would be enough to attract *s. 147 Cr.P.C.* if the first party can prove that he has been using the land or water as a way or irrigation channel etc.[53]

So, it is clear that this section is not restricted to easement but extends to a legal right of user arising from grant, custom prescription or the like. [54]

There is no bar to invoking this section even if a civil suit is pending regarding the same property if there is apprehension of the breach of peace over the user or otherwise. [55]

Under *s. 147 Cr.P.C.* the Magistrate has only to decide as to whether right of user exists in favour of either of the parties claiming the right when the claim is made by easement or otherwise and whether such right has been used within three months next before the receipt of information leading to the institution of enquiry. The Magistrate is not called upon to decide title of either party.[56]

10. Whether a Magistrate is competent to proceed under s. 145 or 147 during the pendency of a suit in the Civil Court.—

1. There is nothing in the Code to bar the jurisdiction of a Magistrate to proceed under s. 145 or s. 147 while a civil suit regarding the same property is pending, [57] if there is apprehension of breach of the peace notwithstanding institution of the civil suit [58] [*see* under s. 145,*ante*].
2. But since the scope and powers of the two Courts are different, in exercising the jurisdiction under s. 145 or s. 147, a Magistrate must bear in mind the following considerations:

   (a) The scope of a civil suit is to decide the right to possession of the property, while that of a proceeding before the Magistrate is to prevent a breach of the peace. [59]

   (b) If, therefore, there is an apprehension of breach of the peace, and there is not even an interim order of the Civil Court, the Magistrate would not be powerless to make an order under s. 145 or 147,[60] , [61] merely because a civil suit is pending, though it may be proper for him in such cases to make an order under s. 107 or s. 144. [62]

   (c) If there is an interim order of the Civil Court, the Criminal Court should ordinarily respect it and should not make any order in derogation thereof. [63] But if subsequent to the order of the Civil Court there has been a change in the situation, and there is an apprehension of breach of the peace, the Magistrate would not be powerless to proceed under s. 145 or s. 147,[64] considering that the breach of peace could not be averted by action under s. 107. [65]

   (d) The jurisdiction of the Magistrate under s. 147 would cease as soon as a competent Civil Court *has adjudicated* upon the validity of the right of user alleged. [66]

11. Sub-section (2) : Inquiry and evidence.—

1. After the order under sub-section (1) is issued, the parties are to put in written statements of their respective claims and also to produce evidence in support of their claims.

2. The Magistrate has then to make an inquiry as to whether the alleged right [sub-section (1) exists or not, including a local inquiry under s. 148, if necessary.

12. 'Consider the effect of such evidence'.—

1. 'Evidence' means the oral or documentary (if any) evidence tendered by the parties and would *not* include—

   (a) Affidavits. [67]

   (b) In a Calcutta case, [68] it was held that the report of the inspecting Magistrate [s. 148] could not be used by the trying Magistrate as evidence in his inquiry, without examining the inspecting Magistrate. But sub-section (2) of s. 148 was not considered.

13. 'Provisions of s. 145 shall, as far as may be, apply...'.—

1. Since the provisions of s. 145 are made applicable to such 'inquiry', it is clear that the inquiry must be on the lines of s. 145(4), and that a final order may not be made under s. 147(3), without taking evidence, as provided for in s. 145(4),[69] read with its Proviso [*see,* further, under s. 147(3),*post* '.

2. Under the *old* Code there was some controversy whether an order of attachment could be passed in a proceeding under s. 147. The consensus of opinion is in the *negative* . [70] The lone Single Judge Calcutta decision to the contrary [71] is not sound, for the following reasons:

   (i) A mere right of user or right of easement, being an intangible right, cannot itself be attached.

   (ii) The provision for attachment contained in Proviso 3 of s. 145(4) has been transferred by the *new* Code and incorporated in s. 146(1); hence no order of attachment can be made unless s. 146 is specifically imported into s. 147(2).

   (iii) Section 146(1) provides for the attachment of the 'subject of dispute', which is the 'land or water' mentioned in s. 145(1). But the subject of dispute under s. 147(1) is not the land or water itself, but a right of *user* thereof. Hence, s. 147(2) cannot authorise the deprivation of the possession of the owner of the land or water, by attaching the land or water itself.

3. It has been held [72] that if, at any stage of the proceeding under s. 147, the Magistrate is satisfied that there was no likelihood of any breach of the peace, he can drop the proceedings under s. 147 (see

ante , as to the cases under s. 145). The reason is that apprehension of a breach of the peace is the foundation of the jurisdiction both under Sections 145 and 147. [73]

14. No interim order of prohibition or restraint.—

Sub-section (1) of s. 147 provides for the issue of an order in the nature of a notice for hearing and sub-section (3) provides for a final order after hearing. But there is no provision in this section for the issue of any interim order prohibiting or restraining any party, so long as the right of user claimed is not established by evidence at the hearing under sub-section (3). [74]

15. Sub-section (3) : Final order, when can be made.—

It is clear that a final order under s. 147 can be made only after an inquiry is made, [75] after the drawing up of a preliminary order under sub-section (1), and if, as a result of such inquiry the Magistrate is satisfied that the alleged right of the first party exists. If the Magistrate starts a proceeding under s. 147 on the basis of a Police report that a breach of the peace is apprehended, and without making any inquiry, at once passes an order asking the second party to the proceeding not to interfere with the right of the Petitioners to draw water from a tank, the order would be without jurisdiction and liable to be quashed. [76]

When in a case under *s. 147 Cr.P.C.* there was a dispute between the parties regarding use of public path, report of the Tahsildar was silent about any such dispute. Tahsildar did not enter the witness box to prove his report. The existence of the right of user was also not made out from the evidence or the report. The Magistrate had not also recorded about the existence of the breach of peace. So, the order of the Magistrate for removal of the obstruction was found to be unsustainable and was set aside by the High Court.[77]

16. Nature of right under s. 147 Cr.P.C.—

The order under *s. 147 Cr.P.C.* is intended to be temporary in nature till the rights of parties are decided by the Civil Court.[78]

When there is a dispute over the stoppage of water supply for irrigation from the joint well, the dispute attracts *s. 147 Cr.P.C.* The Executive Magistrate may initiate proceedings under *s. 147 Cr.P.C.* and if conditions exist the appropriate order may be passed.[79]

But right of user of land connotes the user of legal right relating to a land distinct from the use of land as owner. [80]

Right to fish in a reservoir is a right which attracts *s. 147 Cr.P.C.* [81]

Right to worship in a temple or other public religious place also attracts *s. 147 Cr.P.C.* [82]

17. Nature of order.—

In view of the changes made in sub-section (3) of *s. 147 Cr.P.C.* by the new Code of 1973, the Magistrate has the power not only to issue prohibitory order but also mandatory order of removal of obstruction, if deemed fit and proper, but only in appropriate cases and subject to the proviso to sub-section (3) of *s. 147 Cr.P.C.* [83] The object of the relief under *s. 147 Cr.P.C.* is to remove obstruction in order to prevent breach of the peace. The Magistrate may not direct the opposite party to rebuild the drain or the other construction that has been demolished. But it can direct the restoration of the ditch which had been raised to obstruct a canal or pathway.[84]

2. *Change made by the new Code* .—The words 'including ... any such right' have been added at the end of sub-section (3), in accordance with the recommendation of the Commission [85] to make it clear that, in a proper case, the Court should not lack the power to make a positive order for removal of the obstruction, adopting the view taken by the Allahabad and Madras High Courts, [86] *e.g.* , the removal of a fencing or a filling up a drain [87] or a wall [88] by which a pathway has been obstructed. [89]

3. Of course, the power to issue a mandatory injunction should be exercised only in 'proper cases', exercising the judicial *discretion* of the Magistrate, [90] subject to the Proviso (*below*), which now controls the power to issue both a prohibitory and a mandatory order.

Since the Allahabad view [91] has been adopted in drafting *new* s. 147(3), the following guidelines for the exercise of the Magistrate's discretion, as laid down in the Allahabad case [92] may be borne in mind:

(a) The object of relief under s. 147 is to remove the obstruction, in order to prevent a breach of the peace, the Magistrate may not direct a party to *rebuild* a drain or other construction which he has demolished, but he has the power to direct him to demolish a wall which caused the obstruction, where there is no other means to prevent obstruction of the plaintiff's right of easement or the like.

(b) Where the obstruction or interference with the 1st Party's right is of a continuous nature, a power to remove obstruction would be the only effective means of enforcing a prohibitory order not to obstruct the exercise of his right.

The change introduced by the *new* sub-section (3), however, goes beyond the pre-1923 position by expressly laying down that in a 'proper case' the Court shall be competent to make an order "for the removal of any obstruction". Hence, it is no longer necessary for the Court to invoke the doctrine of 'ancillary power' to enforce an order couched in a negative form. The Magistrate can now make a *direct order* to restore a ditch which had been filled up or to remove a fence which had been raised to obstruct a channel or a pathway. [1]

(c) On the other hand, since the ultimate remedy upon the determination of the right must lie before the Civil Court, the Magistrate may, instead of making a mandatory order, refer the aggrieved Party to seek his remedy from the Civil Court, *e.g.* —

(i) Where the construction is of a costly nature, or where a whole house has to be pulled down (not merely a wall) to remove the obstruction;

(ii) Where the obstruction has already been in existence for a long time without causing a breach of the peace, the Magistrate may grant sufficient time to the 2nd Party to remove the obstruction or to move the Civil Court, before making an order for removal of the obstruction, [2], [3] through Court. [4]

4. An order of removal of an obstruction should specify a date within which the second Party is to effect the removal, or move the Civil Court, if so advised. [5] In case of the Party's default to carry out the removal within the specified date, the Court may direct it to be done by a Commissioner appointed by it at the cost of the second Party. [6]

18. Proviso.—

1. This proviso corresponds to the Proviso to sub-section (2) of the *old* s. 147, with the changes indicated in italics, to remove any doubts as to the date of 'institution of the inquiry'.
2. This Proviso lays down the condition precedent [7] to the making of a final order under sub-section (3), which is—

(a) Where the right in question is exercisable at all times of the year, *e.g.* , a passage, [8] —it must be proved and found that the right was exercised by the successful party within *three* months before the receipt by the Magistrate of the Police report or other information under sub-section (1).

The requirement being mandatory, there must be a definite finding of such user within the specified period. [9] But an absence of such finding may not necessarily lead to a reversal of the order in revision if there are materials on the record, from which the Revisional Court may find that such user within the specified period of limitation was proved by the evidence before the Magistrate, *e.g.* , where the date of obstruction of the user had been established by the evidence, such date being within the period. [10]

(b) Where the right in question is not exercisable throughout the year but only at particular seasons or on particular occasions, *e.g.* , the right to bury, there is no period of limitation; [11] but it must be proved that it was exercised by the claimant during the last such season or the last of such occasions when the right was *exercisable* , [12] before the receipt of the report or information under sub-section (1).

19. Sub-section (4) : Conversion from s. 147 to s. 145 and vice versa.—

Even prior to the insertion of this sub-section by the *new* Code, it was held, applying general principles, that a proceeding started under s. 145 could be converted to one under s. 147 and *vice versa* . But a new feature seems to have been introduced by the *new* sub-section (4) :

Under the *old* Code, the conversion would have taken place only from the date of the order of the Magistrate effecting such conversion, and upon such conversion, he was supposed to follow the various steps under the new provision *ab initio* . For instance, if a proceeding under s. 145 was to be converted, at some subsequent stage, into one under s. 147, the Magistrate had to start afresh under s. 147, but initiating a preliminary order under s. 147(1). [13]

But the words 'as if they had been commenced under sub-section (1)' at the end of both paragraphs of *new* sub-section (4) to s. 147 suggests that the conversion would relate back to the earliest stage of the proceeding, so that if a proceeding under s. 145 be converted into one under s. 147(1), the preliminary order already issued under s. 145(1) would be treated as a preliminary order under s. 147(1), and that the Magistrate should follow the stages under s. 147 subsequent to the date of conversion, without being required to follow the idle formality of issuing a fresh preliminary order under s. 147(1), because the parties have already been notified when they are to attend his Court and to put in their written statements, by the initial order under s. 145(1). This will save time and ensure speedy remedy.

20. Revision.—

Revision lies under s. 397 against an order under s. 147 which is *ultra vires* [14] or without jurisdiction, *e.g.* —

An interim order of prohibition, which is not warranted by s. 147. [15]

21. Inherent power under s. 482.—

Under its inherent power under s. 482 (*post*), the High Court may interfere with an order passed under this section, *e.g.* , to specify a time within which the Party directed to remove an obstruction shall comply with such order. [16]

22. Suit.—

A party aggrieved by an order under s. 147 may institute a suit in a Civil Court of competent jurisdiction which would be competent to declare the rights of the parties and also to interfere with the order as to costs, if any, awarded under s. 148(3). [17] But a decree as to the rights of the parties does not *ipso facto* set aside the order as to costs made under s. 147, read with s. 148(3). [18]

28 *Subal v. State of Orissa,* AIR1967 Or 198; *Malla v. State,* AIR1966 J&K 29 (30).

29 *Subal v. State of Orissa,* AIR1967 Or 198; *Malla v. State,* AIR1966 J&K 29 (30).

30 *Subal v. State of Orissa,* AIR1967 Or 198; *Malla v. State,* AIR1966 J&K 29 (30); *Sankali v. State of Orissa,* (1974) 80 Crlj 219 (Or) .

31 *Sankali v. State of Orissa,* (1974) 80 Crlj 219 (Or) .

32 *Raghunath v. Yadav,* AIR1959 Mys 177 179.

33 *Ismatennassa v. Sarat,* (1976) Crlj 129 (Gau) ; *Satya v. Sailendra,* AIR 1954 Cal 560 [LNIND 1953 CAL 61].

34 *Ismatennassa v. Sarat,* (1976) Crlj 129 (Gau) ; *Satya v. Sailendra,* AIR 1954 Cal 560 [LNIND 1953 CAL 61]; *Panchan v. Mohan,* AIR1950 Pat 315.

35 *Subali v. State of Orissa,* AIR1967 Or 198; *Malla v. State,* AIR1966 J&K 29 (30).

36 *Panchan v. Mohan,* AIR1950 Pat 315.

37 *Sheo Murat v. State,* (1975) Crlj 1436 (para 7) (All).

38 *Sheo Mural v. State,* 1975 Crlj 1426 .

39 *Thekkethodika v. Adangalpuravam,* 1988 Crlj 53 Ker .

40 *Ismatan Nessa v. Sara Chandra,* 1976 Crlj 129 .

41 *Lalmon v. Shiv,* (1980) ALJ 1086 (1087).

42 *Feku v. Sibu,* (1969) Crlj 579 (580).

43 *Dhirendra* *v.* *Hrishikeshm,* (1952) 2 Cal 119 (FB) ; *Kunha v. Adbul,* (1961) 2 Crlj 234 (Ker) ; *Vellappa v. Ramaswami,* AIR1938 Mad 537.

44 *Dayaram* *v.* *Emp.,* AIR 1930 All 452 .

45 *Abdul Majid* , AIR1941 Nag 171.

46 *Kader v. Keder,* (1905) 29 Mad 237.

47 *Abdul v. Ashroo,* (1927) 51 Mad 2522.

48 *Amir* *v.* *Mahalingam,* (1927) 28 Crlj 948 (Mad) .

49 *Bishwanath* *v.* *Rajdeo,* (1974) 80 Crlj 424 (Pat) .

50 *Sankali* *v.* *State of Orissa,* (1974) 80 Crlj 219 (Or) .

51 *Subal v. State of Orissa,* AIR1967 Or 198; *Malla v. State,* AIR1966 J&K 29 (30).

52 *Satyanarayan v. Krishna,* AIR1950 Mad 593.

53 *Thankaswamy* *v.* *Sridharan,* 1977 Crlj 697 Mad .

54 *Bhubaneswari v. Kaliram,* AIR1960 Assam 90.

55 *Sheonandan* *v.* *Thakur,* 1976 Crlj 1781 Pat .

56 *Maheshwar Prosad Singh v. State of Jharkhand,* (2008) 4 Crimes 465 [LNIND 2008 JHAR 24](Jhar) .

57 *Pally* *v.* *Kambil,* (1969) Crlj 331 (334); *Imambu v. Hussenbi,* AIR1960 Mys 203.

58 *Sheo Nandan* *v.* *Thakur,* (1976) Crlj 1781 (para 3) Pat.

59 *Tikuda* *v.* *State,*
AIR 1961 Raj 216 [
LNIND 1961 RAJ 172](FB) .

60 *Pally* *v.* *Kambil,*
(1969) Crlj 331 (334); *Imambu v. Hussenbi,* AIR1960 Mys 203.

61 *Tikuda* *v.* *State,*
AIR 1961 Raj 216 [
LNIND 1961 RAJ 172](FB) .

62 *Tikuda* *v.* *State,*
AIR 1961 Raj 216 [
LNIND 1961 RAJ 172](FB) .

63 *Pally* *v.* *Kambil,*
(1969) Crlj 331 (334); *Imambu v. Hussenbi,* AIR1960 Mys 203.

64 *Pally* *v.* *Kambil,*
(1969) Crlj 331 (334); *Imambu v. Hussenbi,* AIR1960 Mys 203.

65 *Tikuda* *v.* *State,*
AIR 1961 Raj 216 [
LNIND 1961 RAJ 172](FB) .

66 *Anya* , AIR1927 Bom 654.

67 *Badaruddin* *v.* *Karamat,*
(1977) Crlj 267 (NOC) Gau ; *Onkar v. Sri Ram,* (1973) CrLJ 1464 (1467) All.

68 *Kirti* *v.* *Lakshman,*
AIR 1959 Cal 314 [
LNIND 1959 CAL 12](para 3).

69 *Abdul* ,
(1910) 15 CWN 667 .

70 *Rameshwar v. Raghu,* AIR1961 Pat 869; *Rahim v. Abdul,*
(1948) 1 Cal 374 .

71 *Mukul* *v.* *Champa,*
AIR 1956 Cal 231 [
LNIND 1956 CAL 42].

72 *Dharmadas* *v.* *Bhusan,*
(1954) 58 CWN 962 (DB) ; *Gobardhan v. Ramautar,* AIR1961 Pat 404.

73 *State* *v.* *Phodal,*
AIR 1971 MP 437 .

74 *Krishna* *v.* *Deen* *Dayal,*
(1975) Crlj 127 (Pat) ; *Khuda Bux* ,
(1940) 44 CWN 623 . [Contra *Irshad v. State,*
(1978) Crlj 1464 (All)]; *Niranjan v. Laxmidhar,*
(1990) Crlj 1599 (para 5) Or.

75 *Kanailal* *v.* *Satirani,*
(1973) CWN 35 .

76 *Kanailal* *v.* *Satirani,*
(1973) CWN 35 .

77 *Balak* *Ram* *v.* *Rasil* *Singh,*
2009 Crlj 186 HP .

78 *Thankaswamy* *v.* *Sridharan,*
1977 Crlj 697 Mad .

79 *Edla* *Anjaiah* *v.* *P.* *Balesham,*
1998 Crlj 750 AP .

80 *Feku* *v.* *Sibu*
1969 Crlj 1436 (All).

81 *Subal v. State of Orissa,* AIR1967 Ori 198.

82 *Kunha* *v.* *Abdul,*
(1961) 2 Crlj 234 (Ker) ; *Bhimrendra v. Hrishikesh,*
ILR (1952) 2 Cal 119 (FB) .

83 *State* *v.* *Phadal,*
AIR 1971 MP 43 [
LNIND 1970 MP 73].

84 *Thankaswamy* *v.* *Sridharan,*
1977 Crlj 697 Mad .

85 41st Rep of the Commission, Vol. I, para. 12.11; 37th Rep., para. 398.

86 *Abdul* *v.* *Hameedullah,*
AIR 1951 All 238 [
LNIND 1950 ALL 360](FB) ; *Angappa v. Krishnaswami,* AIR1959 Mad 28;
Raghunath v. Yadav, AIR1959 Mys 117.

87 Cf. *Kirti* *v.* *Lakshman,* (1959) 63 CWN 449 (450).

88 *Abdul* *v.* *Hameedullah,* AIR 1951 All 238 [LNIND 1950 ALL 360](FB) ; *Angappa v. Krishnaswami,* AIR1959 Mad 28; *Raghunath v. Yadav,* AIR1959 Mys 117.

89 Cf. *Kirti* *v.* *Lakshman,* (1959) 63 CWN 449 (450).

90 Cf. *State* *v.* *Phodal,* AIR 1971 MP 43 [LNIND 1970 MP 73](para 15).

91 *Abdul* *v.* *Hameedullah,* AIR 1951 All 238 [LNIND 1950 ALL 360](FB) ; *Angappa v. Krishnaswami,* AIR1959 Mad 28; *Raghunath v. Yadav,* AIR1959 Mys 117.

92 *Abdul* *v.* *Hameedullah,* AIR 1951 All 238 [LNIND 1950 ALL 360](FB) ; *Angappa v. Krishnaswami,* AIR1959 Mad 28; *Raghunath v. Yadav,* AIR1959 Mys 117.

1 *Thankaswami* *v.* *Sridharan,* (1977) Crlj 697 (paras 1, 5) Mad.

2 *Abdul* *v.* *Hameedullah,* AIR 1951 All 238 [LNIND 1950 ALL 360](FB) ; *Angappa v. Drishnaswami,* AIR1959 Mad 28; *Raghunath v. Yavad,* AIR1959 Mys 117.

3 *Thankaswami* *v.* *Sridharan,* (1977) Crlj 697 (paras 1, 5) Mad.

4 *Angappa v. Krishnaswami,* AIR1959 Mad 28 (paras 13, 17).

5 *Thankaswami* *v.* *Sridharan,* (1977) Crlj 697 (paras 1, 5) Mad.

6 *Thankaswami* *v.* *Sridharan,* (1977) Crlj 697 (paras 1, 5) Mad.

7 *Bishwanath* *v.* *Rajdeo,* (1974) 80 Crlj 424 .

8 *Bishwanath* *v.* *Rajdeo,* (1974) 80 Crlj 424 .

9 *Bishwanath v. Rajdeo,* (1974) 80 Crlj 424 ; *Ram Chandra v. Khokha,* (1969) Pat LJ 470 .

10 *Chaturgun v. Jamadar,* AIR1961 Pat 374(DB) .

11 *Gostha* , AIR 1950 Cal 425 .

12 *Jadubans* , AIR1934 Pat 557.

13 Cf. *Sheo Murat v. State,* (1975) Crlj 1436 .

14 *Debendra v. Satish,* AIR1958 Assam 113.

15 *Krishna v. Deen Dayal,* (1975) Crlj 127 (Pat) .

16 *Angappa v. Krishnaswami,* AIR1959 Mad 28 (paras 13, 17).

17 *Antony v. Cecillia,* AIR1957 Mad 764.

18 *Antony v. Cecillia,* AIR1957 Mad 764.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER X
MAINTENANCE OF PUBLIC ORDER AND TRANQUILITY

D.—Disputes as to Immovable Property

S. 148
Local inquiry.

(1) Whenever a local inquiry is nece ssary for the purposes of Section 145, Section 146 or Section 147, a District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under Section 145, Section 146, or Section 147, the Magistrate passing a decision may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion and such costs may include any expenses incurred in respect of witnesses and of pleaders' fees, which the Court may consider reasonable.

1. Local enquiry.—

Section 148 Cr.P.C. gives a discretion to the District Magistrate or Sub-Divisional Magistrate while holding enquiry under s. 145 or s. 146 or *s. 147 Cr.P.C.* to hold local enquiry or to depute a Magistrate sub-ordinate to him to hold an enquiry. But no party can insist that the local enquiry shall be conducted by Sub-Divisional Magistrate. So, when the Magistrate rejected the prayer of the party who prayed for local enquiry, the High Court cannot entertain a petition under

s. 482 Cr.P.C. to compel the Magistrate to get the enquiry done by a Sub-ordinate Magistrate. It is indicated that if at any particular stage the party feels that a local enquiry should be made, he may apply for it and the Magistrate may pass any order in accordance with law. But the party cannot compel the Magistrate to hold local enquiry.[19]

2. Sub-section (3) : Award of Costs.—

The award of costs for the proceedings of s. 145, s. 146 or *s. 147 Cr.P.C.* is in the discretion of the Magistrate. The Magistrate may also direct as to by whom the costs would be paid or how the costs would be proportioned or whether it would be paid in whole or in part.

Such order for costs can be made by the Magistrate who has passed the order. [20]

However, Patna High Court has held that the costs can also be awarded by the successor-in-office of the Magistrate and there is no bar for the successor-in-office of the Magistrate to award costs if the Magistrate who passed the order did not award costs. [21]

3. No limitation.—

There being no limitation prescribed for relating to awarding of costs under s. 148(3) *Cr.P.C.* to a successful party the same cannot be challenged as invalid if passed within a reasonable time from the date of disposal of the proceedings.[22]

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19 *Soorajmal v. State of Rajasthan,* 1998 Crlj 1515 Raj .

20 *Sarju v. Ram,* AIR1959 Pat 151.

21 *Khobari v. Ram,* 1977 Cri-J 445 (Pat) DB.

22 *Hawatdar v. Punyadeo,* 1975 Cri-J 124 (Pat) (DB).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XI

PREVENTIVE ACT ION OF THE POLICE

S. 149

Police to prevent cognizable offences.

Every police officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

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1. Analysis of preventive measures under the Code.—

The Code provides measures to prevent breaches of the peace and commission of offences under two principal heads: (a) Magisterial, and (b) Police.

A. Magisterial measure are divided into two Chapters: VIII and X.

I. The first branch of the provisions, contained in Chapter VIII, is aimed at persons who create danger to the public by committing crimes, breaches of peace and disturbing public tranquillity [Sections 106- 124]. Preventive measure can be taken by way of demanding security against misconduct of several kinds, *e.g.* , security for keeping the peace on conviction or in case of breach of the peace or disturbance of public tranquillity [Sections 106, 107].

II. The second branch of the magisterial "preventive measures" provisions is contained in Chapter X, *Cr.P.C.* [Sections 129- 148] which deals with the maintenance of public order and tranquillity. Preventive measures can be taken by way of making the following orders:

(i) Order for dispersal of unlawful assembly [s. 129].

(ii) Order for use of armed forces to disperse unlawful assembly [s. 130].

(iii) Conditional order for removal of nuisance [s. 133].

(iv) Order of injunction pending inquiry [s. 142].

(v) Order prohibiting repetition or continuance of public nuisance [s. 143].

(vi) Order directing a person to abstain from a certain act or to take certain order in urgent cases of nuisance or apprehended danger [s. 144].

(vii) Order in cases of dispute concerning possession of land or water which is likely to cause breach of peace [s. 145].

(viii) To attach subject of dispute and to appoint receiver in emergent cases, and when there is doubt as to the fact of possession, pending decision by a competent Court [s. 146].

(ix) Order in cases of dispute concerning right of *use* of land or water [s. 147].

B. Chapter XI of the Code deals with preventive jurisdiction of the Police just as Chapters VIII and X of the Code deals with the preventive jurisdiction of the Magistrates. Whereas the magisterial preventive jurisdiction is quasi-judicial and quasi-executive, the preventive jurisdiction of the police is purely executive. The Police jurisdiction in this connection is ordinarily of a summary nature and the powers of the police appear to be very wide. Chapter XI of the *new* Code covers (i) prevention of cognizable offences; (ii) prevention of injury to public property; and (iii) inspection of weights and measures.

2. Scope of s. 149.—

This section reproduces *old* s. 149.

3. 'Interpose'.—

This section authorises, in general terms a Police Officer to prevent the commission of 'cognizable offences' [as defined in s. 2(c), *ante*], Chapter XI, however, does not specify what definite acts can be done by a Police Officer for this purpose, excepting arrest without warrant, of a person designing to commit a cognizable offence, if it cannot be otherwise prevented [s. 151]. This power to arrest, it has been held, cannot authorise detention of the arrested person, for which resort to some other provision would be necessary (*see* under s. 151,*post*), *e.g.* , Ss. 56, 76.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XI

PREVENTIVE ACT ION OF THE POLICE

S. 150

Information of design to commit cognizable offences.

Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

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1. Scope of s. 150.—

It reproduces *old* s. 150.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XI
PREVENTIVE ACT ION OF THE POLICE

S. 151
Arrest to prevent the commission of cognizable offences.

(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.

STATE AMENDMENT

Maharashtra. —In its application to the State of Maharashtra, in s. 151—

(a) In sub-section (2), after the words "required or authorised" the words, brackets and figure "under sub-section (3) or" shall be inserted;

(b) after sub-section (2), the following sub-section shall be inserted, namely :—

"(3) (*a*) Where a person is arrested under this section and the officer making the arrest, or the officer in charge of the police station before whom the arrested person is produced, has reasonable grounds to believe that the detention of the arrested person for a period longer than twenty-four hours from the time of arrest (excluding the time required to take the arrested person from the place of arrest to the Court of a Judicial Magistrate) is necessary, by reason that—

(i) the person is likely to continue the design to commit, or is likely to commit, the cognizable offence referred to in sub-section (1) after his release; and

(ii) the circumstance of the case are such that his being at large is likely to be prejudicial to the maintenance of public order,

the officer making the arrest, or the officer in charge of the police station, shall produce such arrested person before the nearest Judicial Magistrate, together with a report in writing stating the reasons for the continued detention of such person for a period longer than twenty-four hours.

(b) Notwithstanding anything contained in this Code or any other law for the time being in force, where the Magistrate before whom such arrested person is produced is satisfied that there are reasonable grounds for the temporary detention of such person in custody beyond the period of twenty-four hours, he may, from time to time, by order remand such person to such custody as he may think fit :

Provided that, no person shall be detained under this section for a period exceeding fifteen days at a time, and for a total period exceeding thirty days from the date of arrest of such person.

(c) When any person is remanded to custody under Clause (*b*), the Magistrate shall, as soon as may be, communicate to such person the grounds on which the order has been made and such person may make a representation against the order to the Court of Session. The Sessions Judge may, on receipt of such representation, after holding such inquiry as he deems fit, either reject the representation, or if he considers that further detention of the arrested person is not necessary, or that it is otherwise proper and just so to do, may vacate the order and the arrested person shall then be released forthwith." [*Vide* Mah. Act 7 of 1981, S. 18 (w.e.f. 27-8-1980)]

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1. Scope of s. 151.—

This section corresponds to *old* s. 151, with the addition of sub-section (2), to bring it in conformity with the provision in *Art. 22(2) of the Constitution* .[1]

2. Conditions for the application of s. 151.—

1. This section authorises a Police Officer to arrest a person without warrant [*see* under s. 41, p. 187, *et seq.*] or order from a Magistrate on two conditions, *viz.* —

(a) That the Police Officer *knew* that such person had a design to commit a cognizable offence [vide s. 2(c), *ante*].

(b) That it appeared to such Police Officer that the commission of the offence could not be prevented otherwise than by arresting such person.

But the foregoing two conditions, namely, whether the Police Officer had the requisite knowledge about the designed offence and whether its commission could have been prevented otherwise than by the arrest of such person, are matters of the subjective estimate of the Police Officer, who is charged with the maintenance of public order and not for an

independent scrutiny by the Court. [2]

2. It has, however, been held [3] that the jurisdiction of the Court is not barred in case of an *improper* exercise of the power under s. 151. This has been made clear by the insertion of sub-section (2), which brings the power subject to the constitutional obligation under *Art. 22(2) of the Constitution* , under which the Court before whom the arrested person is produced has the jurisdiction to determine whether the arrest of such person has been in accordance with the law. His further detention beyond 24 hours from the time of arrest has thus been subjected to the orders of the Court, under s. 167,*post* , or any other law in this behalf.

3. That Court has, therefore, the power to release the arrested person—

(i) If the power under s. 151 has been used for a purpose extraneous to s. 151,*e.g.* , for the purpose of *preventive detention* of a person on *political* [4] grounds, because s. 151 can be used only to prevent the commission of a cognizable offence.

(ii) For the same reason, s. 151 cannot be used merely on an apprehension of breach of the peace, [5] for which other provisions may be available. There must be a 'design to commit a cognizable offence', in order to arrest a person under s. 151. 'Apprehension', again, is not the same thing as knowledge. [6]

(iii) Section 151 merely authorizes arrest, and not detention of any kind. Authority for detention must be had under some other provision of the Code or any other law. This is made clear by the words "unless his further detention ..." in *new* sub-section (2) of s. 151.

3. Section 151 Cr.P.C. if unconstitutional.—

Section 151Cr.P.C cannot be said to be either arbitrary or unreasonable or infringing upon the fundamental rights of the citizen under Article 21 of the *Article 22 of the Constitution* . This is because s. 151 itself makes the provision for the circumstances under which an arrest can be made under that section and also places a limitation on the period for which a person so arrested may be detained. The guidelines are in-built in the provision itself. These guidelines have to be read with the requirements laid down in *Jagdish Kumar v. State,* and *D.K. Basu v. State of West Bengal,* [7]

These requirements are in addition to the constitutional and statutory safe-guards and not detract from the various directions given by the courts from time to time in connection with safe-guarding of the rights and dignity of the arrestee. So, the Supreme Court has held that there is no substance in the contention that *s. 151 Cr.P.C.* is *ultra vires* the constitutional provisions. [8]

However,
s. 50A of the Code of Criminal Procedure has also provided further rights to the person arrested by making the statutory provision of the police officer arresting a person to ask the arrestee the name of the person to whom the intimation of his arrest shall be made and the place of arrest. This

provision has been brought in force by *Cr.P.C.* (Amendment) Act, 2005 which has come into force with effect from 23.06.2006.

4. Arrest of female—

Sub-section (4) of *s. 46 Cr.P.C.* inserted in the Code by the *Cr.P.C.* (Amendment) Act, 2005 with effect from 23.06.2006 provides—

'(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and when such exceptional circumstances exist, the woman police officer shall by making a written report, obtain prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest to be made'.

However, prior to this amendment there was no statutory provision there the female person can only be arrested by a female police officer. The Supreme Court though preferred a female person to be arrested by a female officer, but it is observed that the arresting authority should make all efforts to keep a lady constable present but if a lady constable is not available or delay in procuring a female constable or delay in arrest would impede the course of investigation, the arresting officer for reasons to be recorded can arrest a female person for lawful reasons at any time of the day or night even in the absence of a lady constable. [9]

However, after sub-section (4) of *s. 46 Cr.P.C.*, the arrest of a female person shall only by a lady police officer and ordinarily before sunset and after sunrise and only in exceptional circumstances the arrest can be made after sunset and before sunrise for which a prior permission of the Magistrate first class concerned shall be obtained stating the special circumstances.

5. Medical examination of the arrestee.—

In *D.K. Basu v. State of West Bengal,* (*Supra*) in sub-paras (7) and (8) of the paragraph 35, the Supreme Court has issued the following directions:

(7) The arrestee, should, when he so requests, be also examined at the time of his arrest and major or minor injuries, if any, present in his or her body must be recorded at that time. The 'inspection memo' must be signed by both the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during detention in custody or by a doctor of the panel of approved doctors appointed by the Director of Health Services shall prepare a panel for all tahsils or district as well'.

This also re-iterated in *State of Maharashtra v. C.C.W. Council of India.* [10]

6. Arrest under s. 151 Cr.P.C., illegal.—

The petitioner and other project affected people were squatting on the road, shouting slogans demanding rehabilitation and demanding rehabilitation measures. They had no design to commit any cognizable offence. There was nothing on record to raise apprehension that they would disturb public peace or public order. So, their arrest under *s. 151 Cr.P.C.* was held to be unconstitutional being violative of *Articles 19* and *21* of the *Constitution* . For such illegal arrest and detention in jail of the petitioner and other agitators High Court directed the State to pay petition and other arrested compensation of Rs.10,000/- each. Liberty was given to the State to recover the sums awarded as compensation from the erring police officers responsible for such illegal arrest.[11]

7. Further detention of the person arrested under s. 151 Cr.P.C.—

The power of the Magistrate to extend a period of detention under s. 151 and to remand him in the custody under *s. 167 Cr.P.C.* can be exercised only when an investigation is started against the arrestee. Therefore, when no investigation has been started by the Police for commission of any cognizable offence after such arrest under *s. 151 Cr.P.C.* before he is produced before the Magistrate, the Magistrate cannot detain him further and he has to be released forthwith. The Supreme Court has observed that the period of detention under *s. 151 Cr.P.C.* cannot exceed 24 hours the arrested if before expiry of 24 hours, the arrested is found to be required to be detained under any other provision of the Code or under any other law, his detention can continue under that provision of law instead of under *s. 151 Cr.P.C.* [12]

8. Right of arrested person.—

(1) An arrested person being held in custody is entitled, if he so requests, to have one friend, relative or other person who is known to him or likely to take interest in his welfare told so far as practicable that he has been arrested and where he is being detained.

(2) The Police Officer shall inform the arrested person of this right when he is brought to the police station.

(3) An entry shall be made in the Diary as to who was informed of the arrest. These protections must be held to flow from Arts. 21 and 22(1) of the *Constitution* and enforced strictly.

(4) It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in various Police Manuals [13] [*see also* pp. 234-235, *et seq*].

9. Sections 151 and 167.—

The power of the Magistrate to extend the period of detention of a person arrested under s. 151 and to remand him to jail custody under s. 167 can be exercised only where an *investigation* has been started by the Police after the arrest. The Magistrate cannot use this power where the Police has not started any investigation. [14]

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1 Vide Author's *Constitutional Law of India,* Latest Edition.

2 *Om Prakash* , in re., AIR 1947 Mad 744 ; *Chakkappan v. State of Kerala,* AIR 1960 Ker 297 [*LNIND 1960 KER 122*]; *Gopalan v. State of Kerala,* AIR 1962 Ker 215 [*LNIND 1961 KER 369*].

3 *Mohammad v. Ram,* AIR 1965 All 160 [*LNIND 1964 ALL 43*](paras 10-11).

4 *Prahlad v. Prov. of Orissa,* AIR 1950 Or 107 111 .

5 *Mohammad v. Ram,* AIR 1965 All 160 [*LNIND 1964 ALL 43*](paras 10-11).

6 *Balraj v. Union of India,* AIR 1967 Del 31 [*LNIND 1966 DEL 119*](para 5).

7 (1997) 1 SCC 416 [*LNIND 1996 SC 2177*] : 1997 SCC (Cri) 92 : AIR 1997 SC 610 [*LNIND 1996 SC 2177*]: 1997 Crlj 743 .

8 *A.N. Bhatti v. State of Gujrat,* AIR 2005 SCC 2115 : (2005) 3 SCC 647 : 2005 SCC (Cri) 794 : 2005 Crlj 2157 .

9 *State of Maharashtra v. C.C.W. Council of India,* AIR 2004 SC 7 [*LNIND 2003 SC 886*]: (2003) 8 SCC 546 : 2004 Crlj 14 .

10 *State of Maharashtra v. C.C.W. Council of India,* AIR 2004 SC 7 [*LNIND 2003 SC 886*]: (2003) 8 SCC 546 : 2004 Crlj 14 .

11 *Medha Patkar v. State of M.P.,* 2008 Crlj 47 MP DB .

12 *Janardan v. State of Bihar,* AIR 1968 Pat 22 .

13 *Joginder Kumar v. State of U.P.,* (1994) Crlj 1981 : AIR 1994 SC 1349 [*LNINDORD 1994 SC 51*]: (1994) 4 SCC 260 [*LNINDORD 1994 SC 51*].

14 *Janardan v. State of Bihar,* AIR 1968 Pat 22 (23-24).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XI

PREVENTIVE ACT ION OF THE POLICE

S. 152

Prevention of injury to public property.

A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, movable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

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1. Scope of s. 152.—

This section reproduces *old* s. 152. *See* in this connection s. 41(e), *ante* , and Sections 431, 434, I.P.C.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XI

PREVENTIVE ACT ION OF THE POLICE

S. 153

Inspection of weights and measures.

(1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

1. Scope of s. 153.—

This section reproduces *old* s. 153.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Scheme of Chapter XII.— This Chapter deals with (a) information to the Police about the commission of an offence, and (b) investigation by the Police on receipt of such information or otherwise [s. 157].

I. *Information. —*

1. The earliest information given to the Police which sets the investigation in motion, and is reduced to writing by the latter is known as the 'First Information report' [1] or the F.I.R., though that term is not mentioned in the Code. [2] The object of the F.I.R. is to obtain early information about an alleged *criminal act* and to record the circumstances before there is time for them to be forgotten or embellished. [3]

2. Though the F.I.R. enables the Police to start the investigation on the basis of the information, [4] the Code draws a distinction between cognizable and non-cognizable offences [vide s. 2(c), (1), *ante*].

   (a) If the information relates to a cognizable offence, the Police may at once start investigation, without the order of a Magistrate [s. 156], though the officer-in-charge of the police station has to send a report about such information to a Magistrate empowered to take cognizance of the offence [s. 157].

   (b) If the information relates to a non-cognizable offence, the Police cannot start investigation without the order of a Magistrate who is competent to try the case or commit it for trial [s. 155(2)].

3. It must not be supposed, however, that the Police can investigate a cognizable offence only on receipt of an F.I.R. The very opening words of s. 157(1) say that the investigation may be started in any case the officer-in-charge of a Police station 'has reason to suspect the commission of a (cognizable) offence', 'from information received or *otherwise* '. [5]

In other words, the receipt and recording of F.I.R. by the Police is not a condition precedent to the setting in motion of a criminal investigation. [6] , [7]

II. *Investigation.—*

1. The meaning of investigation and the different stages in investigation have been explained under s. 2(h), *ante* .

2. Chapter XII deals with police investigation in all its aspects from the moment when the information about the commission of an offence is received at the station-house to the stage when the police complete the investigation and send a final report to the Magistrate.

   A sharp distinction is drawn right at the beginning of the Chapter between cognizable cases and non-cognizable cases. The latter may be investigated by the police only on the orders of a Magistrate.

   If the information indicates the commission of a cognizable offence, investigation can commence without the orders of a Magistrate, but the investigation officer has to send a report about it to the Magistrate. If the offence does not appear to be serious and if the station-house officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.

3. During investigation, the police officer has the power to require the attendance of witnesses before him and to put questions to them which they are bound to answer [Sections 160- 161]. He has also the power to send any witness he likes before a Magistrate and have his statement recorded on oath. The police officer has the power to search and place and seize anything material found at the place [Sections 100, 165]. In such a case he must prepare on the spot a list of the articles seized and send a copy of the list to the Magistrate. If as a result of his investigation the police officer arrests any person, he must have that person presented before a Magistrate within 24 hours and thereafter the custody of the arrested person will be under the control of the Magistrate [s. 167]. [8]

4. The provisions from s. 161 to s. 164 have one object in common, *viz.* , that no one should be put to the harassment of a criminal trial unless there are good and substantial reasons for holding it. They are aimed at securing a fair investigation into the facts and circumstances of a case, however serious the crime and however incriminating the circumstances may be against a person supposed to be guilty of a crime, there must be utmost fairness on the part of the officers investigating into the crime before the lodging of a charge-sheet. [9]

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1 *Soma v. State of Gujarat,* AIR 1975 SC 1453 [*LNIND 1975 SC 183*] (para 18) : (1975) 4 SCC 257 [*LNIND 1975 SC 183*] : 1975 Crlj 1201 .

2 *Manimohan v. Emp.,* (1931) 58 Cal 1312 .

3 *Nazir v. K.E.,* AIR 1945 PC 18 .

4 *Hasib v. State of Bihar,* AIR 1972 SC 283 : 1972 Crlj 233.

5 *State of U.P. v. Bhagwant,* AIR 1964 SC 221 [*LNIND 1963 SC 114*] : (1964) 1 Crlj 140 .

6 *Nazir* *v.* *K.E.,* AIR 1945 PC 18 .

7 *Apren* *v.* *State* *of* *Kerala,* AIR 1973 SC 1 5 : (1973) 3 SCC 114 : 1973 Crlj 185 .

8 Law Commission, 41st Report, Vol I, p 67.

9 *Sirajuddin* *v.* *State* *of* *Madras,* (1970) 1 SCC 595 [*LNIND 1970 SC 112*] (para 19) : AIR 1971 SC 520 [*LNIND 1970 SC 112*]: 1971 Crlj 523 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 154
Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

[[10]

Provided **that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, *section 376E* or *section 509* of the *Indian Penal Code (45 of 1860)* is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:**

Provided further **that—**

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, *section 376E* or *section 509* of the

Indian Penal Code (45 of 1860) **is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be:**

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.]

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

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1. Scope of s. 154.—

This section corresponds to *old* s. 154, with the addition of sub-sections (2) and (3). This section has been amended *vide* the *Criminal Law (Amendment) Act, 2013* which has added two provisos to sub-section (1). These newly added provisos lay down that if the information is given by the woman against whom an offence under the sections specified in these provisos is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer.

2. Object of F.I.R.—

1. The object of recording the first information report is to put into writing the statement of the informant before his memory fails or before he gets time and opportunity to embellish it. [11]

   But the F.I.R., *i.e.* , the receipt or recording of information by the Police under the present section, is not a condition precedent to the setting in motion of a criminal investigation. [12]

2. This means that if a Police Officer starts the investigation of a cognizable offence and goes to the spot on hearing about the commission of a crime; without recording it is accordance with the present section, the prosecution or trial thereafter cannot be challenged on the ground that there was no F.I.R. in the case [13] [*see,* further, under s. 156(1),*post*].

3. But if information is received and recorded in accordance with s. 154, such F.I.R. becomes the basis of the case set up by the informant, even though it may not be admissible as substantive evidence, [14] and it assumes importance if promptly made. [15]

4. At the same time, the F.I.R. cannot be said to be the last word of the prosecution because it need not be made by an eye-witness [16] nor is required to give full details. It merely marks the beginning of the

investigation and its value must accordingly depend on the circumstances of each case, including the nature of the crime, the position of the informant and the opportunity he had of witnessing the whole or part of the offence. [17] It need not necessarily be given by a person who has first-hand knowledge of the incident; hence, it cannot be rejected as F.I.R. merely because it is based on hearsay. [18]

5. The F.I.R. cannot serve as a conclusive test for determining the question whether there should be one or several trials of the several offences disclosed in the F.I.R. The matter has to be determined on the basis of the result of the investigation in the light of the provisions of the Code. [19]

6. It is not the encyclopedia of the whole incident and its object is to set out the gravemen of the allegations made against the accused and if such essential features are set out, the incident set out in the FIR cannot be disbelieved only because there are omissions therein. [20]

7. Only essential or broad spectrum need be set out in the FIR and all the minute details are not required to be stated therein. It may not be necessary to catalogue the act s therein and non-mentioning of some facts or vague references to some others are not fatal. [21]

8. F.I.R. is a vital material as it is first information about the incident and has less chances of altering the version and improvement. [22]

9. It is not a substantive evidence and cannot contradict the testimony of the eye witnesses but may contradict its maker. [23]

10. The F.I.R. need not contain every minute details about the occurrence. It is not substantial piece of evidence and it is not necessary that the name of every person present at the scene is required to be stated in the F.I.R. [24]

11. When the informant was in a state of shock having seen the dead bodies of his son and brother-in-law and had also heard of injuries to her family members, omission of names of same accused in F.I.R. is not of such information. [25]

12. An F.I.R. is an important document no doubt, but it is not be all and end all. It is not one universal such that once the F.I.R. is found with discrepancies, the whole prosecution case has to be thrown out. [26]

3. Conditions of validity of an F.I.R.—

1. In order to be valid as a first information under this section:

(i) The information must relate to the commission of a cognizable offence, on the face of it, and not merely in the light of subsequent circumstances. [27]

(ii) It must be an information given to the officer-in-charge of a Police station (who is empowered by s. 154 to record an F.I.R.); [28] or some other Police officer (*e.g.* , an officer of the Anti-Corruption Police), who is, by statute, given the status of an officer-in-charge of a Police station; [29] or the Superintendent of Police, who is authorised by new sub-section (3), *below* .

Hence, the following information, even though earliest in point of time, would be excluded from the nomenclature of F.I.R.:

Information given to an Assistant Sub-Inspector of Police, or to the Tehsildar or to a Head-constable in charge or a beat-house of Police outpost (as distinguished from the ‘Police station’). [30]

It is not to be supposed, however, that an information given to and recorded by an officer

superior to the officer-in-charge of a police station cannot constitute an F.I.R. under s. 154 or start a valid investigation, for, s. 154 is to be read with s. 36, which corresponds to *old* s. 551. [31] [*See,* further, under ' Sections 36 and 154', *post*].

(iii) It must be the earliest report relating to the commission of such offence made to a Police Officer, *with a view to his taking action* in the matter, after recording it in writing for that purpose. [32]

Where, on receipt of a report regarding the occurrence, the A.S.I. sought instructions on the phone from the Main Police Station, before reducing it in writing, it was the report which was reduced into writing, though a little later in point of time, rather than the telephonic message, which constituted the F.I.R. [33]

(iv) It must be reduced in writing, signed by the informant.

Hence, a cryptic and anonymous oral message conveyed through telephone cannot be treated as F.I.R., even though it was first in point of time. [34] In order for a message or communication to be qualified to be first information report, there must be something in the nature of complaint or accusation or at least some information of the crime given with the object of setting the police or criminal law in motion. It is not necessary that the first information report should contain the minutest detail or the names of offenders or the witnesses. But it must contain some information about the crime committed as also some information about the manner in which the cognizable offence was committed. [35]

(v) It is an information on the basis of which the investigation is commenced,—as distinguished from an information received by the Police *after* the commencement of the investigation, which is covered by Sections 161- 162 of the Code, [36] and does not constitute F.I.R., [37] even though the maker of such subsequent statement may be the informant of the F.I.R. himself. [38]

In a case of murder during communal riots, the information about riots having been received by the police and the police having started investigation thereon, the subsequent F.I.R. about the murder lodged after such receipt of information cannot be treated as F.I.R. as it is hit by *s. 162 Cr.P.C.* But the statement made therein can be used to contradict the informant. The statement can also be used to corroborate the evidence of other eye witnesses.[39]

(vi) It must not be vague or indefinite (*see post*).

2. Any information which satisfies the aforesaid requirements would constitute an F.I.R., *e.g.* —

(a) Information by anybody who may have heard about the incident. The section does not say that, in order to constitute F.I.R., the information must be given by a person having personal knowledge of the incident. [40] s. 154 is thus an exception to the rule against 'hearsay evidence'; if the other conditions are satisfied to enable the Police to start investigation upon it, it will be treated as F.I.R. even though the informant's statement was based on hearsay. [41]

Of course, when such hearsay report reaches the Police, it would be open to them either to treat it as the F.I.R. and start the investigation forthwith [42] or to wait for more authentic or reliable information, say, from an eye-witness; when the latter course is adopted, it is the information received from the eye-witness which forms the F.I.R. since information was started on the basis thereof. [43]

Where the F.I.R. is the statement of a person other than an eye-witness, at the trial the Court would be justified in preferring the testimony of the eye-witness, particularly when his name is mentioned in the F.I.R. as a witness. [44]

(b) A report by the *accused* himself, which results in the launching of the investigation; it is admissible against him as F.I.R., [45] and not being a confession [46] nor a 'statement made to a Police Officer in the *course of investigation* ', it would not be barred by Sections 25- 26 of the *Evidence Act* or *s. 162 of the Cr.P.C.* [47]

If, however, the accused makes any statement to the Police *after* the investigation has already started on the basis of some earlier information, such statement of the accused cannot be treated as F.I.R. and must be hit by s. 162. [48]

On the other hand,—In a case of dacoity with murder, the police arrived at the spot on receiving telephonic message of murder having been committed, and as soon as the police arrived, a *list* of stolen articles were handed over to the police. It may be treated as a part of F.I.R. and is not, therefore, hit by s. 162. [49]

3. But the following irregularities will not invalidate or render inadmissible an F.I.R.—

(i) That it has not been recorded by the Police Officer according to the requirements of the section. [50] It is the information given by the informant to the Police Officer, whether orally or in writing, which starts the investigation, and the neglect of the Police Officer to record it would not vitiate that information. [51] , [52]

(ii) That, though recorded by the Police Officer, it has not been signed by the informant, [53] even though such refusal sign is punishable under s. 180, I.P.C.

(iii) That the names of the accused persons were not mentioned in the information, particularly when the informant was not then in such a frame of mind as to discuss about the names of the culprits before he left for the police station. [54]

But when the informant claims to be an eye-witness of the incident, non-mention of the presence of one of the accused in the F.I.R., if not properly explained by circumstances, would demolish the case against the accused. [55]

(iv) Even though a telephone message was received by the Investigating Officer, but the same did not contain such details as to amount to first information relating to a cognizable offence, the first

information report, reported the police at thereafter cannot be hit by *s.* *162* *Cr.P.C.* [56]

4. Contents of F.I.R.—

1. The information referred to in s. 154 is commonly known as the "First Information Report". Whether an information is one under s. 154 is a matter of law.
2. What s. 154 requires is that information must be in relation to "the commission of a cognizable offence". It odes not require [57] that the information must give details of all elements of the offence, [58] or the weapon used [59] or the names of the witnesses or even of the accused, [60] if the particulars given are sufficient for appreciation of the evidence. [61] Thus,

   Where the part played by each of several accused has been broadly stated, the F.I.R. cannot be thrown away as unreliable because the details of how, from what distance the assault took place *etc.* were not mentioned; [62] or all the weapons used. [63] On the other hand,—a cryptic and anonymous telephonic message was not treated as an F.I.R., because it did not clearly specify a cognizable offence, even though it was an information first in point of time. [64]

   But if it gives full information with the name of the informant, and is recorded by the Police Officer, it may constitute F.I.R. [65]

3. The mere non-mention of the name of a witness [66] or the assailant [67] in the F.I.R. is not enough to hold that he did not see the occurrence, [68] if the omission to mention is explicable [69] by circumstances, *e.g.* , the agitated condition of the mind of the informant at that time; [70] or that he fell unconscious after the incident.
4. In determining whether the omission of such particulars should discredit the story given out in the F.I.R., the circumstances or the manner in which the report was made should be taken into consideration, for instance, whether it indicates a rustic simplicity or a clear and well-planned deceit; [71] whether the informant was a man of status; whether he had any motive to falsely implicate the accused. [72]

   In order to constitute F.I.R., the informant’s statement must not be vague or indefinite but must give sufficient materials to the Police to start the investigation on it. [73]

   If the foregoing conditions are satisfied, it cannot be ignored on the ground that it was not as full as it should have been. [74] It is not necessary that at the time of lodging the F.I.R., the informant must give a elaborate account of everything that had happened. [75]

5. When more than one FIR has been lodged one recorded first in point of time which persuaded the police to start the investigation is to be treated as FIR. [76]
6. If it is not given an eye-witness then such FIR could not give all the details of the incident. [77]

7. When on the basis of oral statement given to the police, the police started investigation, the written report given immediately thereafter cannot be admissible in evidence and cannot corroborate the person who made the oral complaint. [78]

[79] 8. A cryptic telephonic message regarding the incident was given and the police on that message went to the spot to investigate the case. The same cannot be treated as FIR. [80]

8. An FIR was lodged at the Police Station for the offence under s. 307 I.P.C. but the police received the report of the doctor of the hospital that the patient died. The police can convert the case to s. 302 I.P.C. but the report of the doctor about the death of the victim cannot be treated as FIR for offence of murder. [81]

10. In a murder case, no information was lodged to the police station regarding the commission of the offence, but when the police came to the spot, statement was given by the mother of the victim three days after the incident. The same can be treated as FIR as no information relating to the incident was recorded by the police prior to the coming to the spot. [82]

11. When the victim was brought to the hospital and the doctor on making the preliminary examination of the petitioner sends the memo, to the police station, such memo, can be treated as FIR. [83]

12. But an anonymous letter or information from somebody which does not disclose the authentic knowledge of the commission of offence cannot be treated as FIR. [84]

5. Conditions for admissibility.—

The report, when written, must be tendered by the prosecution, and the maker of the information must be examined, giving the accused an opportunity of cross-examining him. In the absence of this opportunity, the F.I.R. cannot be used in evidence. [85]

6. Two FIRS in respect of same incident.—

The legal position is that there can no be two FIRS against the same accused in respect of same offence. But if there are revival versions of the incident of two FIRS, then two FIRS are to be recorded and the investigation in respect of the two FIRS can be undertaken. [86]

But two FIRS on the same incident is not prohibited by the code and the police is not justified in refusing to record the second FIR. In such a case, the Magistrate can direct the police to investigate also the second FIR. [87]

7. Who can lodge FIR.—

FIR can come from any quarter. Even an anonymous letter sent reporting a cognizable offence may be treated as FIR. [88]

It need not be lodged by the eye-witness alone. [1]

It is not necessary that the informant had personal knowledge of the murder. [2]

8. FIR by the accused.—

FIR lodged by the accused to the police station containing confession cannot be admissible in evidence except under s. 27 of the Act. [3]

However, non-confessional part may be used as a conduct of the accused under *s. 8 of the Evidence Act* . [4]

9. Evidentiary value of the F.I.R.—

1. In view of *s. 35 of the Evidence Act* , [5] The F.I.R. may be admissible in evidence, provided the handwriting of the Police Officer who recorded it is proved according to *s. 67 of the Evidence Act* . [6]
2. These provisions, however, do *not* make it a substantive evidence [7] of the facts stated and cannot be used as such at the trial against the accused. [8] It can be used for certain limited purposes *only* , as settled by numerous decisions:

(a) To corroborate or contradict [9] the marker thereof [10] (*Sections 154* , *157* , *Evidence Act*), if the maker is examined as a witness. [11]

(b) To impeach the credit of the maker, if examined as a witness (*s. 155, Evidence Act*). [12] , [13]

(c) To show that the implication of the accused was *not* an afterthought. [14]

(d) To use it as evidence as to the informer's conduct under s. 8. [15]

(e) When the information was given by the accused himself, the F.I.R. can be used against him as evidence of his conduct (*s. 8, Evidence Act*); [16] or as an admission (*s. 21, Evidence Act*), [17] , [18] provided it is a *non* -confessional statement (a confessional statement being barred by s. 25), [19] , [20] —apart from the uses under Sections 145, 157 where the accused is examined as a witness. [21]

But such F.I.R. made by one accused cannot be used as evidence against the other accused [22] or to contradict *any other witness* . [23]

If any part of the statement of the accused is confessional, no part of it can be used against him as evidence and the doctrine of severability cannot be invoked. [24]

An F.I.R. lodged by the accused cannot be used against him for any other purpose, *e.g.* , to

show his motive for the offence. [25]

(f) If the informant dies, and the F.I.R. contains a statement as to the cause of his death, or the circumstances resulting in his death, it may be used as substantive evidence as to the cause of his death, under *s. 32(1) of the Evidence Act* . [26], [27]

(g) When the F.I.R. is promptly lodged, it is reliable and where it is supported by evidence, the plea that the accused person is falsely implicated is to be rejected. [28]

3. Omissions in the F.I.R. of important facts affecting the probabilities of the case, are relevant under *s. 11 of the Evidence Act* in judging the veracity of the prosecution case; [29] but not mere omission to mention matters of detail, [30] particularly when the F.I.R. was lodged by a rustic woman. [31]

4. In general, the omission to name one of the several accused (where the incident took place in a crowded bus) in the F.I.R. cannot discredit other evidence which is reliable. [32] In such a case, the prosecution has to explain why those names were not mentioned in the F.I.R., but there is not rule of law that an accused whose name is not mentioned in the F.I.R. is entitled to be acquitted. [33]

5. The value of the F.I.R. is not undermined by minor discrepancies between the F.I.R. and the evidence. [34]

   But where the discrepancies between the prosecution evidence and the F.I.R. cannot be said to be minor, the testimony of the prosecution cannot be accepted at its face value for convicting the accused. [35]

6. Non-production of the original F.I.R. by the Police officer and substituted by another renders the prosecution case suspicious. [36] So also where the rough notes' submitted by the constable, on the basis of which the F.I.R. was prepared, was not produced. [37]

7. Where the steps in investigation, by way of drawing inquest report *etc.* started soon which could only follow the handing over of F.I.R., the mere fact that there was delay in sending the report to the Magistrate under s. 157 would not necessarily lead to the inference that the F.I.R. was ante-dated and that the investigation was not fair or was tainted. [38]

8. FIR is not substantive piece of evidence and can only be used for corroboration of the statement of the maker under *s. 161 of the Evidence Act* or to contradict him under s. 145 of that Act . It can never be used as evidence of the maker at the trial if he himself becomes an accused to corroborate or contradict other witnesses. [39]

9. When the FIR was recorded in plain papers and not in prescribed form as it was recorded outside the police station, that fact by itself does not undermine its eventiary value. [40]

10. Not being a substantive evidence, it is only relevant for judging the veracity of the prosecution case and value to be attached to it depends upon the facts of each case. [41]

11. Where the accused was apprehended on the spot and his identity and name were disclosed in the FIR and it was disclosed that the accused was brought from the place of occurrence to the police station and handed over to the police, FIR stating all such facts corroborate the substantive evidence of the prosecution led during the trial. [42]

12. When the informant died and the FIR cannot be proved by him but by somebody else, the FIR cannot be used for the purpose of contradicting or corroborating the maker. [43]

13. When the FIR was given by a person who was not an eye-witness to the occurrence, then the variance between the statements of FIR and those of the evidence of eye-witness is not sufficient to discredit the evidence of eye-witness. [44]

14. However, FIR being the first version of the incident, though it is not a substantive evidence, the statement made therein must be given due weight. [45]

15. Even if FIR is not proved that would be no ground of acquittal of the accused if the prosecution evidence adduced proves the charge against the accused to the hilt. [46]

16. Only because there are some variations of the time of lodging the FIR, it does not *per se* render the prosecution story vulnerable. [47]

17. FIR not being encyclopedia of the whole incident only because of non-mention of the source of light at the time of incident, the omission is not fatal. This is because only broad outline of the incident was required to be noted and not the minutest details. [48]

18. F.I.R. in a criminal case specially in a murder case is a vital and valuable piece of evidence for appreciating the evidence led by the prosecution in the trial. [49]

19. F.I.R. is not substantive piece of evidence and can be used only to discredit the testimony of the maker and it cannot be utilized for contradicting or discrediting the testimony of other witness. [50]

20. Non-naming of one or few of the accused persons in the F.I.R. is no reason to disbelieve the testimony of the crucial witness. [51]

10. Delay in F.I.R.—

1. The evidentiary value of an F.I.R. will be reduced if it is made after such delay,—which is unexplained, [52] as would make it likely for the informant to concoct the story and falsely implicate his enemies. [53]

2. The real question is not mere delay but the circumstances which could suggest that is was made after consultation [54] or embellishment. [55] Where such circumstances exist, the fact that it was lodged promptly cannot rule out an embellishment in the version. [56]

3. What is sufficient explanation for the delay would also depend on circumstances, [57] *e.g.* , distance between the place of incidence and the police station; [58] fierceness of the shock to the informant; [59] the informant, father, taking the victim to hospital; [60] the informant reporting the incident promptly to the nearest police station but delay occurred in that police station to forward the information to the proper police station which was situated at some distance; [61] doubt as to cause of death, [62] the informant himself being seriously injured; [63] the incident having occurred at night; [64] and the eye-witnesses being afraid of stirring out at night. [65]

4. Similarly, whether the delay is so long as to throw a cloud of suspicion on the prosecution case would depend on a variety of factors which would vary from case to case. [66] Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies had no motive for implicating the accused. On the other hand, prompt filing of the F.I.R. is not an unmistakable guarantee of the truthfulness of the version of the prosecution. [67]

5. Whether the delay in filing the F.I.R. was unreasonable or not would depend upon the circumstances. [68] , [69]

6. Where the delay is explained by circumstances, and there is no reason to suspect its correctness, the conviction will stand. [70] Thus,—

(i) When the offence took place at night and the police station was 10 miles away, then lodging of F.I.R. within 8 hours of occurrence cannot be said to be inordinately delayed. [71]

(ii) When, in the matter of commission of murder by strangulation, the material particulars mentioned in the F.I.R. as to how the offence was committed were substantiated by the testimony of eye-witnesses and their testimony was corroborated by medical evidence and was found reliable, then the delay in filing F.I.R. was of no consequence and the offence was proved beyond reasonable doubt against some of the accused. [72]

(iii) F.I.R. containing a categorical statement that nobody came forward to accompany the complainant, the wife of the deceased, to the police station at the dark night. So, she had to wait till the morning for visiting the police station to lodge the F.I.R. In her long cross-examination no question was raised regarding delay. No suggestion was made that she was giving wrong explanation for the delay. So, there was neither any unexplained delay nor was there any requirement for explanation. [73]

(iv) Immediately after the occurrence, the deceased was taken to the hospital by the complainant and other relatives where he was declared dead. One general diary was entered on the same night which was just after a gap of two hours. Therefore, considering the normal human conduct delay of about two hours in lodging the complaint was not a factor for discrediting the prosecution case. [74]

11. Delay when fatal, when not.—

When the FIR was lodged within ten hours after the incident and place of incident is about ten miles away of the Police Station, there was no motivated delay which in not fatal for the prosecution case. [75]

Murder took place at 12 noon. The Police station was about nine miles away. Even if the son of the complainant reached the Police Station promptly, but he was made to wait till the arrival of the Inspector of the Police there and FIR was delayed. The delay has been properly explained. [76]

Mere delay in lodging FIR may not prove fatal but in the facts of the case, the Supreme Court has observed delay is one of the factors which corrodes the credibility of the prosecution case. [77]

In the case of outraging of modesty of a woman the husband and her relatives were elsewhere and not readily available. Such delay in not fatal. [78]

In the absence of a motive of falsely implicating the accused and plausible explanation had been given, the delay in lodging FIR is not fatal. [79]

Delay in lodging the FIR becomes material when it causes prejudice to the accused or where there is doubt about the prosecution case. When in the instant case, there is no allegation that the delay has prejudiced the accused and it did not cast any doubt on the prosecution case, delay can be condonable. [80]

The victim was immediately taken to the Health Centre, then to the Civil Hospital and ultimately to P.G., where the succumbed to the injuries. The relatives were all busy for the treatment of the victim. After the death of the victim the relatives went to the Police Station and lodged the FIR. So, the delay was explained and was not unreasonable. [81] The father of the victim girl having found the dead body of her married daughter in her matrimonial house at 1.00 p.m. on 08.09.1990 was terribly shocked and said that he would lodge the FIR later. He lodged the FIR on the following day narrating the incident but did not make any allegation that his daughter has been murdered. Such delay has been held to be not fatal. [82]

But when the complainant police officer living fifty yards away from the police station failed to lodge the FIR promptly, even if telephonic service was available, it was held that the delay raised doubt to the veracity of the prosecution case. [83]

The occurrence took place at about 6.00 p.m. The FIR was lodged at 2.00 a.m. The delay was caused due to medical treatment of the victim and in preparing Medico-Legal Report due to non-availability of the doctor in the hospital. The Supreme Court has held that the delay was not due to any ulterior motive and did not make the prosecution story suspect. [84]

The incident of rape took place on October 01, but was reported to the police on the 5th October. There was initial hesitation on the part of the victim's father to lodge the FIR and to give publicity to the incident as also likelihood of communal tension. The delay has been properly explained. [85]

When there was delay of only nine hours in lodging the FIR, it is held by the Supreme Court that it is not fatal for the prosecution case. [86] But when the incident took place at about 8.00 pm. and the FIR was lodged at the police station, the following day at 6.00 p.m., such delay not being explained makes the prosecution case suspect. [87]

The incident took place at 1.30 p.m. but complaint was lodged at 3.15 p.m. on the following day. Even though the police station was thirty miles away from the place of incident but the tractor was available for transport. But such transport was taken use of on the following day. There was no explanation for the delay. However, long unexplained delay renders the prosecution story doubtful. [88]

The occurrence took place at the midnight but the informant did not go to the police station promptly. He wanted till 7.00 a.m. of the following day and thereafter started to the police station to lodge the FIR. The FIR gave great details about the family affairs of the deceased. It is held that the FIR was lodged after much deliberations and cannot be held to be genuine. [89]

Even in a rape case, there was delay of 17 or 18 days to lodge the FIR but the same has been properly explained, the delay was not proved to be fatal. [90] When the FIR was lodged after eight days of the date of occurrence for which no satisfactory explanation was given, the accused appellants have been given benefit of doubt and acquitted. [91]

Incident in which death of a person occurred took place at 11.00 p.m. Dead body was lying in the house and informant and others were threatened. Informant started for the police station about eleven kilometers away. On

his way he met the S.I. of the police and reported the incident to him. FIR was recorded at 3.10 a.m. In this situation, the FIR was lodged without much delay and the prosecution case cannot be held to be suspect. [92]

Even if there was some delay in lodging the F.I.R., as three accused had put up a counter version on the incident, the delay in the F.I.R. was somewhat reduced. Moreover, the delay was properly explained. So, considering the background, delay of a couple of hours having been properly explained is not fatal. [93]

Action on the part of the PWS in giving priority to the treatment of injured deceased was wholly justifiable. Again, they were busy in intimating the son of the injured and bringing him to the hospital at the earliest possible opportunity. Therefore, delay in lodging the F.I.R. had been properly explained. [1]

When the F.I.R. was lodged seven days after the occurrence and forty days were taken to send it to the Court unexplained delay was fatal. The Appellate Court set aside the conviction of the accused on the ground of fatal delay in lodging the F.I.R. But the single Judge of the High Court set it aside and converted the acquittal with reduced sentence. The Supreme Court set aside the order and sent the matter to the High Court for considering the effect of delay. [2]

The informant, the wife of the accused, her mother and one more lady were only present in the house at the time of incident which arose out of quarrel between the accused and his wife and mother-in-law, as a result of which the accused inflicted fatal blows on the mother-in-law. None from the locality came to their rescue on hearing the hue and cry. The lady got frightened. The informant, the wife of the accused went to her father's place to inform him. As the father came late of night, F.I.R. was lodged on the next day. It is held that there was sufficient explanation for the delay. [3]

Early reporting of occurrence with all its vivid details gives assurance regarding truth of its version. But every delay in lodging FIR is not fatal. Where murder was committed in the night and the FIR was lodged next early morning, it was held by the Supreme Court that the explanation that the informant did not go to the police station out of fear because of long standing enmity, was held to be sufficient. [4] In such cases of delay the Court has to be careful to see that the proceedings are not allowed to be degenerated into weapon of harassment and persecution. But where the complaint had lost two sons in the incident and one grandson had received serious injuries, it was held that the delay in lodging FIR stood explained where complainant had gone to lodge the FIR after hospitalizing the injured. [5]

However, is a rape case, the delay of 60 hours in lodging the FIR was sought to be explained on the ground that no police officer was present at the police station and so the prosecutrix and her family had to go to another police station about 22 Kilometers away to lodge the information. It was held that the explanation was difficult to believe inasmuch as the police station initially visited was a full-fledged police station which would invariably be manned. [6]

In a case of murder, where the FIR was lodged by the father of the deceased woman only after her cremation, it was found that the father of the deceased had only been informed that his daughter had consumed poison. No other detail was brought to his notice and the body was cremated against his wishes. Thus, the Supreme Court held that the delay stands explained. [7]

Where the brother of the deceased lady was an eye witness to murder by her father-in-law the delay in lodging the FIR was occasioned due to threat administered to the informant. Due to threat, the informant preferred go back to his village and the FIR was lodged after he returned with others. It was held that the delay of a few hours in lodging the FIR cannot be termed as fatal to the prosecution. [8]

In a murder case, the FIR was lodged after delay by the informant who had witnessed the murder. The evidence of the informant showed that he was threatened by the accused persons. It was held that the possibility of the informant being afraid of the threat cannot be ruled out as every human being would not react in the same manner when he sees commission of an offence. The informant talked to the parents of the deceased on phone and evidence showed that the parents of the deceased asked him toawait their arrival and thereafter the informant gathered courage to lodge FIR after consultation with them. Thus, the delay was held to have been reasonably explained. [9]

Where an incident of murder happened at 2-30 p.m. and the police arrived at the scene an hour later, it was found that the deceased had received as many as 58 injuries, most of which were incised and cutting wounds with profuse bleeding. Therefore, the first anxiety of everybody, including attendants and doctors, was to take the injured to hospital. It was held that the formal report lodged at 7-15 p.m. and immediately forwarded to Magistrate who received it at 10.00 p.m., cannot be said to be lodged after delay. [10]

12. F.I.R. and Identification.—

1. Omission to name the accused or to describe his identity in the F.I.R., where at least one of the eye-witnesses could be expected to have known him would not discredit his identification of the accused a long time thereafter [11] but would demolish the case against the accused. [12] In such a case, a conviction cannot stand solely on the evidence as to identification. [13]

2. The evidence of test identification is admissible under *s. 9 of the Evidence Act* , but any unreasonable and unexplained delay in holding the identification parade after arrest of the accused detracts from the value or credibility of the identification. [14]

13.Duty of police to record F.I.R. —

1. An FIR has to be given to the officer in charge of the police station and he cannot refuse to record it. When he does, the High Court directs the officer-in-charge to record it even if it was directed against a sub-inspector of Police. [15]

2. It has to be recorded without delay. [16] It cannot be refused on extraneous ground. [17]

3. Once an FIR is laid before a police officer in compliance with the requirements of *s. 154 Cr.P.C.* , the police officer is obliged to enter it in the prescribed form and register it and investigate the case.[18]

4. Non-registration of the FIR by the officer-in-charge of the police station amounts to dereliction of duty because he is duty bound to register it and if he fails in his duty, the High Court directs the Superintendent of Police to get a case registered on the basis of the allegations of the petitioner and the annexed petition of complaint and to get it investigated by senior Superintendent of Police. [19]

5. When the police officer did not register a case but claimed that he had started investigating the case, the Supreme Court directed the police to first register the case and then duly investigate it in accordance with the rules. [20]

6. As the police is duty bound to register the case, if the FIR disclosed a cognizable offence genuineness or credibility of the complaint was not to be looked into. If he fails to perform his mandatory duty, the High Court by a writ of mandamus can direct him to register the FIR and start investigating the case. [21]

Genuineness or credibility of the information is not a condition precedent to the registration of the case. [22]

In a P.I.L. inaction of police to record the F.I.R. and in cases F.I.R.s are recorded on Court apathy of police to investigate the case is disclosed. So, the Supreme Court in order to curb this malady proposed to issue stringent direction pinning responsibility of police authorities to act promptly or to face contempt or disciplinary action including suspension. Before doing that the Supreme Court issued notes to the State Governments and Union Territory, D.G.s of Police and Commissioner of Police for ascertaining their views before issuing proposed directions. [23]

The police on refusing to record the F.I.R. of the rape victim directed to settle the matter amicably with the accused. Only when the Magistrate under s. 156(3) *Cr.P.C.* directed the police to record the F.I.R., the F.I.R. was recorded. In the meantime, six months have passed and delay was made to send the victim for medical examination. As a result, the valuable medical evidence is lost. The attitude of police was deplored by the Supreme Court.[24]

14. Preliminary enquiry before registration of case.—

When an anonymous complaint was received against a member of a Special Police Force alleging corruption against him, a preliminary enquiry may be undertaken by the police before deciding to lodge the FIR and not to initiate the investigation immediately on receiving such anonymous complaint. [25]

So, in appropriate cases, the police officers do have duty to make a preliminary enquiry so as to find out whether the allegations made have any substance or not. [26]

15. Lack of territorial jurisdiction.—

The Police cannot refuse to record F.I.R. on the ground that the concerned Police-station has no territorial jurisdiction over the place of crime. The proper course will be to record the information and forward the same to the Police-station having jurisdiction. [27]

16. Punishment for refusal to sign the F.I.R.—

Since s. 154(1) requires the informant to sign the F.I.R. after it is read over, an informant who refuses to sign it when asked by the officer-in-charge of the Police station, he may be liable to punishment under s. 180, I.P.C.

17. Sub-sec. (2) : Right of informant to copy.—

This *new* sub-section has been introduced for the convenience of reference of the informant. Read with sub-sec.(1), the duties of the officer-in charge of a Police station in regard to an F.I.R. are—

(a) He has to reduce the oral information into writing by his own hand or under his direction; (b) He is to read over to the informant the information so recorded; (c) He is then to obtain the signature of the informant on the F.I.R. so recorded and read over; (d) He is then to cause the substance of the F.I.R. to be entered in a book (called the General Diary); (e) He is to deliver a copy of the F.I.R. free of cost, to the informant, immediately after the preceding formalities are over.

18. Right of accused to copy of F.I.R.—

Section 207(ii), *post,* gives the accused right to receive a copy, free of cost, of the F.I.R. (along with other documents) form the Magistrate where a case has been instituted on a Police report.

19. Delay in sending copy of F.I.R. to Magistrate.—

The copy of the F.I.R. is to be sent to the Magistrate promptly. Even in such case the delay, if properly explained, will not be fatal. [28] Even when the Magistrate receiving the copy makes the endorsement but does not put in his seal, that will not affect the authenticity of the F.I.R. [29]

20. Delay in sending FIR when fatal or when not.—

The delay in dispatching of the copy of the FIR to the Magistrate is not held to be fatal to the prosecution case unless prejudice is shown to the accused by such delay. In the facts of the case, the Supreme Court did not accept the plea of the defence that the sending of the report was delayed in order to introduce some improvement, embellishment or distorted version of the occurrence. [30]

A delay of a few hours in dispatching the copy of the FIR to the Magistrate does not make the prosecution story given in the FIR suspect. [31] The Supreme Court has pointed out that the delay in sending the copy of the FIR to the Magistrate would not demolish other positive and credible evidence on record and this delay only shows carelessness on the part of the investigating agency to dispatch the copy of the FIR to the Magistrate promptly. [32]

Consequently delay in dispatching the FIR would not be fatal when the FIR is otherwise reasonable and trustworthy. [33]

There was 17 victims and the police after the FIR was lodged was making inquest and there was, therefore, a few hours delay in dispatching copy of the FIR of such a serious crime. Therefore, the delay in dispatching the copy of the FIR to the Magistrate has been properly explained. [34]

An FIR was recorded at 9.00 p.m. and copy of which reached the Court of the Magistrate on the next day at 1.30 p.m. So, it cannot be held that there was any delay in sending the copy of the FIR to the Magistrate. [35]

The delay in forwarding the FIR to the Magistrate was not found to be fatal for the prosecution case. The prosecution case has been established by reliable evidence. [36]

When copy of F.I.R. was sent to the Magistrate after four days and the said delay was not explained, so the requirement of *s. 157 Cr.P.C.* were not satisfied.[37]

21. Sub-sec.(3).—

Under the *old* Code, an informant had no remedy from a superior Police officer if the officer-in-charge of a Police station capriciously refused to record his information in accordance with sub-sec. (1).

The deficiency of the law is sought to be removed by *new* sub-sec. (3), which has been introduced in the legislative stage, to provide that an informant, who is aggrieved by the refusal of the officer-in-charge of a Police station to record an F.I.R. under s. 154(1), may communicate by post the *substance* of such information to the Superintendent of Police of the district, who would then play the part of an officer-in-charge of a Police station for the purpose of investigating the offence alleged in such communication.

What the Superintendent of Police is to do on receipt of the communication is : (a) to be satisfied that the information received through post disclosed the commission of a cognizable offence; (b) if so satisfied, he would start the investigation himself or direct a subordinate Police officer to make it. The provisions of s s. 156*et seq* will then apply to such investigation.

22. Ss. 36 and 154 : Power of superior Police officers.—

1. Even under the *old* Code, there was a provision in s. 551, which empowered all Police officers superior to an officer-in-charge of a Police station to exercise all the powers conferred by the Code upon the officer-in-charge of a Police station,—within their respective jurisdiction. This provision has been reproduced in s. 36 of the *new* Code, which has already been noticed.

2. It has been held that the foregoing provision would extend also to the provision relating to investigation contained in s s. 154*et seq.* In the result, if an informant approaches a superior Police officer direct, instead of going to the officer-in-charge of the local Police station, it would be lawful for such superior officer to entertain and record that F.I.R. under s. 154 and start investigation under S s. 156-157. [38]

3. Hence, it has been held that the following officers, who are ‘superior in rank’ new to an officer-in-charge of a Police station according to the relevant Service Rules, would be competent to record an F.I.R. and either to investigate or to direct investigation by a subordinate Police officer into the cognizable offence disclosed by the information so recorded :

   I.G.P. or Additional I.G.P.; [39] Deputy Superintendent of the C.I.D. [40] or an Inspector of Police of the C.I.D.; [41] Special Police Officer appointed under the Suppression of Immoral Traffic in Women

and Girls Act, 1956. [42]

4. It has further been held that there is nothing wrong if an informant sends a written complaint to the Chief Minister and he hands it down to a superior Police Officer, recording such complaint as F.I.R. [43]

23. An FIR if ante-timed or ante-dated.—

Whether the FIR was ante-timed or antedated has to be decided on the basis of the external checks. When the site map was prepared by the I.O at the spot in presence of the informant giving crime number and G D Entry maintained by the Police Station gave all relevant contents of the FIR are sufficient checks to indicate that the FIR was neither ante-timed nor ante-dated. Non mention of the name of the accused who hurled bomb on the deceased after the first informant left for the Police Station to lodge an FIR clearly supports the view that the FIR was neither ante-timed nor ante-dated. [44]

The FIR had cast a serious doubt on the correctness of the FIR specially its time and date of recording. All these would support the defence version that the FIR in which the names of all the accused persons have been mentioned would have come into existence much later. [45]

Case is based on evidence of the illiterate rustic lady, it cannot be accepted that because of minor variance of her statement when her evidence was recorded long after would not be sufficient to held that the FIR was ante-timed or ante-dated. [46]

F.I.R. was lodged one and half hours after the occurrence. Only because the complainant made a delayed F.I.R. it cannot be said that it was lodged after deliberation with others. Only because the copy of the F.I.R. was sent to *Ilaqua* Magistrate on next Monday, on the following the lodging of F.I.R. which was a Sunday, the F.I.R. cannot be treated as ante-time or ante-dated. [47]

The informant alone rushed to the Police Station 9 km away from the place of occurrence by bi-cycle and lodged a written F.I.R. within one and half hours of the incident. In such a case, stating details of incident in written F.I.R. is neither unnatural nor unusual. There was nothing artificial in the F.I.R. Moreover, inquest report prepared later also refers to lodging of F.I.R. Merely because crime no. is not mentioned in it or one person was arrested from the place of occurrence at 3-00 p.m. by the Investigating Officer in connection with another case would not militate against the time of F.I.R. as shown in the police papers. Hence, the F.I.R. is neither ante-timed nor ante-dated. [48]

24. Incident took place at duck.—

The police jeeps carrying at a dead body broke down at about 3-4 Kms. Away from the hospital town and that was why the delay in lodging the FIR took a day such explanation is acceptable and only because there was delay, he cannot be held that the FIR was ante-timed. [49]

The FIR was lodged at 00.25 hours on 13.04.1992. It was received by the Judicial Magistrate only on 18.04.1992. The only explanation offered was that the same was sent through a Circle Inspector and not

directly. No explanation was furnished as to why he did not act responsibly. The statement of a person who accompanied the complainant to the Police Station when the FIR was lodged was not recorded by the Police and the provisions of the U.P. Police Regulations were not complied with. So, the finding of the Trial Court that there was possibility of the FIR being ante-timed has been upheld. [50]

The occurrence took place on 27.06.1995 in the morning and witnesses were examined by the I.O. on the very day. Post mortem examination was held on 3.00 p.m. on that date. The Magistrate also received the copy of FIR but made a mistake on putting of relevant date as 26-06-1995 instead of 27.06.1995. Therefore, the contention that the FIR was ante-timed and ante-dated was not maintainable. [51]

It is alleged by the defence that the FIR was made 15 days after the incident. The incident took place on 13.10.1988. Evidence of the Doctor of the Hospital indicates that on 01.11.1988, he on medically examined the victim who was brought to the hospital by a constable. The requisition slip carried by the constable indicated that the FIR was recorded on 01.11.1988 when the victim and his wife were brought to the hospital for treatment. In the circumstances, it cannot be held that the FIR was ante-timed. [52]

The defence took the plea that the FIR was ante-timed. In such a case, the General Policy Diary ought to have been produced. The copy of the FIR was sent to the Circle Inspector after four days and the Court of the Magistrate after eight days of the incident. So, the production of G.D. Diary wherein the FIR was required to be taken down was necessary when it was alleged to be ante-timed. Therefore, there is substance in the defence version that the FIR was ante-timed. [53]

25. Inherent power to quash proceedings.—

1. When a prosecution has been instituted on the foundation of an F.I.R. which *prima facie* does not disclose an offence as alleged, [54] , [55] or there is a legal bar or its continuation would be an abuse of the process of Court. [56] The High Court may quash the proceedings, in exercise of its inherent power under s. 482. [57] This power may be exercised after taking cognizance, by an interlocutory order. [58]

2. But it would be an arbitrary exercise of this extraordinary power at a stage when not even investigation by the Police has been started on the basis of the F.I.R.,—not to speak of proceedings in Court. [59] The reason is that the jurisdiction of the Court does not extend to any stage before the Police prefers a charge in exercise of their statutory right to investigate. [60] In short, the Court has no jurisdiction to interfere with investigation proceedings on an appraisal of the statements made in the F.I.R. or the evidence collected by the Police, at the investigation stage, [61] or even on the ground of absence of jurisdiction. [62]

3. To the rule, just stated, that the Court has no power to interfere with investigation by the Police into a cognizable offence, the following exceptions have been acknowledged :

   (a) In case of *mala fide* use of the statutory power conferred on the Police by ss. 156-157 of the Code, the High Court may, under *Art. 226 of the Constitution* , issue a writ of *mandamus* restraining the Police officer from misusing his legal powers. [63]

   But a prosecution which is otherwise valid does not become vitiated by reason of the *mala fides* or political vendetta of the informant or the complainant. [64]

(b) Though a Magistrate has no power to *stop* investigation by the Police in a cognizable case, in case the Police decides not to investigate under the Proviso to s. 157(1), the Magistrate, on receipt of such report from the Police under s. 157(1) may either direct an investigation by the Police or to make or order a preliminary judicial inquiry [s. 159]. In short, while the power of the Police *to* investigate is independent of any control by the Magistrate, the discretionary power of the Police *not* to investigate may be overridden by the Magistrate exercising his powers under s. 159, read with s. 156(3). [65]

4. Proceedings may also be quashed where it violates the guarantee of speedy trial under *Art. 21 of the Constitution* . [66]

26. Rights of the first informant.—

The informant who lodges the F.I.R. with the Police does not fade away with the lodging of the F.I.R. He is vitally interested as to what act ion is taken by the Police on receipt of the F.I.R. as well as in the subsequent proceedings to ascertain if any offence has been committed and if so, what action should be taken against the offender. The Code, therefore, lays down several provisions to keep him informed at various stages :

(i) As soon as the F.I.R. is lodged, the informant is entitled to get a copy of the F.I.R. free to cost [s. 154(2)].

(ii) If the Officer-in-charge of the Police Station on receipt of F.I.R. decides *not* to investigate the case because it appears to him that there is no sufficient ground for entering on an investigation, the Officer-in-charge must notify to the informant that he would not investigate the case [s. 157(2)].

(iii) After the investigation is complete, the Officer-in-charge shall forward to the Magistrate his report. At this stage he must communicate to the informant the act ion taken by him [s. 173(2)(ii)], which means that a copy of the report made under s. 173(2)(i) must be supplied to the informant. [67]

(iv) The Supreme Court has further held [68] that when the Magistrate, after considering the Police report under s. 173(2)(i), is not inclined to take cognizance of the offence and issue process, or that there is sufficient case for proceeding against some of the accused mentioned in the F.I.R., the Magistrate should (a) give notice to the informant, and (b) provide him an opportunity to be heard at the time of consideration of the Police report so that the informant may make his submissions to persuade the Magistrate to take cognizance of the offence. [69]

27. S s. 154 and 161.—

1. The F.I.R. is to be distinguished from information received *after* commencement of the investigation which is covered by s s. 161-162. [70]

2. A statement if eye-witnesses recorded by a Police officer immediately on reaching the scene of occurrence cannot be used as F.I.R. [71] That would not, however, detract the testimony of the eye-witnesses,' which will have to be tested on its own merits.

3. When the Investigating Officer *deliberately* did not record the F.I.R. after receipt of information of a cognizable offence and recorded the complaint only after going to the spot and after due deliberation,

consultation and discussion, such complaint could *not* be treated as F.I.R. as it would be a statement made during investigation and would be hit by *s. 162,Cr.P.C.* [72]

28. S s. 154 and 173(2).—

As to the right of the informant [73] who has lodged the F.I.R. after the Magistrate receives report of the Police investigation under s. 173(2), see under s. 173(2),*post* .

29. S. 154 and Art. 20(3) of the Constitution.—

Formal 'accusation' in a criminal proceeding starts with the F.I.R. Hence, a person whose name is mentioned in the F.I.R. as the suspected accused, is entitled to the protection of *Art. 20(3) of the Constitution* from that stage onwards. [74]

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10 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 13 (w.e.f. 3-2-2013).

11 *Sirajuddin v. State of Madras,* (1970) 1 SCC 595 [*LNIND 1970 SC 112*] (para 19) : AIR 1971 SC 520 [*LNIND 1970 SC 112*]: 1971 Crlj 523 .

12 *Apren v. State of Kerala,* AIR 1973 SC 1 [*LNIND 1972 SC 411*](para 11) : (1973) 3 SCC 114 [*LNIND 1972 SC 411*] : 1973 Crlj 185 ; *Emp. v. Khwaja,* AIR 1945 PC 18 ; *Thevar v. State of T.N.,* (1973) 3 SCC 680 (para 7) : AIR 1973 SC 659 : 1973 Crlj 602.

13 *Khan v. State,* AIR 1962 Cal 641 [*LNIND 1962 CAL 31*].

14 *Apren v. State of Kerala,* AIR 1973 SC 1 [*LNIND 1972 SC 411*](para 11) : (1973) 3 SCC 114 [*LNIND 1972 SC 411*] : 1973 Crlj 185 .

15 *Tarachand v. State of Haryana,* (1971) 2 SCC 579 : AIR 1971 SC 1891 : 1971 Crlj 1411. (584)

16 *Apren v. State of Kerala,* AIR 1973 SC 1 [*LNIND 1972 SC 411*](para 11) : (1973) 3 SCC 114 [*LNIND 1972 SC 411*] : 1973 Crlj 185 .

17 *Chandra v. State of U.P.* , AIR (1971) 3 SCC 983 (para 4).

18 *Hallu v. State of M.P.,* AIR 1974 SC 1936 1938 : (1974) 4 SCC 300 : 1974 Crlj 1385 .

19 *Chandra v. State of U.P.* , AIR (1971) 3 SCC 983 (para 4).

20 *Gopal v. State,* 1997 Crlj 2425 Bom .

21 *Budh Singh v. State of M.P,* (2007) 10 SCC 496 [*LNIND 2007 SC 731*] : (2008) 1 SCC 64 (Cri) ; *Baldev Singh v. State of Punjab,* (1995) 6 SCC 593 [*LNIND 2013 SC 852*] : 1995 SCC (Cri) 1132 : AIR 1996 SC 372 [*LNIND 2013 SC 852*] .

22 *Sujoy Sen v. State of W.B.,* (2007) 6 SCC 32 : (2007) 3 SCC 47 (Cri) : 2007 Crlj 3727 .

23 *Ashram v. State of M.P.,* (2007) 11 SCC 164 [*LNIND 2007 SC 534*] : AIR 2007 SC 2594 [*LNIND 2007 SC 534*] . See also *Bable @ Gurdeep Singh v. State of Chhattisgarh,* AIR 2012 SC 2621 [*LNIND 2012 SC 394*] .

24 *Mohilal v. State of U.P.,* AIR 2010 SC 281 [*LNIND 2009 SC 2053*]: (2010) 1 SCC 581 [*LNIND 2009 SC 2053*] .

25 *D.P. Tiwari v. State of Maharashtra,* AIR 2010 SC 361 [*LNIND 2009 SC 2091*] : (2010) 1 SCC 775 [*LNIND 2009 SC 2091*].

26 *Alagarasamy v. State by D.S.P.,* AIR 2010 SC 859.

27 *Manimohon v. Emp.,* AIR 1931 Cal 745.

28 *State v. Dewari,* (1976) Crlj 262 (Or) DB.

29 *Belurkar v. State of Maharashtra,* (1975) Crlj 517 (para 10) Bom (FB).

30 *Momin* , AIR 1928 Cal 771 ; *Srimanta* , AIR 1960 Cal 519 [*LNIND 1959 CAL 3*]; *Nardeo* , AIR 1953 All 726 [*LNIND 1953 ALL 124*].

31 *Kapur v. Pratap Singh,* AIR 1961 SC 1117 1121 : (1961) 2 Crimes 161.

32 *Soma v. State of Gujarat,* AIR 1975 SC 1453 [*LNIND 1975 SC 183*](para 18) : (1975) 4 SCC 257 [*LNIND 1975 SC 183*] : 1975 Crlj 1201.

33 *Soma v. State of Gujarat,* AIR 1975 SC 1453 [*LNIND 1975 SC 183*](para 18) : (1975) 4 SCC 257 [*LNIND 1975 SC 183*] : 1975 Crlj 1201.

34 *Tapinder v. State of Punjab,* AIR 1970 SC 1566 1569 : (1970) 2 SCC 113 : 1970 Crlj 1415 : *State of U.P. v. Madhu,* AIR 1984 SC 1523 [*LNIND 1984 SC 170*]: (1984) 4 SCC 83 [*LNIND 1984 SC 170*] : 1984 Crlj 1438.

35 *Patai v. State of U.P.,* AIR 2010 SC 2254 [

LNIND 2010 SC 292]:
(2010) 4 SCC 429 [
LNIND 2010 SC 292]. See also *Surajit Sarkar v. State of West Bengal,*
AIR 2013 SC 807 [
LNINDORD 2012 SC 361].

36 *State of Bombay v. Rusy,*
AIR 1960 SC 391 : 1960 Crlj 532.

37 *State of Bombay v. Rusy,*
AIR 1960 SC 391 : 1960 Crlj 532.

38 *Sat Kumar v. State of Haryana,*
AIR 1974 SC 294 (para 11) :
(1974) 3 SCC 643 :
1974 Crlj 345 .

39 *Paresh v. Sadiq,*
(1993) Crlj 1857 (SC) :
AIR 1993 SC 1544 [
LNIND 1993 SC 264]:
(1993) 3 SCC 95 [
LNIND 1993 SC 264].

40 *Hallu v. State of M.P.,*
AIR 1974 SC 1936 [
LNIND 1974 SC 108](para 7); *Apren v. State of Kerala,*
AIR 1973 SC 1 [
LNIND 1972 SC 411](para 11) :
(1974) 1 SCC 19 [
LNIND 1973 SC 291]; *Nankhu v. State of Bihar,*
(1972) 3 SCC 590 (para 7) :
AIR 1973 SC 491 .

41 *Hallu v. State of M.P.,*
AIR 1974 SC 1936 [
LNIND 1974 SC 108](para 7).

42 Cf. *Shivaji v. State of Maharashtra,*
(1973) 3 SCC 219 [
LNIND 1972 SC 453] (para 15) :
AIR 1973 SC 55 [
LNIND 1972 SC 453]:
1973 Crlj 159 ; *Awadhi v. State of Bihar,*
(1971) 3 SCC 116 (para 9) :
AIR 1971 SC 69 : 1971 Crlj 23.

43 *Thevar v. State of T.N.,*
(1973) 3 SCC 680 (para 7) :
AIR 1973 SC 659 : 1973 Crlj 602.

44 *Veeramuthu v. State of Madras,*
(1971) 1 SCC 427 (para 17).

45 *Dal* *Singh* ,
AIR 1917 PC 25 .

46 *Aghnoo* *v.* *State* *of* *Bihar,*
(1965) 2 SCWR 750 (*see post*).

47 *Faddi* ,
AIR 1964 SC 1850 [
LNIND 1964 SC 13]:
(1964) 6 SCR 312 [
LNIND 1964 SC 13] :
(1964) 2 Crimes 744 .

48 *Soma* *v.* *State* *of* *Gujarat,*
AIR 1975 SC 1453 [
LNIND 1975 SC 183](para 18) :
(1975) 4 SCC 257 [
LNIND 1975 SC 183] :
1975 Crlj 1201 .

49 *State* *v.* *Rajan,*
(1994) Crlj 1042 (Kant) (paras 38-39).

50 *Manimohon* *v.* *Emp.,*
AIR 1931 Cal 745 .

51 *Manimohon* *v.* *Emp.,*
AIR 1931 Cal 745 .

52 *Shyam* , (1953) 33 Pat 122.

53 *Khan* *v.* *State,*
AIR 1962 Cal 641 644 .

54 *Liyakat* *v.* *State* *of* *Bihar,*
(1973) 4 SCC 39 (para 7) :
AIR 1973 SC 807 : 1973 Crlj 584.

55 *Jagdip* *v.* *State* *of* *Haryana,*
AIR 1974 SC 1978 (para 9) :
(1975) 3 SCC 133 :
1974 Crlj 1378 .

56 *A Venkata Rawana* *v.* *Public* *Prosecutor,*
AIR 2008 SC 1603 [
LNIND 2008 SC 599]:
(2008) 5 SCC 368 [
LNIND 2008 SC 599] :
(2008) 2 SCC 600 (Cri) :
2008 Crlj 2038 SC .

57 *Bhopat v. state of Maharashtra,* AIR 1973 SC 446 : (1972) 3 SCC 367 : 1973 Crlj 343 .

58 *Narayana v. State of A.P.,* AIR 1975 SC 1252 [*LNIND 1975 SC 147*](para 9) : (1975) 4 SCC 153 [*LNIND 1975 SC 147*] : 1975 Crlj 1062 .

59 *Shivaji v. State of Maharashtra,* AIR 1973 SC 446 447 : (1972) 3 SCC 367 : 1973 Crlj 343 .

60 *Bishan v. State of Punjab,* AIR 1975 SC 461 (para 5); *Liyakat v. State of Bihar,* (1973) 4 SCC 39 (para 7) : AIR 1973 SC 807 : 1973 Crlj 584; *Thakur Prasad v. State of M.P.,* AIR 1954 SC 30 : 1954 Crlj 261; *Pandurang v. state of Hyderabad,* AIR 1955 SC 216 219 : 1955 Crlj 572; *Bharvad v. State of Gujarat,* (1971) SCC 500 (Cr) ; *Kartar v. State of Punjab,* AIR 1977 SC 214 (para 6).

61 *Bishan v. State of Punjab,* AIR 1975 SC 461 (para 5); *Liyakat v. State of Bihar,* (1973) 4 SCC 39 (para 7) : AIR 1973 SC 807 : 1973 Crlj 584; *Thakur Prasad v. State of M.P.,* AIR 1954 SC 30 : 1954 Crlj 261; *Pandurang v. state of Hyderabad,* AIR 1955 SC 216 219 : 1955 Crlj 572; *Bharvad v. State of Gujarat,* (1971) SCC 500 (Cr) ; *Kartar v. State of Punjab,* AIR 1977 SC 214 (para 6).

62 *State of U.P. v. Sughar,* (1978) UJSC 20.

63 *Bhakla v. State of M.P.,* (1973) 3 SCC 672 (para 13) : AIR 1972 SC 2576 : 1973 Crlj 39.

64 *Tapinder v. State of Punjab,* AIR 1970 SC 1566 [*LNIND 1970 SC 269*](para 4) : (1970) 2 SCC 113 [*LNIND 1970 SC 269*] : 1970 Crlj 1415 ; *Sakharam v. State of Maharashtra,* (1969) 3 SCC 730 [*LNIND 1969 SC 504*] (para 6) : 1969 UJ 423 .

65 *Shyam* , (1953) 33 Pat 122.

66 *Narpal v. State of Haryana,* (1977) Crlj 642 (para 10) SC; *Bharat v. State of U.P.,* (1973) 3 SCC 896 [*LNIND 1972 SC 440*] (para 8).

67 *Pandurang v. State of Hyderabad,* AIR 1955 SC 216 [LNIND 1954 SC 171] (1955) 1 SCR 1083 [LNIND 1954 SC 171] 1955 Crlj 572.

68 *Narpal v. State of Haryana,* (1977) Crlj 642 (para 10) SC; *Bharat v. State of U.P.,* (1973) 3 SCC 896 [LNIND 1972 SC 440] (para 8).

69 *Bishan v. State of Punjab,* AIR 1975 SC 461 (para 5).

70 *Narpal v. State of Haryana,* (1977) Crlj 642 (para 10) SC; *Bharat v. State of U.P.,* (1973) 3 SCC 896 [LNIND 1972 SC 440] (para 8).

71 *Pandurang v. State of Hyderabad,* AIR 1955 SC 216 [LNIND 1954 SC 171] (1955) 1 SCR 1083 [LNIND 1954 SC 171] 1955 Crlj 572.

72 *Bhopat v. State of Maharashtra,* AIR 1973 SC 446 : (1972) 3 SCC 367 : 1973 Crlj 343.

73 *State of U.P. v. Bhagwant,* AIR 1964 SC 221 224 : (1964) 1 Crlj 140; *State of Kerala v. Samuel,* AIR 1961 Ker 99 [LNIND 1960 KER 202].

74 *Abdul v. State of M.P.,* AIR 1954 SC 31 : 1954 Crlj 323.

75 *Bhopat v. State of Maharashtra,* AIR 1973 SC 446 447 : (1972) 3 SCC 367 : 1973 Crlj 343.

76 *Vijay Shanker v. State,* 1989 Crlj NOC 151MP : 1989 MP LJ 276.

77 *Balram v. State,* 1994 SCC (Cri) 37 : (1993) 1 Crimes 1195.

78 *Golla Jalla Reddy v. State of Andhra Pradesh,*
(1996) 8 SCC 565
LNIND 1996 SC 2944
1996 SCC (Cri) 713
LNIND 1996 SC 2944
1996 Crlj 2470
AIR 1996 SC 3244
LNIND 1996 SC 2944
].

79 *Damodar v. State of Rajasthan,*
AIR 2003 SC 4414
LNIND 2003 SC 803
2003 Crlj 5014
(2004) 12 SCC 336
LNIND 2003 SC 803
].

80 *Joydev v. State of West Bengal,*
1999 Crlj 1816
.

81 *State of Gujrat v. Anirudh Singh,*
AIR 1997 SC 2780
LNIND 1997 SCDRCHYD 22
1997 Crlj 218
(1997) 6 SCC 514
LNIND 1997 SCDRCHYD 22
].

82 *Sukanto Behera v. State,*
1998 Crlj 194
Ori .

83 *C.V. Govindappa v. State,*
AIR 1998 SC 792
LNIND 1998 SC 98
1998 Crlj 1107
.

84 *Binay Kumar Singh v. State of Bihar,*
AIR 1997 SC 322
LNIND 1996 SC 2707
(1997) 1 SCC 283
LNIND 1996 SC 2707
1997 SCC (Cri) 333
LNIND 1996 SC 2707
1997 Crlj 362
.

85 *Damodar Prasad v. State of Maharashtra,*
(1972) 1 SCC 107
LNIND 1971 SC 607
] (para 13).

86 *Kari Choudhary v. Sita Devi,*
AIR 2002 SC 441
2003 SCC (Cri) 923
2002 Crlj 923
: (2002) 1 SCC 714 :
.

87 *Upkar Singh v. Ved Prakash,*
AIR 2004 SC 4320
LNIND 2004 SC 911

(2004) 13 SCC 292 [
LNIND 2004 SC 911] :
2005 SCC (Cri) 211 [
LNIND 2004 SC 911] :
2004 Crlj 4219 .

88 *Mani* *v.* *State*
1987 Crlj 1965 Ker .

1 *Nanku Singh v. State of Bihar,*
AIR 1973 SC 491 : 1972 Crlj 1204 :
(1972) 3 SCC 590 .

2 *Hallu v. State of M.P.,*
AIR 1974 SC 1936 [
LNIND 1974 SC 108]:
1974 Crlj 1385 :
(1974) 4 SCC 300 [
LNIND 1974 SC 108].

3 *Aghnoo v. State of Bihar,*
AIR 1966 SC 119 [
LNIND 1965 SC 155]:
1966 Crlj 100 .

4 *Bandlamuddi Atchuta Ramaiah v. State of A.P.,*
AIR 1997 SC 496 : (1996) 11 SCC 133 :
1997 SCC (Cri) 128 :
1998 Crlj 4463 .

5 *Ratanchand v. State,*
AIR 1960 Bom 146 148 [
LNIND 1959 BOM 37]; *Hasan v. State of Gujarat,*
AIR 1962 Guj 214 [
LNIND 1961 GUJ 15].

6 *Hasan v. State of Gujarat,*
AIR 1962 Guj 214 [
LNIND 1961 GUJ 15].

7 *Apren v. State of Kerala,*
AIR 1973 SC 1 [
LNIND 1972 SC 411](para 11) :
(1973) 3 SCC 114 [
LNIND 1972 SC 411] :
1973 Crlj 185 .

8 *Apren v. State of Kerala,*
AIR 1973 SC 1 [
LNIND 1972 SC 411](para 11) :
(1973) 3 SCC 114 [
LNIND 1972 SC 411] :
1973 Crlj 185 ; *Nisar Ali v. State of U.P.,*
AIR 1957 SCR 657 : 1957 Crlj 550.

9 *Apren* *v.* *State* *of* *Kerala,*
AIR 1973 SC 1
LNIND 1972 SC 411
(1973) 3 SCC 114
LNIND 1972 SC 411
1973 Crlj 185
[
](para 11) :
[
] :

10 *Nisar* *Ali* *v.* *State* *of* *U.P.,*
AIR 1957 SCR 657 : 1957 Crlj 550.

11 *Mohar* *v.* *State,*
AIR 1968 SC 1281
LNIND 1968 SC 82
(1968) 3 SCR 525
LNIND 1968 SC 82
1968 Crlj 1479 .
[
](para 10) :
[
] :

12 *Apren* *v.* *State* *of* *Kerala,*
AIR 1973 SC 1
LNIND 1972 SC 411
(1973) 3 SCC 114
LNIND 1972 SC 411
1973 Crlj 185
[
](para 11) :
[
] :

13 *Shanker* *v.* *State* *of* *U.P.,*
AIR 1975 SC 757
(1975) 3 SCC 851
1975 Crlj 634 .
(para 11) :
:

14 *Nisar* *Ali* *v.* *State* *of* *U.P.,*
AIR 1957 SC 366
LNIND 1957 SC 17
(1957) SCR 657
LNIND 1957 SC 17
1957 Crlj 550 .
[
]:
[
] :

15 *Nisar* *Ali* *v.* *State* *of* *U.P.,*
AIR 1957 SC 366
LNIND 1957 SC 17
(1957) SCR 657
LNIND 1957 SC 17
1957 Crlj 550 .
[
]:
[
] :

16 *Mohar* *v.* *State,*
AIR 1968 SC 1281
LNIND 1968 SC 82
(1968) 3 SCR 525
LNIND 1968 SC 82
1968 Crlj 1479 .
[
](para 10) :
[
] :

17 *Mohar* *v.* *State,*
AIR 1968 SC 1281
LNIND 1968 SC 82
(1968) 3 SCR 525
[
](para 10) :
[

LNIND 1968 SC 82] :
1968 Crlj 1479 .

18 *Faddi v. State of M.P.,*
(1964) 6 SCR 313 .

19 *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

20 The only exception to Section 25 is Section 27, where that section is applicable [*ibid*].

21 *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

22 *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

23 *Shanker v. State of U.P.,*
AIR 1975 SC 757 (para 11) :
(1975) 3 SCC 851 :
1975 Crlj 634 ; *Faddi v. State of M.P.,*
1964 6 SCR 313 .

24 *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

25 *Sahaj v. State of U.P.,*
(1973) 1 SCC 490 (para 14).

26 *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

27 *Emp* . v. *Md.* , AIR 1943 Cal 173 ; *Lalaram v. State,* AIR 1953 MB 249 .

28 *Jangir v. State of Haryana* , (1993) Supp (2) SCC 632.

29 *Ram v. State of M.P.,* AIR 1975 SC 1026 [*LNIND 1975 SC 57*]: (1975) 3 SCR 519 [*LNIND 1975 SC 57*] : (1975) 3 SCC 815 [*LNIND 1975 SC 57*] : 1975 Crlj 870 .

30 *Nawratan v. State of Bihar,* (1979) Crlj 1295 (para 2); *State of U.P. v. Hari,* (1983) Crlj 1683 (SC) .

31 *Gurnam v. Bakshish,* AIR 1981 SC 631 [*LNIND 1980 SC 415*]: 1980 Supp SCC 567 : 1981 Crlj 34 .

32 *Eqbal v. State of A.P.,* AIR 1987 SC 923 (para 6) : (1986) 2 SCC 476 : 1987 Crlj 838 .

33 *Darshan v. State of Punjab,* (1983) Crlj 235 (SC) .

34 *Abdul v. State of M.P.,* AIR 1954 SC 31 : 1954 Crlj 323.

35 *Mitter v. State of U.P.,* AIR 1976 SC 1156 (para 5) : (1976) 1 SCC 723 : 1976 Crlj 857 ; *State of Punjab v. Sohan,* AIR 1974 SC 300 : (1974) 3 SCC 585 : 1974 Crlj 351 ; *Ram v. State of M.P.,* AIR 1975 SC 870 (para 9); *Halloo v. State of M.P.,* AIR 1974 SC 1936 [*LNIND 1974 SC 108*]: (1974) 4 SCC 300 [*LNIND 1974 SC 108*] : 1974 Crlj 1385 ; *Yudhisthir v. State of M.P.,* (1971) 3 SCC 436 (para 24).

36 *Sevi v. T.N.,* AIR 1981 SC 1230 [*LNIND 1981 SC 128*](*1232*) : 1981 Supp SCC 43.

37 *Balbir v. State of Haryana,* (1987) 1 SCC 533 [*LNIND 1987 SC 64*] (para 14) : AIR 1987 SC 1053 [*LNIND 1987 SC 64*]: 1987 Crlj 853 .

38 *State of U.P. v. Gokaran,* AIR 1985 SC 131 (para 13) : 1984 Supp SCC 482 : 1985 Crlj 511 ; *Pala v. State of Punjab,* AIR 1972 SC 2679 [*LNIND 1972 SC 377*]: (1992) SCC 640 : 1973 Crlj 59 .

39 *Ravi Kumar v. State of Punjab,* AIR 2005 SC 1929 [*LNIND 2005 SC 230*]: (2005) 5 SCC 315 : 2005 Crlj 1742 .

40 *Rokad Singh v. State of M.P.,* 1994 Crlj 494 MP .

41 *Baldev Singh v. State of Punjab,* (1995) 6 SCC 593 [*LNIND 2013 SC 852*] : 1995 SCC (Cri) 1132 : AIR 1996 SC 372 [*LNIND 2013 SC 852*]].

42 *State of Gujrat v. Anirudh Singh,* AIR 1997 SC 2780 [LNIND 1997 SCDRCHYD 22]: (1997) 6 SCC 514 [LNIND 1997 SCDRCHYD 22] : 1997 SCC (Cri) 946 [LNIND 1997 SCDRCHYD 22] : 1997 Crlj 3397 .

43 *Harikirat Singh v. State of Punjab,* AIR 1997 SC 3231 [*LNIND 1997 SC 988*]: (1997) 11 SCC 215 [*LNIND 1997 SC 988*] : 1999 SCC (Cri) 1068 : 1997 Crlj 3954 .

44 *Dadi Narsi Reddy v. State of A.P.,* 1999 Crlj 2055 AP .

45 *Kalyan v. State of U.P.,* (2001) 9 SCC 632 [*LNIND 2001 SC 2182*] : AIR 2001 SC 3976 [

LNIND 2001 SC 2182]:
2001 Crlj 4677 .

46 *Krishna Mochi v. State of Bihar,*
AIR 2002 SC 1965 [
LNIND 2002 SC 291]:
(2002) 6 SCC 81 [
LNIND 2002 SC 291] :
2002 SCC (Cri) 1220 [
LNIND 2002 SC 291] :
2002 Crlj 2645 .

47 *State of M.P. v. Man Singh,*
(2003) 10 SCC 414 [
LNIND 2003 SC 661] :
(2007) 2 SCC 390 (Cr) :
(2003) 3 Crimes 381 .

48 *S. Sudarshan Reddy v. State of A.P.,*
AIR 2006 SC 2716 [
LNIND 2006 SC 540]:
(2006) 10 SCC 163 [
LNIND 2006 SC 540] :
(2006) 3 SCC 503 (Cri) :
2006 Crlj 4033 .

49 *Mahmood v. State of U.P.,*
2008 SC 515 :
(2007) 14 SCC 16 [
LNIND 2007 SC 1333] :
2008 Crlj 696 : (2008) 1 All LJ 248.

50 *Pandurang v. State of Maharashtra,*
(2009) 10 SCC 773 [
LNIND 2009 SC 1885].

51 *Kirendar Sarkar v. State of Assam,*
AIR 2009 SC 2513 [
LNIND 2009 SC 997]:
(2009) 12 SCC 342 [
LNIND 2009 SC 997] :
2009 Crlj 3727 .

52 *Apren v. State of Kerala,*
AIR 1973 SC 1 [
LNIND 1972 SC 411](paras 11-12) :
(1973) 3 SCC 114 [
LNIND 1972 SC 411] :
1973 Crlj 185 ; *Purna v. State of U.P.* , (1983) All Cr R 390 (SC); *Ramji v. State of Maharashtra,*
(1983) Crlj 388 (SC) .

53 *Atmaduddin v. State of U.P.* , (1973) 4 SCC (para 10); *Thulia v. State of T.N.,*
AIR 1973 SC 501 504 : (1972) 3 SCC 393 :
1972 Crlj 1296 ; *Dilawar Singh v. State,*
AIR 2007 SC 3234 [

LNIND 2007 SC 1037]:
(2007) 12 SCC 641 [
LNIND 2007 SC 1037] :
2007 Crlj 4709 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 155
Information as to non-cognizable cases and investigation of such cases.

(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

1. Scope of s. 155.—

This section corresponds to *old* s. 155, with the changes in sub-sec. (1) indicated in italics and the addition of sub-sec. (4).

This section will apply where a case consists solely of non-cognizable offence or offences, while s. 156 will apply when one at least of offences involved is cognizable [sub-sec. (4)].

2. Investigation of non-cognizable offence.—

1. No Police officer can investigate into a non-cognizable case without the orders of a competent Magistrate [s. 156(2)].

2. Hence, when information is received by an officer-in-charge of a Police station of the commission of a non-cognizable offence within his jurisdiction, he is—(a) to record the *substance* of the information; and (b) to direct the informant to file a complaint before the competent Court, under s. 190(1)(a) [s. 156(1)].

3. There is, however, an exception to the foregoing proposition, *viz.* , that when the information relates to two or more offences, of which at least one is cognizable, the case should be treated as a cognizable case, so that the Police may investigate such case without the orders of a Magistrate, even though some of the offences involved are non-cognizable [s. 155(4)].

4. There is no provision in the Code for the Police making a report to the Magistrate where the information relates exclusively to a non-cognizable offence or offences. But if the Police officer takes up investigation of a case on the assumption that it relates to a cognizable offence and after investigation it appears to be a non-cognizable offence, the report of the Police under s. 173 shall be treated as a 'complaint' under s. 190(1)(a) [vide *new* Exp. to s. 2(d),*ante*]. Upon taking cognizance of the case upon such complaint from the Police officer, the Magistrate, if he does not proceed to try the case or himself to make inquiry, may direct a Police officer to make an investigation [S. 202(1)], for the purpose of deciding whether there is sufficient ground for proceeding to trial, after issuing process against the accused.

It is clear from the provisions of *s. 155 Cr.P.C.* that though the Police Officer cannot investigate a non-cognizable offence on his own as in the case of cognizable offence, but he can investigate a non cognizable offence under the order of the Magistrate having power to try such non-cognizable offence or commit the same for trial within the terms of s. 155(2) *Cr.P.C.* , but subject to sub-section (3) of *s. 155 Cr.P.C.* Further, under s. 155(4) *Cr.P.C.* where a case relates to two offences to which one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offences are non-cognizable and under such circumstances the police officer can investigate such offences with the same powers as he has while investigating a cognizable offence.[75]

3. Sub-sec. (1): 'Refer the informant to Magistrate'.—

1. It has been held in some cases, that instead of asking the informant of a non-cognizable case to get the order under s. 155(2) from the competent Magistrate, the Police officer who received the information from the informant may himself seek the order from the Magistrate and that if the Police thereafter investigates the offence, the subsequent trial and conviction would not be set aside by reason of any defect in such order of the Magistrate at the instance of the Police. [76]

2. When the Police officer 'refers the informant to the Magistrate', the informant has the following courses open before the Magistrate :

(a) Instead of lodging a formal 'complaint' under s. 190(1)(a), read with s. (2)(d), he may simply 'inform' the Magistrate about the commission of the non-cognizable offence; if would then be at the discretion of the Magistrate to determine whether he would take cognizance on the basis of such information.

(b) He may institute a 'formal complaint', conforming to s. 2(d), so that the Magistrate may take cognizance thereupon under s. 190(1)(a), upon an examination of such complaint as to whether it satisfies all the requirements of the law. [77]

After taking cognizance of the complaint, if valid, the Magistrate may—(i) issue process against the accused [s. 204]; or (ii) make an inquiry himself [s. 202(2)]; or (iii) direct investigation by the Police or some other person [s. 2000], before issuing process, for his preliminary satisfaction as to whether there was 'sufficient ground for proceeding' against the accused. [78]

Such investigation shall not, however, be ordered where the case is triable exclusively by the Court of Session [s. 202(1), Proviso]. In such a case, he should himself hold an inquiry under s. 202(2), if necessary, for deciding 'whether or not there is sufficient ground for proceeding'.

3. After the inquiry under s. 202(2) is over or the Magistrate receives the report of the Officer who was directed to investigate [under s. 202(1)], the Magistrate will decide whether or not there is sufficient ground for proceeding :

(a) If he is of opinion that there *is* no such ground, he shall dismiss the complaint [s. 203].

(b) If he is of opinion that there is sufficient ground, he shall issue process for the attendance of the accused [s. 204].

4. Sub-sec. (2) : Power of Magistrate to order investigation of non-cognizable offence.—

Sub-section (2) itself does not confer the power upon the Magistrate to order investigation but assumes that it exists under other provisions. That power, being a judicial power, cannot be exercised arbitrarily or without applying the Magistrate's mind [79] to the facts of each case, and certain settled principles, *e.g.* —

(a) This power was granted in the public interest and not for employing Police agencies for doing the work of private individuals. [80] Hence, the Magistrate should order Police investigation of a non-cognizable offence only after being satisfied that there were reasonable grounds for *believing* that an offence had been committed. [81]

(b) The informant or complainant cannot claim as of right an investigation by the Police in respect of a non-cognizable case. [82] On the other hand, the Magistrate should not refuse Police investigation where, in view of the nature of the offence involved, it would not be possible for the complainant or the Magistrate himself to bring the offenders to book, *e.g.* , in the case of continuing offences (such as under the *Trade and Merchandise Marks Act, 1958*).[83]

(c) Where the commission of an offence within the jurisdiction of the Magistrate was disclosed by the complaint but it had not been possible for the complaint to know the name of the person committing the

offence, it would be for the Magistrate to order Police investigation for the purpose of ascertaining that. [84]

5. Effect of violation of s. 155(2) : Investigation without order of Magistrate.—

1. There had been some controversy, under the *old* Code, as to what should happen if the Police investigates a non-cognizable case without receiving the order of a Magistrate, as required by s. 155(2). But, by reason of s. 465 [*old* s. 537] and the new *Explanation* s. 2(d) and s. 2(r),*ante* , a distinction has to be made as to the stage when the question of illegality or contravention of s. 155(2) is raised.

2. There is no doubt that the provision in s. 155(2) is mandatory. [85] If, nevertheless, the Police makes an investigation and submits a purported report under s. 173(d), the Magistrate cannot, in view of s. 2(d) and (r), take cognizance of the offence under s. 190(1)(b), but must treat it as a complaint under s. 190(1)(a), and proceed accordingly. But if the Magistrate fails to do so, but treats it as a 'Police-report', the accused may move in revision; the Revisional Court may quash the proceedings and remand the case to the Magistrate to proceed afresh, according to law. [86]

However, such a report of the police officer of non-cognizable case cannot be treated as a complaint under s. 2(d) of the Code if the police officer from the beginning was aware that he was holding an investigation into a non-cognizable case. In such a case, the report submitted by the police officer cannot be treated as a complaint. So, the High Court quashed the proceedings for prosecution of s. 4(2) B. *C.L.A. Act* against the accused which is a non-cognizable offence.[87]

When a complaint under s. 506 I.P.C. alleging criminal intimidation was a non-cognizable offence and the police offer was aware of such fact investigated into the case without having any order from the Magistrate under s. 155(2) *Cr.P.C.* and submitted a report and the Magistrate took cognizance based on such report, the taking of cognizance was without jurisdiction and set aside.[88]

So, when the police officer investigated into a non-cognizable offence without the order of the Magistrate and submitted charge sheet, the Magistrate cannot take the cognizance and framed the charge. So, the order framing the charge was quashed. [89]

When a report of the police officer relating to the non-cognizable offence is brought to the notice of the Magistrate, he has to apply his mind into the matter and find out whether (a) it is a case in which re-investigation is to be ordered under *s. 202 Cr.P.C.* or (b) whether it could be treated as a complaint under s. 2(d) read with s. 190 (1)(a) *Cr.P.C.* or (c) whether it is a case in which investigation report cannot be treated as a complaint under s. 2(d) *Cr.P.C.* If all these aspects are not brought to the notice of the Magistrate and the trial is concluded, the trial cannot be treated to be vitiated on account of defect in investigation because irregularity in investigation preceding trial could be waived under *s. 465 Cr.P.C.* unless failure of justice has been occasioned because of

such defects.[90]

So, it is clear that once trial is concluded, trial cannot be set aside, only on the ground that the trial was concluded on the basis of the report of a police officer in a non-cognizable case. However, before the trial is concluded the accused can challenge the prosecution and the Court in appropriate case can quash such proceedings for violation of s. 155(2) *Cr.P.C.* but once trial is concluded such irregularity cannot vitiate the trial.[91]

So, if the Court is satisfied that the trial is not vitiated because no prejudices was caused to the accused, the trial is not affected. [92]

However, when the police commenced investigation of non cognizable offence without the order of the Magistrate, the same cannot be validated by an order of the Magistrate passed subsequently. [93]

Investigation of a non-cognizable offence without the written order of the Magistrate being contrary to the provisions of *s. 155 Cr.P.C.* , no cognizance of the offence would be taken and if taken it would be set aside.[94]

6. Effect of order by Magistrate who is not competent.—

1. An order to investigation a non-cognizable offence under s. 155(2) can be made only by a Magistrate who is—

   (a) competent to try the case;

   (b) or to commit the case for trial, *i.e.* , to the Court of Session, where the offence is found by the Magistrate to be triable exclusively by a Court of Session [s. 209,*post*].

2. But in case the order is made by a Magistrate who is not so competent, the proceedings shall not be set aside merely on the ground of his want of competence, provided he has acted in good faith [s. 460(b), *post*].

7. Sub-sec (3) : Effect of Magistrate's order.—

1. This sub-section says that when an order under sub-sec. (2) is issued by a competent Magistrate, directing that he should investigate a non-cognizable case, such Police officer shall have all such powers as an officer-in-charge of a Police station has, under the present Chapter in the case of investigation into a cognizable case, except that he shall not have the power to arrest any person

without warrant. [95] In the result, when the Police officer, so empowered, submits his report, it would be a 'Police report' within the meaning of s s. 173 and 190(1)(b). [96]

2. The exception regarding arrest is made to indicate that Magistrate's order to investigate a non-cognizable case would not confer a power to arrest a person without warrant as is available in the case of a cognizable offence even at the stage of investigation [97] [s. 41(1)(a)]. But the Police officer's power under s. 42(1) in the contingency mentioned therein would remain while he is conducting investigation into a non-cognizable offence.

8. Sub-sec. (4) : Investigation into several offences, cognizable and non-cognizable.—

Cases often arise where, during the investigation into a cognizable offence, it appears from the same information that a non-cognizable offence or offences has or have also been committed and the question arises whether the Police has to take a Magistrate's order before proceeding to investigate the non-cognizable offence, in such a case. There was a controversy on this question which was settled by the Supreme Court in *Pravin Chandra's, case* , [98] and that view has been codified in the present *new* sub-section, as recommended by the Commission, namely, that in such a case, the Police may investigate the entire case as a cognizable case, without the orders of a Magistrate and send up a 'Police report' under s. 173, though it may comprise non-cognizable offences as well. [99]

While interpreting sub-section (4) of *s. 155 Cr.P.C.* , the Supreme Court has held that sub-section (4) of *s. 155 Cr.P.C.* creates a legal fiction and provides that although a case may comprise of several offences of which some are cognizable but others are not, it would not be open to the police to investigate the cognizable offences only leaving aside the non-cognizable offences and that since the whole case comprising cognizable and non-cognizable offences is to be treated as cognizable, the police had no option but to investigate the whole case and to submit charge sheet in respect of all the offences, provided that the offences have been *prima facie* committed. It is pointed out that in view of sub-section (4) of *s. 155 Cr.P.C.* it is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences, the police would be act ing within the scope of his authority in investigating both the offences as the legal fiction enacted by sub-section (4) of *s. 155 Cr.P.C.* provides that in such a case non-cognizable offence shall be treated as cognizable.[1]

The offence under s. 494 I.P.C. is non-cognizable but when I.O. investigated that the case along with other cognizable offences, such as Sections 498A 98A I.P.C. and *s. 4 of the Dowry Prohibition Act* , then it would be deemed to be cognizable offence and the I.O. would be fully competent and authorized to investigate the offence under s. 494 I.P.C. along with the other offences.[2] Therefore, the I.O. would be act ing within the scope of authority in investigating both the cognizable and non-cognizable offences. [3]

Where a case involves one cognizable offence along with non-cognizable offences, it should not be treated as a non-cognizable case for the purpose of sub-s. (2) of s. 155 and this is the intention of legislation which is manifested in s. 155(4). Thus, it was held by the Supreme Court that in a case of bigamy, where the offence was clubbed with other offences under ss. 417, 420 and 498 A, the cognizance taken by the Magistrate on the basis of charge-sheet submitted by police was valid. [4]

75 *Prakash Singh Badal v. State of Punjab,* [AIR 2007 SC 1274 *LNIND 2006 SC 1091*]: [(2007) 1 SCC 1 *LNIND 2006 SC 1091*] : [(2007) 1 SCC 1 *LNIND 2006 SC 1091*]93(Cri) : [(2006) 4 Crimes 388 *LNIND 2006 SC 1091*].

76 *Biroo v. State,* [AIR 1960 All 509 *LNIND 1959 ALL 102*](paras 2, 6).

77 Cf. *Sevantilal v. State,* [AIR 1969 Guj 14 *LNIND 1967 GUJ 112*](paras 4, 6).

78 Cf. *Sevantilal v. State,* [AIR 1969 Guj 14 *LNIND 1967 GUJ 112*](paras 4, 6).

79 *Biroo v. State,* [AIR 1960 All 509 *LNIND 1959 ALL 102*](paras 2, 6).

80 *Biroo v. State,* [AIR 1960 All 509 *LNIND 1959 ALL 102*](paras 2, 6).

81 *Biroo v. State,* [AIR 1960 All 509 *LNIND 1959 ALL 102*](paras 2, 6).

82 Cf. *Sevantilal v. State,* [AIR 1969 Guj 14 *LNIND 1967 GUJ 112*](paras 4, 6).

83 Cf. *Sevantilal v. State,* [AIR 1969 Guj 14 *LNIND 1967 GUJ 112*](paras 4, 6).

84 Cf. *Sevantilal v. State,* [AIR 1969 Guj 14 *LNIND 1967 GUJ 112*](paras 4, 6).

85 *Subodh v. State,* (1974) Crlj 185 (Cal) .

86 *Subodh v. State,* (1974) Crlj 185 (Cal) .

87 *Illias Ali v. State of West Bengal,* 1997 Crlj 803 Cal .

88 *Makfur v. Kajmul,* 2007 Crlj 1536 Gau .

89 *Man Chand v. State,* 1999 Crlj 1512 All .

90 *P. Kunhumohammed v. State of Kerala,* 1981 Crlj 356 : 1981 Ker LJ 50 : ILR (1981) 2 Ker 452 .

91 *H.N. Rishbud v. State,* AIR 1955 SC 196 [*LNIND 1954 SC 177*]: (1955) 1 SCR 1150 [*LNIND 1954 SC 177*] : 1955 Crlj 526 : *State of U.P. v. Bhagwant,* AIR 1964 SC 221 [*LNIND 1963 SC 114*]: (1964) 3 SCR 71 [*LNIND 1963 SC 114*] : 1964 Crlj 140 ; *Munnalal v. State of U.P.,* AIR 1964 SC 28 [*LNIND 1963 SC 316*]: (1964) 3 SCR 88 [*LNIND 1963 SC 316*] : (1964) 1 Crlj 11 .

92 *Pakkirisamin* in re., *(1970) 1 MLJ 488* [*LNIND 1969 MAD 319*].

93 *Siddanagowda v. State,* 1998 Crlj 2162 Kant ; *Rupan Deol Bajaj v. Kanwar Pal Singh,* (1995) 6 SCC 194 [*LNIND 1995 SC 981*] : AIR 1996 SC 309 [*LNIND 1995 SC 981*]: 1996 Crlj 381 : 1995 SCC (Cr) 1059.

94 *Md. Makfar Rahaman v. Md. Kajimal Huzasin Baruah,* AIR 2007 Crlj 1536 (Gau) .

95 *Pravin v. State A.P.,* AIR 1965 SC 1185 [*LNIND 1964 SC 364*]: (1965) 1 SCR 269 [*LNIND 1964 SC 364*] : (1965) 2 Crimes 250 ; *Sevantilal v. State,*

AIR 1969 Guj 14 [
LNIND 1967 GUJ 112](para 5).

96 *Pravin v. State A.P.,*
AIR 1965 SC 1185 [
LNIND 1964 SC 364]:
(1965) 1 SCR 269 [
LNIND 1964 SC 364] :
(1965) 2 Crimes 250 .

97 Cf. *Chari v. State of U.P.,*
(1951) SCR 312 [
LNIND 1951 SC 21] (315) :
AIR 1951 SC 207 [
LNIND 1951 SC 21]:
1951 Crlj 775 .

98 *Pravin v. State A.P.,*
AIR 1965 SC 1185 [
LNIND 1964 SC 364]: (1965) 1 SCR 269 :
(1965) 2 Crimes 250 .

99 *Pravin v. State A.P.,*
AIR 1965 SC 1185 [
LNIND 1964 SC 364]: (1965) 1 SCR 269 :
(1965) 2 Crimes 250 .

1 *State of Orissa v. Sharat Chandra Sahu,*
(1996) 6 SCC 435 :
1996 SCC (Cri) 1387 :
AIR 1997 SC 1 : (1996) 4 Crimes 212.

2 *Victor Auxilium v. State,*
2008 Crlj 774 : 2008 (1) MLW (Cri) 328 (Mad).

3 *Sukhevale Swapna Bai v. State of A.P.,* 2008 Crlj (NOC) 435 (AP).

4 *A. Subhash Babu v. State of A.P.,*
AIR 2011 SC 3031 [
LNIND 2011 SC 679]:
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LNIND 2011 SC 679].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 156
Police officer's power to investigate cognizable cases.

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

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

(3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned.

1. Scope of s. 156.

This section reproduces *old* s. 156 without any substantial change. While the power of the Police to investigate a non-cognizable offence is dealt with in s. 155,s. 156 deals with the investigation of a cognizable offence.

2. Sub-sec. (1) : Powers of the police to investigate into cognizable cases. —

1. The functions of the judiciary and the Police are complementary, and the combination of individual liberty with a due observation of law and order is only to be obtained by leaving each to exercise its own function. The Police have, under s s. 154 and 156, a *statutory* right to investigate a cognizable offence without requiring the sanction of the court, and the court has no power to interfere with such

investigate, provided it relates to a cognizable offence. The court's functions begin only when a charge is preferred on the result of such investigation. [5]

2. In the case of cognizable offences receipt and recording of a First Information Report is *not* a condition precedent to the setting in motion of an investigation by the Police. [6] The Police may start investigation not only on receipt of such information (under s.154, *ante*), but also on their own motion, on the basis of their own knowledge or of credible though informal intelligence, received otherwise. [7]

3. *New* s. 173(8),*post,* makes it clear that the Police is competent not only to investigate a cognizable case, without any order of a Magistrate, and submit a final report under s. 173(2), but also to make further investigation, in case of further evidence and submit a second such report under s. 173(8),for which also no order from the Magistrate would be necessary. [8]

4. While the sanction of the Government is a condition precedent to the taking cognizance by a Court of certain offences, no such sanction is necessary for investigation into those offences by the Police. [9]

5. Even if power to investigate a cognizable offence is exclusively reserved for the police, it must be legitimately exercised in strict compliance with the provisions of Chapter-XII. *Cr.P.C.* [10]

6. When the police is investigating into a case, the Court cannot direct the I.O. to add s. 307 I.P.C. and investigate the matter. So, the order of the High Court upholding the order of the Metropolitan Magistrate has been set aside. But liberty has been given to I.O. to submit fresh charge sheet on the basis of the materials collected during the investigation. [11]

3. Duty of Investigating Officer. —

The duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction, but to bring out the real unfurnished truth. [12]

Investigation must be fair and effective, must proceed on right direction in consonance with ingredients of the offence and not in a haphazard manner, more so, in cases based on circumstantial evidence. [13]

In every civilized society, the police force is invested with the powers of investigation of crime to secure the punishment of the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence creating false clues only with a view to secure conviction because such act s stake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. [14]

Powers of the police in the investigation of the case do not include torturing a person to extract an information. [15]

However, when the police gave beating to rape victims to shake off their fear from the authority of the Ashram so that they could speak the truth, the Supreme Court did not find any fault with the police to adopt such tactics to elicit truth from them. [16]

4. Magistrate has no power to stop investigation.—

1. The power of the Police to investigate in cognizable offence under s.156 has been made independent of any control by the Magistrate. He has no power to stop an investigation. [17]

2. It is only in a case where the Police decides not to investigate the case that the Magistrate can intervene and either direct an investigation or, in the alternative, himself proceed or depute a subordinate Magistrate to inquire into the case. [18]

5. High Court's power to interfere with investigation into cognizable cases. —

1. The powers of the Police to investigate into a cognizable offence are governed by ss. 154, 156 of the Code. These powers being statutory, the Court should not, in exercise of its power of revision [s. 401,*post*] or its inherent power [s. 482,*post*] interfere with the exercise of such statutory powers by the Police so long as the stage of investigation continues, [19] *i.e* ., so long as the matter does not come to court. [20] , [21]

   Thus, it would not be proper for the High Court even to direct that the Petitioner shall not be detained for more than one hour a day for the purpose of investigation. [22]

2. The investigation comes to an end only under s. 173,—either by a 'final report' or by a 'charge-sheet', [23] and the Court's function then begins. [24]

3. For the same reasons, it would not be proper for the High Court to interfere with an order for further investigation under s. 173(8), except under exceptional circumstances [25] [see under s. 173(8),*post*].

4. The Court can interfere with an investigation only when non-interference would result in miscarriage of justice. [26] [See further, under s. 482,*post.*]

5. The High Court in its writ jurisdiction cannot interfere with the investigation of the case except only in the rarest of rare case when a case of abuse of power of investigation and non-compliance with the provisions under Chapter-XII *Cr.P.C.* When no action was taken by police on the informant's petition of complaint, remedy of the complainant lies under s *s. 190* and *200* *Cr.P.C.* and no writ petition would lie.[27]

6. When the Vadodara police was holding investigation where part of cause of act ion arose, then the High Court under *Article 226 of the Constitution* should not transfer the investigation to another police station of the same district. [28]

7. At the time of hearing, the petition of cancellation of bail granted by the Sessions Judge, the High Court by its order stayed the arrest of the accused and fixed the time and place of carrying of investigation. The Supreme Court has set aside such order of the High Court. It is held that such type of interference by the High Court in investigation would impede the course of investigation of an accused involved in *FERA* violation case. [29]

6. 'Which a Court having jurisdiction ... Chap. XIII'.—

These words widen the power of the officer-in-charge of a Police station to investigate a cognizable offence

beyond the limits of his local jurisdiction. Since a Magistrate has, under Chap. XIII, *post* , the power to try certain offences even though they had been committed beyond his local jurisdiction (see ss. 181-183, *post*), an officer-in-charge of a Police station shall have the jurisdiction to investigate those cognizable offences even though they might have been committed outside the jurisdiction of his Police station.

7. Scope of sub-sec. (2).—

Sub-section (1) of s. 156 is a provision empowering an officer-in-charge of a Police station to investigate a cognizable case without the order of a Magistrate and delimiting his power to the investigation of such cases within a certain local jurisdiction. It is the violation of this provision that is cured under sub-sec. (2). Obviously, sub-sec. (2) of s. 156 cannot cure the violation of any other specific statutory provision. [30]

The accused persons went to the place of the informant at Sriganganagar to meet him and the last transaction of delivery of cheques worth rupees twenty three lakhs by the accused buyers and another took place at that place. The accused persons refused to honour the cheques an the offence of cheating took place at Sriganganagar. So, the FIR could be lodged there and the police at Sriganganagar could take up investigation of the case. So, the plea of the accused persons that the police of Sriganganagar had no territorial jurisdiction to investigate the case is not correct. [31]

Criminal law can be set in motion by anybody. Hence, the prosecution initiated by C.B.I. instead of Bank of financial institution whose money was subject matter of offence is not improper. [32]

Merely because the complainant conducted the investigation that would not be sufficient to cast doubt on the prosecution version to hold that the same makes prosecution version vulnerable. Matter has to be decided on case to case basis without any universal generalization. [33]

8. Scope of sub-sec. (3).—

1. Prior to the Supreme Court decision in *Chari's case* , [34] there was a controversy as to whether the power to direct investigation under s. 156(3) was confined to a case under s. 190(1)(c), [35] *i.e.* , upon his own knowledge or information, but also extended to a case under s. 190(1)(a),*i.e.* , when he was moved by a complaint. [36] This latter view seems to have been approved by the Supreme Court in *Chari's case.* [37] In the result, as soon as a petition of complaint is filed, the Magistrate is not bound to take cognizance of the offence but that he may take "action of some other kind, *e.g.* , ordering investigation under s. 156(3), or issuing a search-warrant for the purpose of investigation."
2. The courses open to the Magistrate on receipt of a complaint have been elaborated in a later case of the Supreme Court: [38]

> Section 190(1)(a) does not mean that once a complaint is filed, the Magistrate is bound to take cognizance if the fact stated in the complaint discloses the commission of an offence. The word 'may' cannot be construed as 'must'. A complaint disclosing a cognizable offence may well justify a Magistrate in sending the complaint, under s. 156(3), to the Police for investigation. There is no reason why the time of the Magistrate should be wasted when the duty to investigate in cases involving cognizable offences if primarily with the Police. [39]

On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence, on receipt of a complaint, without Police investigation. But if he does so, then he would have to proceed in the manner provided by Chap. XVI of the Code . [40]

3. The character of the subsequent proceedings would depend upon the question whether the Magistrate has ordered investigation by the Police [s. 202] after examining the complainant on oath under s. 200, or without examining the complaint. There was much confusion on this point, which was removed by the Supreme Court decision in *Jamuna Singh's case* [41] according to which—

(a) Whether the Magistrate has taken cognizance of an offence would depend upon the purpose for which he applied his mind and the step taken by him in pursuance thereof. [42]

(b) When a Magistrate applies his mind for the purpose of applying Chap. XVI, he must be held to have taken cognizance of the offence, [43] *e.g.* , when he examines the complainant on oath [44] because the examination of the complainant contemplated by s. 200 is by a Magistrate taking cognizance of an offence *on complaint.* [45] Hence, where the Magistrate, after examining the complainant, directs investigation by the Police, the report submitted by the Police on such investigation will fall under s s. 202-203,*post.* [46] When cognizance had been taken by examining the complainant, there was no scope for cognizance being taken afresh of the same offence, after the receipt of the Police Officer's report. Therefore, the subsequent report by the Police officer, even though it purported to be a charge-sheet, should be treated as merely a consequence of the step the Magistrate has taken under s. 202,[47] and not as a 'Police report' under s s. 156(3),[48] 190(1)(b).

(c) But if the Magistrate directs Police investigation, without taking cognizance upon examining the complainant on oath, the report submitted by the Police consequent upon such investigation will fall within s. 156(3),[49] so as to have the effect of a 'Police report' for purposes of s. 190(1)(b). So the Magistrate can order investigation under s. 156(3) only at the pre-cognizance stage, that is to say before taking cognizance under s s. 190, 200 and 204. [50]

When the Magistrate subsequently takes cognizance in pursuance of such 'Police report', it cannot be said that it was a 'case instituted upon complaint' within the meaning of *new* s. 378(4), *post,* because the Magistrate did not take cognizance on the basis of the complaint. [51]

4. The power under s. 156(3) may also be exercised by a Magistrate under s. 159 where the Police has declined to investigate, under s. 157(1), Proviso (b), *post* , provided the Magistrate is empowered to take cognizance.

5. When an investigation is undertaken by the police at the instance of the Magistrate under sub-section (3) of *s. 156 Cr.P.C.* , the police officer is bound except in specific and specially exceptional cases, to conduct such investigation even if he was of the view that he did not have jurisdiction to investigate the matter. So, without holding the investigation, he cannot forward

the report to the Magistrate with the observation that since the entire cause of action for the alleged offence had purportedly arisen beyond his territorial jurisdiction, the investigation should be transferred to the concerned police station.[52]

6. When the Magistrate under s. 156(3) directed the police to record F.I.R. and to start investigation, the police investigating the matter is not required to approach the Magistrate and take orders from him before arresting the accused. [53]

9. When can Magistrate exercise power under s. 156(3)Cr.P.C.—

Any judicial Magistrate before taking cognizance can order investigation of the case by the police under s. 156(3) *Cr.P.C.* If he does so, he does so, he was not taking cognizance of the case. For such purpose, the Magistrate may direct the police to register the case. Even if he does not say so in so many words, the officer-in-charge of the police station has the duty to first register a case and then proceed with the investigation.[54]

When a petition of the complaint is filed before the Magistrate for directing the police to investigate into a cognizable offence, the Magistrate before taking the cognizance of the case can direct the police to investigate the case. [55]

But once the Magistrate takes cognizance of the case, it is not open to him to refer the case to the police for investigation under s. 156(3) *Cr.P.C.* [56]

Similarly, a Judicial Magistrate after taking cognizance of the offence on a police report and after appearance of the accused cannot order further investigation into the case. [57]

When the complainant prayed before the Magistrate to send the petition of complaint to the police to investigate the case the Magistrate in an appropriate case may refuse such prayer and direct the complainant to examine himself and his witnesses under s. 200 and *s. 202 Cr.P.C.* [58]

Section 156(2) is wide enough to include all such powers which are necessary for proper investigation when the Magistrate directs the police to conduct investigation by recording an F.I.R. He has incidental or implied power to direct or monitor police investigation. [59]

The power under Section 156(3) of the Code can be exercised by the Magistrate even before he takes cognizance provided the complaint discloses commission of a cognizable offence. Thus, where the complaint did not disclose commission of a cognizable offence, the order directing investigation was held liable to be quashed. [60]

10. Power of the Magistrate to direct the C.B.I. to investigate the case.—

Ordinarily, the Magistrate shall direct investigation to the local police. But even in appropriate case, he can direct the C.B.I. to hold the investigation and when such a direction is given s. 6 of the Delhi Special Police Investigation Act is no bar. This is what is stated by the Supreme Court in *State of West Bengal v. Sampat Kumar.* [61]

Before directing the C.B.I. to hold such enquiry either under s. 156(3) of s. 173(8) *Cr.P.C.* , the Magistrate must be *Prima facie* satisfied that from the circumstance appearing from the record the statutory investigating agency has not worked in an effective way or the circumstances are such that such agency may not able to discharge its function fairly and impartially. [62]

However, the Supreme Court has expressed the view that the provision of s. 156(3) cannot be stretched to give power to the Magistrate to direct the C.B.I. to investigate a case. It can only direct the officer-in-charge of the police station of the local police station to do so. [63]

11. Transfer of investigation to the C.B.I. by the State Government.—

When the State Government has transferred the investigation to the CBCID in the absence of any opinion on record based on any material advising the transfer of the case to the CBCID. The accused persons have not made any complaint against the local police regarding their functioning. The investigation by the local police has been completed and charge sheet submitted. At that stage, the direction of the State Government to transfer the investigation to CBCID only to propritiate two MLAS of the Samajwadi Party was an order passed on irrelevant and extraneous considerations. So, the High Court quashed the order of transferring the investigation to the CBCID at that stage. [64]

12. Ordering investigation by the Magistrate in Sessions triable case.—

Even when the complainant alleges offences of the Sessions triable case, there is no bar to the Magistrate to direct the police to investigate the case by passing an order under s. 156(3) *Cr.P.C.* [65]

13. Effects of order to investigate.—

1. While sub-sec. (1) empowers the Officer-in-charge of a Police station to make investigation into a cognizable offence without the orders of any Magistrate, sub-sec. (3) empowers a Magistrate to direct such investigation, if he has the power to take cognizance of the case. This power may be exercised by the Magistrate under the following circumstances:

   (a) Under s. 159, when the Police submits a report under s. 157(2), refusing to investigate a case.

   (b) Before taking cognizance of a case, on receipt of a complaint. [66]

If he directs such investigation after taking cognizance, s. 202 would be attracted, [67] instead of s. 156(3).

2. Once the Magistrate directs investigation by the Police under s. 156(3), the Police acquires the power to investigate to the same extent as under sub-secs. (1)-(2) of s. 156. It follows that—

   (a) While making such a direction to investigate, the Magistrate cannot impose any limitation or direct the officer conducting it as to how to conduct the investigation. [68]

   (b) A Police officer who conducts an investigation under an order under s. 156(3) cannot be said to be a delegate of the Magistrate for purposes of the investigation. [69] House, production of a document before such Police officer cannot be said to be a production before the Magistrate so as to attract the ban under s. 195(1)(c). [70]

3. When after completion of investigation the police submits charge sheet the Magistrate shall take cognizance under s. 190 (1)(b) *Cr.P.C.* and not under s. 190(1)(a) *Cr.P.C.* [71]

4. When the investigation has been directed by the Magistrate under s. 156(3) *Cr.P.C.*, the complainant had no right to direct the Magistrate to recall the order on the ground that the matter has been compromised between the parties and the Magistrate should not have recalled the order. When the investigation has been ordered on the direction of the Magistrate the investigation must be carried out which may ultimately culminate either in filing charge sheet or a final report. After directing investigation, the Magistrate has no power to recall the order.[72]

14. Direction for second investigation.—

When the investigation by the Police is pending, the Magistrate under s. 156(3) *Cr.P.C.* cannot direct the police on the second complaint over the self-same matter to investigate the case again.[73]

But if the second complaint contains additional allegations, then the Magistrate did not commit any illegality in again directing the police to investigate under s. 156(3) *Cr.P.C.* [74]

15. S s. 156(3) and 200.—

1. A Magistrate has the power to direct investigation by the Police under both s s. 156(3) and 200.
2. But a distinction must be made between the two provisions :

(a) S. 202(1) applies to the post-cognizance stage, s. 155(3) is applicable to the pre-cognizance stage. On receiving a complaint, the Magistrate is not bound to take cognizance of the offence; he may, without taking cognizance, direct investigation of the case by the Police under s. 156(3). [75]

(b) The very fact that the Magistrate has passed the order for investigation without examining the complainant shows that he has not taken cognizance and has proceeded under s. 156(3). [76]

3. The investigation envisaged under *s. 202 Cr.P.C.* when the Magistrate directs police to investigate the complaint is different from an investigation under s. 156(3) *Cr.P.C.* occurring in Chapter-XII of the Code.[77]

4. So, it is clear that when the Magistrate directs an investigation under s. 156(3) *Cr.P.C.*, he has to do so prior to taking cognizance, whereas *s. 202 Cr.P.C.* contemplates investigation of a limited nature which is directed by the Magistrate either to police or to any other person on taking cognizance.[78]

16. S. 156 vis-a vis s. 195 Cr.P.C.—

Section 195 and *s. 340 Cr.P.C.* do not affect the power of the police officer investigating the cognizable offence. But after investigation is completed, the Magistrate shall not take cognizance in view of the bar of *s. 195 Cr.P.C.*. But the Court can file a complaint o the basis of the material collected during the investigation provided it follows the procedure adopted in *s. 346 Cr.P.C.* [79]

17. Steps which a Magistrate may take after receipt of report of Police investigation, under s. 156. —

1. A distinction must be made as between (a) the case where a Magistrate orders investigation by the Police, after taking cognizance upon a complaint, under s. 202(1), and (b) the case there Magistrate orders Police investigation *before* taking cognizance upon a complaint, under s. 156(3). [80]
2. It is this latter contingency which is being dealt with in the present context, namely where on receipt of complaint, the Magistrate orders Police investigation, without taking cognizance of the offence, upon the complaint. In such a case, the Police after making investigation, will submit a report under s. 173(1),*post.* Upon receipt of such Police report, the Magistrate has several courses open to him: [81]

(a) He may straightaway issue process against the accused, *disagreeing* with the Police report to the effect that there is no sufficient ground for proceeding further. Even though he disagrees with the Police report, in this case, he would be taking cognizance under s. 190(1)(b), [82] and then issue process.

(b) Where he disagrees with Police report that no offence has been disclosed, the Magistrate may take cognizance of the offence under s. 190(1)(a), on the basis of the original complaint and proceed to examine the complainant and his witnesses under s. 200. [83]

(c) He may agree with the Police report that there is no sufficient ground for proceeding further and drop the proceeding. [84]

18. Magistrate cannot direct the Superintendent of Police to hold preliminary enquiry before registering the case.—

Under s. 156(3) *Cr.P.C.*, the Magistrate can direct the police to investigate the complaint before taking cognizance. But the Magistrate cannot direct the Senior Superintendent of Police to get the complaint investigated by a subordinate police officer as a preliminary enquiry and if it discloses a *prima facie* case, then to register a case for investigation. Such an order is illegal. [85]

19. The Private complaint of a cognizable case, and power of the Magistrate under s. 156(3)Cr.P.C.—

When the complainant files a private complaint under *Sections 6 of the Dowry Prohibition Act* for taking cognizance under s. 190(a) *Cr.P.C.*, the Magistrate has the power to direct the police to investigate such case. Only because the complainant did not make such prayer, the power of the Magistrate under s. 156(3) *Cr.P.C.* is not lacking. Even if the Magistrate while directing the investigation mentioned a wrong section *i.e.* s. 155(3), such an order is not vitiated. [86]

Similarly, a private complaint lodged under s. 498A I.P.C. can be sent to the police for investigation as it is a cognizable offence. [87]

20. Whether second complaint lies after acceptance of Police report to drop the proceeding. —

There has been some confusion as to whether a second complaint would lie after the Magistrate has taken act ion upon a 'final report' of the Police. Here also the distinction between the different contingencies should be borne in mind :

(a) Where the Magistrate had ordered Police investigation under s. 202,*after taking cognizance* , and he accepts the 'final report' of the Police, the only order he can make is one of 'dismissal of the complaint', under s. 203. In such a case, a second complaint would not lie unless there are *new* facts or special circumstances are disclosed in the second complaint. [88] (See, further, under s. 203).

(b) Where the Magistrate had ordered Police investigation under s. 156(3),*before* taking cognizance, and thereafter drops the proceedings or discharge, the accused on the basis of the 'final report' of the Police, there is one view that a subsequent complaint petition filed by the complainant may be treated as a 'protest petition', [89] *i.e.* , a petition protesting against the 'Police report'. In such a case, the Magistrate may proceed upon the original complaint, and proceed to examine the complainant under s. 200, regardless of the Police report. [90]

21. Further investigation under ss. 16(3) and 173(8). —

The order of a Magistrate to make further investigation under s. 156(3) is independent of the power the investigating Police officer or of a superior Police officer, of his initiative or at the instance of the State Government, to direct further investigation. [91] Hence, the power of the Magistrate to disagree with the final report and to direct further investigation does not stand in the way of the Police officer to further investigate the case even after submission of his final report under s. 173(2). [92] This is clear from s. 173(8),*post* .

22. Re-opening of investigation.—

In a case in which a practicing lawyer, his wife and child were abducted and murdered and the lawyers' fraternity were not satisfied with investigation and demanded judicial enquiry, the Supreme Court held that when investigation was completed and charge-sheet filed, it is not for the Supreme Court to ordinarily direct the re-opening of investigation. However, in the facts and circumstances of the case to do complete justice in the matter and to install confidence in the public mind, the Supreme Court directed fresh investigation by C.B.I. [93]

23. Police investigation vis-a-vis power of the Court.—

1. The Magistrate after directing investigation under s. 156(3) *Cr.P.C.* cannot recall his order and discharge the accused.[94]

2. Once the Magistrate directs investigation under s. 156(3) *Cr.P.C.* he cannot place any limitation on the police officer as to how to conduct the investigation.[95]

3. The provisions of the Code do not empower the Magistrate to ask police to submit charge sheet. If, however, the Magistrate feels on perusing the report that the matter requires further investigation, he can do that. s. 190(1)(c) requires the Magistrate to take cognizance notwithstanding contrary opinion of the police. [1]

4. When a Magistrate receives final report in a case in which he ordered investigation, the Magistrate disagreeing with the report may issue notice upon the complainant and on examining the complainant and his witnesses and being *prima facie* satisfied that he shall proceed further in the matter, he can issue process. [2]

5. So, in general the Court would not interfere with the investigation of a case where, on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed. [3]

24. Revision under s. 482.—

1. Since investigation into a offence is the exclusive field of the executive through the Police, the High Court should not, in the exercise of its inherent power of revision, interfere with Police investigation as ordered by a Magistrate. [4] 2. The High Court may, however, interfere where the order for investigation would be an abuse of the process of the Court, [5] malicious and its object is to harass the petitioner or to make a short-cut to a civil suit; [6] or where non-interference would result in miscarriage of justice. [7]

25. Interference under Art. 226 of the Constitution.—

1. Where the High Court is convinced that the power of investigation has been exercised by a Police Officer *mala fide* [8] or the F.I.R. disclosed no offence under the law, [9] the High Court can issue a writ of *mandamus* restraining the Police Officer from *misusing* his powers. [10] But where the accused reasonably believes that the investigator is actuated by malice or personal bias, he must come to Court at the earliest with material facts. If he stands by till the charge-sheet was filed, it must be assumed that he has waived his objection. [11]

2. Where the investigation is dilatory and infringes the right of the accused to a speedy trial under *Art. 21 of the Constitution* , the Court may give proper directions. [12]

3. On the other hand, since the F.I.R. is not the only condition for starting a criminal proceeding [13] under s. 157, the Court would not normally interfere with the investigation where the Court is satisfied that there were *other* relevant materials from which an offence was disclosed. [14]

26. Special law.—

A Special Court under the *Essential Commodities Act* is competent to make an order [s. 156(3)]. [15]

27. Role of judiciary in cases of investigation by the police.—

The function of the judiciary in the cases of investigation should be complementary and full freedom should be given to the investigating agency to collect evidence. However, in appropriate cases then after registering the case for unexplained reasons, no expeditious investigation is done by police the Magistrate or the High Court on satisfying ground may direct completion of investigation within a reasonable time. [16]

While as a rule the Court would not give any direction to the police while investigation is still pending, there is a residuary jurisdiction left with the Court to give directions to the investigating agency. When it is satisfied that the requirements of law are not being complied with and the investigation is not being properly conducted. [17]

But as a rule the Court should not monitor investigation unless such investigation transgresses any provision of law. [18]

However, when shortcomings of the investigation had been brought to the notice of the Magistrate by the informant but he refused to direct further investigation which power he had under s. 173(8) *Cr.P.C.* , the Magistrate failed in his duty to exercise his jurisdiction, vested in law taking the view that he had no power to review the earlier order. It is pointed out by the Supreme Court that in such a case, he was not required to review the order but to order further investigation into the case which he was competent to do under s. 173(8) *Cr.P.C.* [19]

But during investigation, the Court cannot direct the I.O. to include a person as an accused. This is because, it is within the exclusive jurisdiction of the I.O. during investigation whom he would assign as an accused. [20]

The Court should not also disclose the materials contained in the police diaries and statement of witnesses recorded under *s. 161 Cr.P.C.* by I.O., nor should it make comments or the manner of investigation or make observation amounting to interference in investigation. However, the High Court during the investigation could make general observation that the investigating agency must act in efficient and vigilant manner without being pressurized.

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5 *Emp.* *v.* *Nazir* *Ahmad,* AIR 1945 PC 18 .

6 *Chandrama* *v.* *State,* ILR (1951) 1 Cal 539 .

7 *Emp.* *v.* *Nazir* *Ahmad,* AIR 1945 PC 18 .

8 *State* *of* *Bihar* *v.* *Saldanna,* (1980) Crlj 98 (SC) (para 19).

9 *Emp.* *v.* *Nazir* *Ahmad,* AIR 1945 PC 18 .

10 *Divine* *Retreat* *Centre* *v.* *State* *of* *Kerala,* AIR 2008 SC 1614 [LNIND 2008 SC 644] (2008) 3 SCC 542 [LNIND 2008 SC 644] (2008) 2 SCC 9 2008 Crlj 1891 (2008) 1 KLT 1042 [LNIND 2008 SC 644].

11 *Shariff* *Ahmed* *v.* *State,* AIR 2009 SC 2691 [LNIND 2009 SC 991] (2009) 14 SCC 184 [LNIND 2009 SC 991].

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13 *Sasi* *Tomas* *v.* *State,* (2006) 12 SCC 421 [

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20 *State of W.B. v. Basak,*
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21 Cf. *Supdt. L.R. v. Mohar,*
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 157
Procedure for investigation.

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender :

Provided **that—**

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer-in-charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case :

21 **[**

Provided **further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.]**

(2) In each of the cases mentioned in Clauses (a) and (b) of the proviso to sub-section (1), the officer-in-charge of the police station shall state in his report his reasons for not fully complying with the requirements to that sub-section, and, in the case mentioned in Clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

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1. Scope of s. 157.—

This section corresponds to *old* s. 157 without substantial change.

It imposes certain duties upon the Officer-in-charge of a Police station and may any interference by the Government with these statutory duties would be illegal. [22]

2. S s. 100(4) and 157 : Witnesses to the investigation.—

A recovery on search under s. 100, has to be made in the presence of two or more independent witnesses. In an investigation under s. 157, on the other hand, recoveries may be proved even by the solitary evidence of the Investigating Officer if his evidence could otherwise be believed. [23] Nor is there anything in the law to require that where recoveries have to be made from different places on the information furnished by the accused, different sets of persons must be called in to witness them. [24]

3. Sub-sec. (1): 'If from information received ... report'.—

1. The Officer-in-charge of a Police station acquires his power to investigate into a cognizable offence, as soon as the information referred to in s. 154 is received by him. [25] If he fails to record the F.I.R. or to send a report to the Magistrate immediately, [26] that might constitute an irregularity, but would not vitiate his investigation, [27] which he is entitled to start at once, under s. 157(1), read with s. 156.

2. The word 'otherwise' indicates that the Officer-in-charge may be set on motion under s. 157 not only from an F.I.R. but also by some other material which gives reason to suspect the commission of a cognizable offence, [28] *e.g.* , an irregular complaint. [29] In other words, the receipt of information is not a condition precedent for investigation. [30] In short, the Police cannot abstain from performing their statutory duty to investigate into a cognizable offence so long as somebody does not come to the Police station to give information about its commission. Even a telegram or telephonic message, which may not constitute an 'F.I.R.', may suffice to put the Police officer on his duty to investigate, under s. 157(1).

3. The investigation *starts* only after the Police officer takes some material step in pursuance of the information, *e.g.* , proceeding to the spot, taking measures for discovery or arrest of the offender, [31] as distinguished from 'preliminary inquiries' into a vague rumour or information. [32] It has been held that where an allegation of corruption is made against a top-ranking public servant, a preliminary inquiry may be necessary even before filing the F.I.R., only to find out whether there was *prima facie* evidence to investigate. The investigation cannot be said to have commenced when the Police starts such preliminary inquiry into the allegation. [33] But even then the Police Officer was expected to follow the requirements of Chap. XIV of the Code to ensure fairness. [34]

4. *Section 156 Cr.P.C.* gives a statutory power to an officer-in-charge of the police station or his subordinate under his direction to investigate into any cognizable offence. In case of cognizable offences receipt or recording of FIR is not a condition precedent for setting in motion investigation. *s. 157 Cr.P.C.* provides the procedure for investigation. If the officer-in-charge of the police station on information or otherwise has reasons to suspect the commission of a cognizable offence and empowered to investigate into such offence, he shall proceed in person or depute a subordinate officer not below the rank of prescribed officer to investigate into the case and arrest the offender.[35]

5. The expression 'reason to suspect' in *s. 157 Cr.P.C.* is different from the expression 'reasonable suspicion' as used in s. 41(a) and (g) *Cr.P.C.*[36]

6. The statutory investigating agency should not be directed to obtain financial assistance from the private parties for meeting the expenses required for conducting the investigation. [37]

7. However, before starting an investigation, it is the duty of the police officer to register a case. [38]

8. Merely because a political opponent was the complainant, it does not *per se* lead to an inference that the complaint has to be thrown out without investigating into the complaint. [39]

9. When preliminary enquiry was conducted on the basis of an anonymous complaint without registering the FIR, it was not necessary to comply with the provision of proviso (b) to sub-section (1) of *s. 157 Cr.P.C.*[40]

4. Investigation when can be commenced.—

Investigation can be commenced when Police officer has "reason to suspect" and not "reasonable suspicion". s. 157(1) requires an officer-in-charge of a Police station who, from information received or otherwise, has reason to suspect the commission of an offence (that is a cognizable offence), he can investigate the matter under s. 156. The expression 'reason to suspect' as occurring in s. 157(1) is not qualified as in s. 41(a) and (g) of the Code, where the expression "reasonable suspicion" is used. Therefore, what s. 157(1) requires is that the Police officer should have reason to suspect with regard to the commission of an offence. [41]

Therefore, investigation into a cognizable offence by a police officer commences, when two conditions are satisfied namely, (1) the officer has reason to suspect the commission of a cognizable offence, and (2) the officer is satisfied that there is sufficient ground for entering into investigation. [42]

5. Delay in arresting the accused.—

The accused residing near the house of the solitary eye-witness PW-2, was not arrested promptly on the ground that the correct address was not given when address of the accused was known to all. The Supreme Court did not find explanation to be satisfactory and directed the accused to be arrested forthwith. [43]

6. 'Forthwith send a report'.—

1. These words enjoin the officer-in-charge of a Police station to send a report to the Magistrate empowered to take cognizance of the offence as soon as he has reason to suspect the commission of

a cognizable offence, from information or other source. The object of laying this duty on the Police is to keep the Magistrate informed of the investigation of a cognizable offence and to give appropriate direction under s. 159 in case the Police declines to investigate, under Proviso (b) to s. 157(1). [44]

2. It is not possible to lay down any universal rule as to within what time the special report is required to be dispatched by the S.H.O. after recording the F.I.R. Each case turns on its own facts. [45]

3. Mere delay in sending the report to the Magistrate, however would not vitiate the trial, in the absence of prejudice caused to the accused by such delay, where the F.I.R. was promptly recorded and the investigation was started on the basis thereof, without any other infirmity. [46] , [47]

4. Nor is it material if the time of despatch of the report to the Magistrate is not mentioned. [48]

5. But extraordinary delay in sending the F.I.R. to the Magistrate provides a legitimate basis for suspecting that the F.I.R. was recorded much later than the stated date and hour, affording sufficient time to the prosecution to introduce improvements and set up a distorted version of the occurrence. This suspicion hardens when the case made in Court differs in some important particulars from that narrated in the F.I.R. In such a case, the evidence. of eye-witnesses cannot be accepted at its face value. [49]

7. Forthwith.—

The expression ‘ *forthwith’* has been explained by the Supreme Court as meaning within a reasonable time and without unreasonable time and without unreasonable delay. So, when the FIR was lodged at the Police Station at 12.00 Noon and the copy of the FIR reached the Magistrate at 6.00 p.m., then having regard to the facts and circumstances of the case as well as lack of adequate police force at the police station, it is held that there was no delay at all to forward the copy to the Magistrate. [50]

Even if there was delay in dispatching the copy of the FIR to the Magistrate, but such delay, if otherwise reasonable, would not effect the prosecution case. [51]

But the inordinate delay in sending the report to the Magistrate with the copy of the FIR in the absence of satisfactory explanation contributed to the doubtful circumstances surrounding the prosecution case. [52]

When in the instant case, there was delay of sixteen hours to send the copy of the F.I.R., yet the same was due to the fact that the majority of police were deputed for maintaining law and order duty which was too tense due to murder of three men of the village. Hence, there is no cogent and convincing reason for doubting the correctness and truthfulness of the F.I.R. [53]

In a murder case F.I.R. was lodged promptly on April 04, immediately after the occurrence. The copy of the F.I.R. reached the Circle Inspector on April 05. Only because there was delay in sending the special report to the Magistrate which reached him on April 08, the Supreme Court did not find any reason to doubt the genuineness of the F.I.R. [54]

8. Delay to be reasonable.—

Delay in sending the copy of FIR to the Magistrate would not alone affect the prosecution case if the same is otherwise found to be trustworthy. [55] In sending the copy of the FIR to Magistrate, every delay is not fatal but

unexplained inordinate delay in sending the FIR to Magistrate may affect the prosecution case adversely. [56] However, where the plea of delay in forwarding the report was neither raised before the trial court nor before the High Court, it was held that the plea cannot be raised for the first time before the trial court. [57]

The failure to forward copy of FIR to Magistrate, where no explanation is given by the prosecution, would cast shadow on the prosecution case. Thus, where material contradictions in statements of prosecution witness existed and serious doubt about the evidence regarding the recovery of weapons of offence was raised, the combined effect of all these factors would make the prosecution case doubtful. [58]

Where the constable carrying the FIR reached the court premises within two hours of the lodging of FIR, but had to wait till the court's sitting hour was over, it was held that the reaching of the FIR before Magistrate in 6 hours on the same day cannot be said to be inordinately delayed. [59]

When no action was taken on the first FIR lodged about the missing of a boy but a second complaint was filed alleging about kidnapping for ransom and the police after recording FIR sent the copy of the said second FIR to the Magistrate promptly, only because there was delay in sending the copy of the first FIR would not affect the prosecution case of kidnapping of the boy for ransom. [60]

When the delay in sending the copy of the FIR to the Magistrate had been properly explained the Court should not doubt the veracity of the FIR. However, because of delay in sending the copy of the FIR to the Magistrate as it was required to be dispatched forthwith, it would put the Court on guard to minutely examine the prosecution version of the story. But that by itself would not render the whole prosecution story doubtful. [61]

Incident took place on 03-04-1988. F.I.R. was lodged on that date. The F.I.R. sent to the Magistrate on that very date. But it is not understood how it reached the Magistrate on 12-04-1988. However, the Supreme Court is of the view that if the evidence of eyewitness is found convincing and credible delay in sending copy of the F.I.R. concerned as unsignificant. [62]

When the occurrence took place on 16-12-2001 while the copy of the report was received by the Magistrate on 20-12-2001 there was delay in sending the copy to the Magistrate, no doubt. But that is a lapse for the police and for that delay the credibility of the prosecution version of the story would not be affected. [63]

Delay in sending copy of the F.I.R. to the Magistrate does not make investigation tainted. Further, if an explanation is offered by the prosecution for the delay that has to be tested. But unexplained delay by itself may not be fatal but is certainly a relevant aspect which can be taken note of while considering the role of the accused. Delay in sending the F.I.R. to the Magistrate sometimes affords opportunity to introduce improvement and embellishment, thereby resulting distorted version of the accused. Hence, *s. 157 Cr.P.C.* mandates that report should be sent forthwith which indicates urgency.[64]

9. Importance of report to the Magistrate at various steps of the investigation.—

Since investigation by the Police is not an end in itself but is only a step culminating in the Magistrate's taking cognizance under s. 190(1)(b), the provisions of the Code enjoin the Police to report to the Magistrate at every

step of the investigation. [65] The reporting starts under s. 157 and ends under s. 173, including the further report (if any), under *new* s. 173(8).

10. Proviso (a).—

This Proviso only says that investigation on the spot may not be necessary where (a) the information is against a person by name; and (b) the case is *not* of a serious nature. In such a case, the Police officer shall not refuse to investigate, but will make the investigation without going to the spot.

11. Proviso (b).—

1. This Proviso lays down that if it appears to the officer-in-charge of a Police station that there is no sufficient ground for entering into an investigation, he may refuse to investigate. But even in that case, he must—

   (a) Enter the information in the Station Diary [s. 154]; [66]

   (b) Comply with the requirements of s. 157(2), viz., to send a report to the Magistrate [67] empowered to take cognizance, stating his reasons for not entering into investigation; notifying to the informant that he will not investigate the case.

2. Though the Proviso does not specify the reasons which would justify his refusal to investigate, it has been held that the following may be good reasons:

   That it would be futile to launch investigation because of the delay in giving information; [68] that it involved a dispute of a civil nature. [69]

12. Further proviso, safeguards for rape victims.—

A further proviso has been inserted below proviso (b) of sub-section (1) of *s. 155 Cr.P.C.* to safeguard the interest of rape victims and to relieve them of harassment by calling them to the police station for the purpose of recording their statements. It has been specifically provided in this proviso that in relation to an offence of rape, the recording of the statement of said victim has to be made in the residence of the victim or in the place of her choice and as far as practicable by a woman police officer. Such recording of statement has to be made in the presence of her parents or guardians or relatives or social worker of the locality. This is a very satisfactory provision in order to maintain dignity of the victim of rape who after rape is committed is traumatised and if the statement of such victim is not recorded in presence of their parents or guardians or near relatives or a social worker of the locality, it would be difficult for eliciting from the victim the details of the incident which culminated in commission of rape.

13. Prior notice to accused before investigation, not necessary.—

When the investigating officer is not deciding any matter except collecting materials for ascertaining whether a *prima facie* case is made out or not, it cannot be said that at that stage rule of *audi alteram partem*

superimposes an obligation to issue a prior notice and hear the accused which the statute does not expressly recognise. [70]

14. Remedies against arbitrary refusal by the Police to investigate.—

1. In case of improper use of the Proviso to s. 157 to refuse investigation into a case, the informant should move the Magistrate under s. 159[71] (see under s. 159,*post*).

2. The aggrieved party may also approach the High Court under *Art. 226 of the Constitution* for a writ of *mandamus* to direct the Police to act according to law, in case such refusal is *mala fide.* [72]

3. The aggrieved party may move the Magistrate by filing a complaint under s. 190(1). In such a case, if the complainant's case was otherwise proved and the conduct of the Police was not satisfactory, no importance should be given to the fact that Police was not satisfied about the complainant's case. [73]

15. Remedies where the Police abuse their power to investigate, under s. 156- 157.—

In this case, the Magistrate cannot take any action to stop or suspend the investigation, [74] but the party aggrieved may obtain relief from the High Court under Art. 226 if the Police officer act s *mala fide,* [75] or in excess of jurisdiction, [76] in which case the High Court can issue *mandamus* to restrain the Police officer from misusing his statutory powers. [77] But it is difficult to establish *mala fides.* [78]

16. Dying declaration. —

It is desirable that the dying declaration should be recorded by a Magistrate and not the Investigating Police Officer. [79] But there may be circumstances when the investigating Officer had no other alternative. [80]

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21 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 11 (w.e.f. 31-12-2009).

22 *Jay Engineering v. State of W.B.,* (1967) 72 CWN 441 (paras 43, 50).

23 *H.P. Admn. v. Om Prakash,* (1972) I SCC 249 (para 10).

24 *H.P. Admn. v. Om Prakash,* (1972) I SCC 249 (para 10).

25 *Kantilal v. State,* AIR 1970 Guj 218 [LNIND 1969 GUJ 56](para 7).

26 *Pala Singh v. State of Punjab,* AIR 1972 SC 2679 [LNIND 1972 SC 377](para 7) : (1972) 2 SCC 640 [LNIND 1972 SC 377] : 1973 Crlj 59 ; *Sarwan Singh v. State of Punjab,* AIR 1976 SC 2304 1976 4 SCC 369 : 1976 Crlj 1757 ; *State of U.P. v. Gokaran,* AIR 1985 SC 131 : 1984 Supp SCC 482 : 1985 Crlj 511 .

27 *H.P. Admn. v. Om Prakash,* (1922) I SCC 249 (para 10).

28 *H.P. Admn. v. Om Prakash,* (1922) I SCC 249 (para 10).

29 *Vaidyanathan,* AIR 1970 Mad 65 .

30 *Bhagwant,* AIR 1964 SC 221 [LNIND 1963 SC 114]: (1964) 1 Crlj 140 .

31 *Nika v. State of H.P.,* AIR 1972 SC 2077 [LNIND 1972 SC 266]: (1972) 2 SCC 80 [LNIND 1972 SC 266] : 1972 Crlj 1317 ; *Maha Singh v. State,* AIR 1 976 SC 449 (para 37) : (1976) 1 SCC 644 [LNIND 1976 SC 6] : 1976 Crlj 346 ; *State of U.P. v. Bhagwant,* AIR 1964 SC 221 [LNIND 1963 SC 114](paras 8, 18) : (1964) 1 Crlj 140 .

32 *State of U.P. v. Bhagwant,* AIR 1964 SC 221 [LNIND 1963 SC 114](paras 8, 18) : (1964) 1 Crlj 140 .

33 *Sirajuddin v. State of Madras,* AIR 1971 SC 520 [LNIND 1970 SC 112](paras 20, 24) : (1970) 1 SCC 595 [LNIND 1970 SC 112] : 1971 Crlj 523 .

34 *Sirajuddin v. State of Madras,* AIR 1971 SC 520 [LNIND 1970 SC 112](paras 20, 24) :

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35 *State of Bihar v. P.P. Sharma,*
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LNIND 1991 SC 184].

36 *Union of India v. W.N. Chadha,*
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37 *Navin Chandra N. Majithia v. State of Meghalaya,*
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LNIND 2000 SC 1345] :
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LNIND 2000 SC 1345] :
AIR 2000 SC 3275 [
LNIND 2000 SC 1345]:
2000 Crlj 4600 .

38 *Mohindro v. State of Punjab,*
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2001 Crlj 2587 :
(2001) 3 Crimes 190 (2).

39 *Prakash Singh Badal v. State of Punjab,*
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LNIND 2006 SC 1091]:
(2007) 1 SCC 1 [
LNIND 2006 SC 1091] :
(2007) 1 SCC 1 [
LNIND 2006 SC 1091]93(Cri) .

40 *Sashi Kant v. C.B.I.,*
AIR 2007 SC 351 [
LNIND 2006 SC 919]:
(2007) 1 SCC 630 [
LNIND 2006 SC 919] :
(2007) 1 SCC 406 (Cri) :
2007 Crlj 995 .

41 *Union of India v. W.N. Chada,*
AIR 1993 SC 1082 : 1993 Crlj 859 :
(1993) 1 SCC 154 [
LNIND 1992 SC 793] :
AIR 1993 SC 796 [
LNIND 1992 SC 793].

42 *State of Hariyana v. Bhayanlal,*
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1992 Crlj 527 : 1992 Supp (1) SCC 335.

43 *Joseph v. State of Kerala,* (2003) 7 SCC 258 [*LNIND 2003 SC 624*] : 2003 SCC (Cri) 1616 [*LNIND 2003 SC 624*] : 2003 Crlj 3764 .

44 *Pala Singh v. State of Punjab,* AIR 1972 SC 2679 [*LNIND 1972 SC 377*](para 7) : (1972) 2 SCC 640 [*LNIND 1972 SC 377*] : 1973 Crlj 59 ; *Sarwan Singh v. State of Punjab,* AIR 1976 SC 2304 1976 4 SCC 369 : 1976 Crlj 1757 ; *State of U.P. v. Gokaran,* AIR 1985 SC 131 : 1984 Supp SCC 482 : 1985 Crlj 511 .

45 *Mahmood v. State,* 2008 Crlj 696 : (2009) 11 SCC 690 [*LNIND 2009 SC 723*] : (2009) 2 Crimes 80 [*LNIND 2009 SC 723*].

46 *Pala Singh v. State of Punjab,* AIR 1972 SC 2679 [*LNIND 1972 SC 377*](para 7) : (1972) 2 SCC 640 [*LNIND 1972 SC 377*] : 1973 Crlj 59 ; *Sarwan Singh v. State of Punjab,* AIR 1976 SC 2304 1976 4 SCC 369 : 1976 Crlj 1757 ; *State of U.P. v. Gokaran,* AIR 1985 SC 131 : 1984 Supp SCC 482 : 1985 Crlj 511 .

47 *Pattipati v. State of A.P.,* (1985) 4 SCC 80 [*LNIND 1985 SC 254*] (para 9) : AIR 1985 SC 1715 [*LNIND 1985 SC 254*]: 1985 Crlj 2012 ; *Sarwan v. State of Punjab,* AIR 1976 SC 2304 : (1976) 4 SCC 369 : 1976 Crlj 1757 .

48 *Om Prakash v. State of U.P.,* (1983) Crlr 267(SC) .

49 *Ishwar v. State of U.P.,* AIR 1976 SC 2423 (para 5) : 1976 Crlj 1883 ; *Mitter v. State of U.P.,* AIR 1976 SC 1156 : (1976) 1 SCC 723 : 1976 Crlj 857 .

50 *All China Apparoa v. State of Andhra Pradesh,* (2002) 8 SCC 440 [*LNIND 2002 SC 647*] : 2002 SCC (Cri) 87 :

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51 *Bodh Raj v. State of J&K,*
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2001 Crlj 4708 ; *Harpal Singh v. Devinder Singh,*
AIR 1997 SC 2914 [
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(1997) 6 SCC 660 [
LNIND 1997 SC 881] :
1997 SCC (Cri) 981 :
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52 *Bijay Singh v. State of Bihar,*
AIR 2002 SC 1981 : (2003) 4 SCC 128 :
2003 SCC (Cri) 801 [
LNIND 2003 SC 289] :
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53 *B.N. Rao v. State,*
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54 *Sarvesh Narayan Sukla v. Daroga Singh,*
AIR 2008 SC 320 [
LNIND 2007 SC 1241]:
(2007) 13 SCC 360 [
LNIND 2007 SC 1241] : (2008) 1 All LJ 56.

55 *Gurpreet Singh v. State of Punjab,*
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56 *Bhajan Singh v. State of Haryana,*
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57 *Surajit Sarkar v. State of West Bengal,* AIR 2013 SC 807 [LNINDORD 2012 SC 361].

58 *Shivlal v. State of Chhattisgarh,* AIR 2012 SC 280 [LNIND 2011 SC 926]: (2011) 9 SCC 561 [LNIND 2011 SC 926]: 2011 (10) SCALE 577.

59 *Mookkiah v. State,* AIR 2013 SC 321 [LNIND 2013 SC 6].

60 *A.N.Ventakesh v. State of Karnataka,* (2005) 7 SCC 714 : 2005 SCC (Cri) 1938 : 2005 Crlj 1742 : AIR 2005 SC 3809.

61 *Ravi Kumar v. State of Punjab,* AIR2005 1929 : (2005) 9 SCC 315 [LNIND 2005 SC 230] : 2005 Crlj 1742 : (2005) 1 Crimes 373.

62 *Pandurang v. State of Maharashtra,* (2009) 10 SCC 773 [LNIND 2009 SC 1885].

63 *Ageel Ahmed v. State of U.P.,* AIR 2009 SC 1271 [LNIND 2008 SC 2493]: (2008) 16 SCC 372 [LNIND 2008 SC 2493] : (2009) 2 All LJ 178.

64 *State of Kerala v. Anila Chandran,* AIR 2009 SC 1866 [LNIND 2009 SC 837]: (2009) 13 565.

65 *Roy v. State of W.B.,* AIR 1962 Cal 137.

66 *Kalesha,* in re., AIR 1957 AP 268 [LNIND 1956 AP 65](para 5).

67 *Kalesha,* in re., AIR 1957 AP 268 [LNIND 1956 AP 65](para 5); *Jay Engineering v. State of W.B.,* (1967) 72 CWN 441 (para 43).

68 *Kalesha,* in re.,
AIR 1957 AP 268 [
LNIND 1956 AP 65](para 5).

69 Cf. *Bhauchha v. Srinibass,*
AIR 1967 Or 62 63 .

70 *Union of India v. W.N. Chadha,*
(1993) Crlj 859 :
AIR 1993 SC 1082 : (1993) 1 SCC 154 :
(1993) 1 Crimes 308 .

71 *Sharma v. Bipen,*
AIR 1970 SC 786 [
LNIND 1970 SC 121]:
(1970) 1 SCC 653 [
LNIND 1970 SC 121] :
1970 Crlj 764 .

72 *Jay Engineering v. State of W.B.,*
(1967) 72 CWN 441 (para 43).

73 *Balwant v. State of Punjab,*
(1987) 2 SCC 27 [
LNIND 1987 SC 144] (para 11) :
AIR 1987 SC 1080 [
LNIND 1987 SC 144]:
1987 Crlj 971 .

74 *Jay Engineering v. State of W.B.,*
(1967) 72 CWN 441 (para 43).

75 *Sharma v. Bipen,*
AIR 1970 SC 786 [
LNIND 1970 SC 121]:
(1970) 1 SCC 653 [
LNIND 1970 SC 121] :
1970 Crlj 764 .

76 *Jay Engineering v. State of W.B.,*
(1967) 72 CWN 441 (para 43).

77 *Sharma v. Bipen,*
AIR 1970 SC 786 [
LNIND 1970 SC 121]:
(1970) 1 SCC 653 [
LNIND 1970 SC 121] :
1970 Crlj 764 .

78 *State of Bihar v. Sharma,*
(1991) Crlj 1438 (paras 23, 55).

79 *State of Bihar v. Sharma,* (1991) Crlj 1438 (paras 23, 55).

80 *Dalip v. State of Punjab,* AIR 1979 SC 1173 : (1979) 4 SCC 332 : 1979 Crlj 700 ; *State of Punjab v. Amarjit,* AIR 1988 SC 2013 [*LNIND 2011 SC 158*] (paras 18-19) : 1988 Supp SCC 704.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 158
Report how submitted.

(1) Every report sent to a Magistrate under Section 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer-in-charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

1. Scope of s. 158.—

This section reproduces *old* s. 158.

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CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 159
Power to hold investigation or preliminary inquiry.

Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in this Code.

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1. Scope of s. 159.—

This section reproduces *old* s. 159. The power to direct investigation which is conferred by the present section upon a Magistrate is not a general power but is limited to this specific contingency of the report under the Proviso to s. 157[81] being one of refusal by the Police to investigate, [82] —as indicated by the words—'on receiving such report'. It cannot be used when the Police reports that it has taken up investigation. [83] , [84]

2. Courses open to Magistrate on receipt of a report under s. 157.—

1. When a Police officer sends a report under s. 157(1) or its Proviso, the Magistrate who receives it may take the following steps :

(i) If the Police officer reports that he would investigate, the Magistrate has nothing to do until the Police officer sends his final report under s. 169 or the challan under s. 173, because, the Magistrate has no power to stop investigation by the Police [85] or to give directions as to how it should be conducted or to direct inquiry by Magistrate. [86] , [87]

[He can, of course, issue a search-warrant under s. 100 to rescue a person reported to be

under wrongful confinement.]

(ii) If, however, the report of the Police is under the Proviso to s. 157(1),*i.e.* , where the officer-in-charge does not proceed to investigate the case, the Magistrate can intervene under s. 159 and either direct an investigation, or, in the alternative, himself proceed or depute a subordinate Magistrate to proceed to inquire into the case. [88]

2. Though it has been stated above that the Magistrate cannot hold or direct a judicial inquiry while Police investigation is going on, if the informant, dissatisfied with the Police investigation, submits a 'protest petition' before the Magistrate against such investigation, it would be open to the Magistrate to treat that protest petition as a 'complaint' and hold an inquiry under s. 202 (*post*). [89]

(iii) The words 'otherwise to dispose of the case', indicates that if, on receipt of the report under the Proviso to s. 157(1), the Magistrate does not think fit to direct investigation or inquiry, he may dismiss the case.

3. 'Preliminary inquiry'.—

Section 159 itself does not lay down the procedure to be adopted at the magisterial inquiry. Hence, the relevant provisions of the Code relating to a 'preliminary inquiry', as distinguished from a trial, are to be followed, to ascertain whether there is a case for trial. [90] At such inquiry, he may record the statements of witnesses under s. 164(1), (5),[91] including confession of the accused, after complying with the requirements of ss. 164, 281, 313. Section 309 [*old* s. 344] will also be attracted. [92] But s. 164 does not make it obligatory upon the Magistrate to record a confession made to him during such preliminary inquiry. [93]

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81 *Pancham* *v.* *State,* AIR 1967 Pat 416 (para 4).

82 *Sharma* *v.* *Bipen,* AIR *1* 970 SC 786 : (1970) 1 SCC 653 [*LNIND 1970 SC 121*] : 1970 Crlj 764 .

83 *Sharma* *v.* *Bipen,* AIR *1* 970 SC 786 : (1970) 1 SCC 653 [*LNIND 1970 SC 121*] : 1970 Cr1-J 764.

84 *Pancham* *v.* *State,* AIR 1967 Pat 416 (para 4).

85 *Pancham* *v.* *State,*
AIR 1967 Pat 416 (para 4).

86 *Sharma* *v.* *Bipen,*
AIR 1970 SC 786 [
LNIND 1970 SC 121]:
(1970) 1 SCC 653 [
LNIND 1970 SC 121] : 1970 Cr1-J 764.

87 *Pancham* *v.* *State,*
AIR 1967 Pat 416 (para 4).

88 *Sharma* *v.* *Bipen,*
AIR 1970 SC 786 [
LNIND 1970 SC 121]:
(1970) 1 SCC 653 [
LNIND 1970 SC 121] : 1970 Cr1-J 764.

89 *Pancham* *v.* *State,*
AIR 1967 Pat 416 (para 4).

90 *Motilal,* (1920) 46 Bom 61.

91 *Harendra,*
AIR 1925 Cal 161 .

92 *Emp.* *v.* *Bhairab,*
(1897) 2 CWN 702 .

93 *Pedda v. Emp.,* (1921) 45 Mad 230.

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CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 160
Police Officer's power to require attendance of witnesses.

(1) Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required :

Provided **that no male person [94] [under the age of fifteen years or above the age of sixty five years or a woman or a mentally or physically disabled person] shall be required to attend at any place other than the place in which such male person or woman resides.**

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

1. Scope of s. 160.—

This section corresponds to *old* s. 160, with the addition of sub-sec. (2). This section has been amended *vide* the *Criminal Law (Amendment) Act, 2013* and under the proviso to sub-s. (1) of s. 160, a privilege had been given to a person under the age of fifteen years and a woman that they shall not be required to attend at any place other than their place of residence for recording their statement during investigation. Now under the present amendment this privilege has also been extended to a person above sixty-five and a person mentally or physically disabled.

2. Sub-sec. (1): 'Any person'.—

Though these words are wide enough to include the 'accused person', in the present context, it would be odd to suppose that the Police officer would require the accused person to attend [95] when he has the power to arrest him. [96]

3. 'Shall attend'.—

1. Non-attendance, in compliance with the Investigating Officer's valid and definite written order, entails punishment under s. 174, I.P.C. [97]

2. The words 'this Chapter' indicate that the provisions of s. 160 cannot be applied to any proceeding under any other Chapter, *e.g.* , under s. 145. [98]

4. Proviso.—

1. This Proviso, which was inserted by Amendment Act 26 of 1955, has been retained by the *new* Code. Prior to this amendment, even a child or woman, if so required by the Investigating Officer, was bound to attend at *place of the investigation.* After the amendment, if the Officer wants to examine a child below 15 or a woman (whether *purdanashin* or not), he must come to their residence.

2. If this provision is violated and the child or woman is kept under restraint in the Police station or other place of investigation, the Investigation Officer may be liable to punishment under ss. 341-342, I.P.C. [1]

5. Directing a woman to appear in police station.—

In view of the proviso to sub-section (1) *s. 160 Cr.P.C.* , so far as the male person below the age of fifteen years or woman is concerned, he or she will be examined his or her place of residence. So, when a police officer directs a woman to appear before him for investigation at the police station, he violates s. 160(1) *Cr.P.C.* [2]

6. Victims of rape brought to woman police station.—

In case of rape of thirteen girls of an Ashram by the founder of the Ashram who had dominion or control over those victims, and accused appellant No. 1 threatened the victims of dire consequences if they disclosed about his misdeeds, the victims were removed from the Ashram and examined and interrogated at Woman Police Station, so that they may speak the truth without any fear. It is held by the Supreme Court that such act as of the I.O. did not violate *s. 160 Cr.P.C.* [3]

Proviso to sub-section (1) of *s. 160 Cr.P.C.* shall now have to be read along with further proviso below proviso (b) of *s. 157 Cr.P.C.* which has now been inserted in the Code by

Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009. In that further proviso, it has been specifically provided that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in place of her choice and as far as practicable by a woman police officer in the presence of parents or guardians or near relatives or social worker of the locality. Over and above, the proviso to sub-section (1) of *s. 160 Cr.P.C.* states that where no male person under the age of fifteen years or woman shall require to attend at any place other than the place in which such male person or woman resides for the purpose of recording the statement. Special provision is made for rape victims in the further proviso below proviso (b) of sub-section (1) of s. 157 Crp.C. specifically providing the recording of the statement of the victim of a sexual offence, such as rape, shall now be made in the residence of the victim or at any place of her choice and also in the presence of her parents or guardians or other relatives or a social worker of the locality.

7. Prosecution for failure to attend on summons under s. 160(1)Cr.P.C.—

When a person on being summoned by the I.O. under s. 160(1) *Cr.P.C.* fails to attend for disobeying such summons, he may be prosecuted under *s. 188 Cr.P.C.* But only because the petitioner may move a complaint to the High Court that certain persons have been detained in the police station illegally, the police officer cannot prosecute him under s. 188 I.P.C. So, the High Court quashed such criminal proceedings against the petitioner.[4]

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94 Subs. by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 14, for the words "under the age of fifteen years or woman" (w.e.f. 3-2-2013).

95 Cf. *State of Gujarat v. Shyamlal,* AIR 1965 SC 1251 [*LNIND 1964 SC 352*]: (1965) 2 Crimes 256.

96 *Saminada,* (1883) 7 Mad 274(FB); *Velu v. State,* (1971) Crlj 725 (Ker).

97 *Jogendra,* (1897) 24 Cal 320.

98 *Manicka,* in re., AIR 1968 Mad 225.

1 Cf. *Raja v. State of Haryana,* (1971) 3 SCC 945 (para 13) : 1972 SCC (Cri) 193.

2 *Nandini Satpathi v. P.L. Dani,* AIR 1978 SC 1025 : 1978 Crlj 968 : (1978) 2 SCC 424 .

3 *Kamalanatha v. State of Tamil Nadu,* AIR 2005 SC 2132 [*LNIND 2005 SC 337*]: (2005) 5 SCC 194 [*LNIND 2005 SC 337*] : 2005 SCC (Cri) 1121 [*LNIND 2005 SC 337*].

4 *T. Purashottam v. Circle Inspector of Police,* 1997 Crlj 4011 AP .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 161
Examination of witnesses by police.

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

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

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

[5] [*Provided* that statement made under this sub-section may also be recorded by audio-video electronic means:]

[6] [*Provided further* that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, *section 376E* or *section 509* of the *Indian Penal Code (45 of 1860)* is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.]

The *Code of Criminal Procedure* (Amendment) Act, 2008 has added a proviso to sub-section (3) of *s. 161 Cr.P.C.* enabling the recording of the statement of witnesses by audio-video electronic means. This proviso has been brought into force with effect from 31-12-2009. This section was again amended by the *Criminal Law (Amendment) Act, 2013* and under sub-section (3) of Section 161, a second proviso has been inserted on the recommendation of Justice J.S. Verma Committee that the statement of a woman, who has been victim of offences enumerated in the proviso shall be recorded by a woman police officer or any woman officer. This has been done to protect a victim woman from the embarrassment of narrating the sexual acts before a male police officer.

1. Scope of s. 161.—

This section corresponds to *old* s. 161, with the addition of the word 'truly' in sub-sec. (2) and the words 'and true' in sub-sec. (3).

2. S s. 161 and 162. —

1. —If the statement is reduced into writing, it may be used at the trial for the purposes under s. 161(I), Proviso, if it complies with the requirements of s. 162(1). [7]

2. But the use under s. 162(1), Proviso can be made only in that very case during the investigation of which the statement had been made, and not in any cross-case. [8]

3. S. 161. (2) and Art. 20(3) of the Constitution.—

1. There is a substantial agreement between the two provision. [9] While Art. 20(3) gives the constitutional guarantee of the immunity from self-incrimination, the latter part of *s. 161(2) of the Crpc* . is a legislative gloss on the constitutional guarantee,—the difference being that while s. 161(2) may be changed by the Legislature, Art. 20(2) cannot be amended by anything short of amendment of the *Constitution* .[10]

2. The bar of Art. 20(3) is, however, wider inasmuch as it applies not only to statements made at the stage of investigation to which s. 161 is specifically attracted, but it applies to *every stage* where furnishing of information and collection of materials takes place, including statements made in court.

3. In relation to statements made during investigation by the Police, the extent of the immunity is co-terminous under both the provisions. The words 'expose himself to a criminal charge' in s. 161(2) would protect the person not only where he is already exposed to a criminal charge but also against incrimination in future, that is, with respect to statements which will imminently expose him to subsequent criminal charges. Similarly, under Art. 20(3), the words 'accused of an offence' must mean a person who is already an 'accused' person at the time when the statement is made; if this condition is satisfied, it would protect him from making any incriminating statement which might amount to compelling him 'to be a witness against himself' in any criminal proceeding, which might be brought against him in future.

4. Sub-sec. (1) : 'Any person'.—

Though the marginal note to this section speaks of examination of 'witnesses', there is nothing in the section to exclude an examination of a person by the Police during investigation of a person who subsequently becomes an accused [11] though, of course, no statement made by such accused to a Police officer during investigation shall be admissible in evidence at the trial, by reason of s. 162, except under s s. 27 and 32 or for purposes of s. 145. [12]

But the constitutional protection under Art. 20(3) would extend to such examination, with the result that (i) the accused would be entitled to refuse answer to incriminating question; (ii) the Police should not use physical or mental pressure, such as threat of prosecution, to extort answers which have a reasonable prospect of exposing him to some other accusation. [13]

5. 'May examine'; 'may reduce into writing'.—

1. These two expression in sub-sec. (1) and (3), respectively, leave it to the *discretion* of the Investigating Officer to examine any person or to record his statement in writing, if examined [see under sub-sec. (3), *post*]. The Law Commission [14] refused to make it obligatory on the ground that it might put a heavy burden on the Investigating Officer [see, further, under sub-sec. (3) *below*].

2. As s. 163(1),*post* provides, the Investigating Officer should not use any threat, inducement, coercion or confinement, [15] or assault [16] for the purpose of obtaining any statement under s. 161 from any person.

6. Manner of recording evidence by the police.—

1. When there are more witnesses than one police officer shall record the statement of the witnesses separately. [17]

2. The Investigating Officer shall not use any threat, inducement, coercion or assault to obtain the statement of the witness. [18]

3. The Investigating officer shall record the statement of witnesses promptly. [19] Such prompt interrogation of witness during investigation and recording their statement eliminate the chances of adulterated account creeping into the statement of the witnesses. [20]

4. As it is not the duty of the Investigating Officer to record the statement of a witness and omission of the Investigating Officer to examine an unnecessary witness under *s. 161 Cr.P.C.* would not cause any prejudice to the accused.[21]

5. Proviso to sub-section (3) of *s. 161 Cr.P.C.* enables the police officer to record the statement of witness by audio-video electronic means. This proviso has been inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009.

7. Effect of delay in recording statements of eye-witnesses.—

Even though it is not obligatory upon the investigating officer to record the statements of witnesses, an inordinate delay in recording the statements of eye-witnesses who were present or available when he visited the scene of occurrence may lend infirmity to the prosecution case at the trial, because it might, with other circumstances, lead to the inference that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. [22]

When a witness is examined by the Investigating Officer about two months after the incident, his testimony should not be taken into consideration. [23]

However, delay of 24 days in examining the witness due to I.O.`s involvement in other duties, according to the Supreme Court, was inconsequential. [24]

Inordinate delay in examination of a witness would not be fatal, when there were reliable eye-witnesses to prove the prosecution case. [25]

When the witnesses gave sufficient explanation for making delay in offering statement to the I.O. and the said explanation has been accepted, the conviction of the accused on the basis of such evidence has not been interfered with. [26]

When due to lack of fairness of the I.O., the superior officer transferred him and entrusted the investigation to some other officer and as a result statement of witnesses were recorded by the second I.O. after 5 or 6 days of the murder, the delay was held to be properly explained. [27]

So, there cannot be a universal rule that because of delay in examination of the witnesses for a few days in all cases be would turn fatal for the prosecution case. [28]

But unexplained delay of three months in recording the statement of witnesses has the adverse effect on the prosecution case. [29]

Unwarranted and unexplained delay in examining the material witnesses make their evidence unreliable. [30]

A child witness aged 13 years sustained head injury for which he was unable to speak except making some moaning noises. The doctor, the I.O. and the neigbbours were all saying that the said witness was unable to communicate though could comprehend what was being asked. The High Court disbelieved his testimony on the ground that the I.O. should have taken his statement in writing. The Supreme Court did not approve such opinion of the High Court. So, his evidence though taken late was accepted as true. [31]

But when the statement of a sole eye witness aged seven years was recorded three days after the occurrence, when the medical report showed that he regained consciousness on the date following the date of occurrence, his evidence has not been believed as there was possibility of his being tutored in the meantime. [32]

Even if there was delay in recording the statement of witnesses but the I.O. was not asked anything about the delay but the witnesses themselves explained the reasons of their delayed examination, the plea that their evidence was not trustworthy was not acceptable. [33]

During the trial no question was asked about the delayed examination of the PW-3 and PW-5 and no plea was taken that their delay in examination affected the prosecution case. There were other eye-witnesses other than PW 3 and PW-5. On considering the whole testimony of the eye-witnesses, it is held that the delay in examination of PW-3 and PW-5 did not affect otherwise trustworthy evidence of other eye-witnesses. [34]

The Supreme Court has observed that though delayed examination of the witnesses by the I.O. is normally looked down upon, but each case has to be considered on its own facts and on perusing the evidence, the Supreme Court has held that in the instant case, there is no reason to disbelieve the evidence of PWS 3 to 6 so far the accused No. 1 is concerned. [35]

The name of the concerned eye-witness did not find place in the F.I.R., but that is not a significant omission. But what is material is the content of the statement of the said eyewitness. It is the case of prosecution that the said eye-witness was constantly in touch with the I.O. but his statement was recorded after one and half months. It is, therefore, held that if his statement was not recorded on the date of the incident or within the reasonable time therefrom, it has to be viewed with caution. [36]

The High Court rejected the evidence of PW-2 only on the ground that there was delay in recording his statement under *s. 161 Cr.P.C.* and that he had criminal antecedent. But PW-2 was named in the F.I.R. which supported the fact that he was present at the spot during the occurrence. Therefore, even if he had criminal antecedent and his statement was recorded later, his evidence inspired confidence and hence keeping caution in mind the High Court should not have totally rejected his evidence.[37]

Evidence of a thirteen years old boy who was an eye-witness and was sitting near the dead body of the deceased even on the night of occurrence particularly because his statement was recorded on the next date at about 12 p.m., could not be thrown out, more particularly when the boy had faced the ordeal of cross-examination in a very efficient manner. Moreover, the usual apathy of police to record the statement in the late hours of night can also be another factor to be considered. Therefore, only because there was some delay in recording the statement of a thirteen year old boy admittedly an eye-witness his evidence could not be rejected only on the ground that his evidence was not recorded by the I.O. on the very night of the occurrence. [38]

8. Sub-sec. (2).—

1. The word ‘truly’, inserted by the *new* Code requires the witness who is examined by the Investigating Officer to answer *truly,* even though there is nothing in the section to require him to take oath or

affirmation, so that he cannot be prosecuted under s. 193, I.P.C, for giving false evidence before the Police. [39] But the liability to be prosecuted under s s. 202-203, I.P.C, remains. [40]

2. The witness so examined is, however, not bound to answer incriminating questions, or questions which have a tendency to expose himself to any statutory penalty or forfeiture.

3. If incriminating statements are obtained from the accused and a charge-sheet is founded thereon, it may be a good ground for quashing the charge with a direction to the trial Court to reconsider the matter after excluding such statements. [41]

9. Sub-sec. (3) : Power to record statements.—

1. This sub-section *empowers* the Police Officer making an investigation under this Chapter, to record the statements of witnesses examined by him but he is not bound to make such a record in every case, [42] and the competency of such witnesses to testify in Court does not depend upon the making of such record.

2. But even though the Police officer is not bound to record the statement of anybody, if he does record, he must comply with the following conditions :

(i) Through he need not record verbatim what the witness has said and may record only its substance or in any other form, [43] it must be a *true* record of the statement, as has been made clear by the insertion of the word 'true' in the new sub-section. But where the identical story is given by several witnesses, the veracity of the record of the statement cannot be questioned merely because identical language is used in recording the statement of the several witnesses. [44]

(ii) Secondly, if the Police officer chooses to record the statement of witnesses, he must make a separate record of the statement of each witness and not a boiled or condensed version of all witnesses in a lump. [45]

(iii) He should not have it signed by the witness [s. 162(1),*post*]. [46]

(iv) The statement should be recorded at the earliest time after the occurrence to which the statement testifies, [47] in order to prevent any embellishments or alternations made by those persons as witnesses at the trial. The accused is given an opportunity to test the veracity of the prosecution witnesses, under s. 162(1), Proviso, with reference to a statement recorded under s. 161. Hence, where the statement under s. 161 is recorded after a long delay on the part of the investigating officer, which is unexplained, the evidence of such witness in Court will be rendered unreliable, [48] and if such witness be a material witness and there are discrepancies in his evidence, the conviction of the accused is liable to be set aside. [49]

But it cannot be laid down that mere delay of the Police Officer in recording the statement of witness will in every case render the evidence of such witness unreliable. [50] It will be so only if (i) the delay is unexplained; and (ii) the delay is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a got-up witness to support a false prosecution case. [51] Hence, the Court should specifically ask the investigating officer about the delay and the reasons therefor. [52]

Thus, the delay will not be material—

Where the witness in question remained hidden for several days after the occurrence out of fear of the accused and was thus not available to the investigating officer for the purpose. [53]

10. Non-recording of statement of witnesses.—

When the witnesses were not witnesses of the act ual occurrence but were witnesses of the dying declaration and of certificate given by the doctor about the mental condition of the deceased, non recording of the statement of those witness by police are not fatal when there was no plea of the accused that the dying declaration was not sent to the Magistrate immediately. [54]

11. Substance of interrogation recorded by the I.O.—

In substance of interrogation recorded by the I.O. cannot be termed as statement recorded under *s. 161 Cr.P.C.* [55]

12. Statement of document by evidence.—

Statement of witnesses under *s. 161 Cr.P.C.* is a documentary evidence under *s. 3 of the Evidence Act* .[56]

13. User of statement under s. 161 Cr.P.C.—

The statement of a witness under *s. 161 Cr.P.C.* is a previous statement and can only be used for the purpose of contradiction or omission of the trial.[57]

Even though the omission or contradiction made by the witness in a statement under *s. 161 Cr.P.C.* is not evidence, the Court has power to look into is for considering to find out the said contradiction and the same can be used to aid the Court in favour of the accused.[58]

Though vital omissions may amount to contradiction, yet non-mentioning of details in the statement does not mean the non-existence of those facts and such minute details can be given in evidence by the witness. [59]

Only because the witness in his statement under *s. 161 Cr.P.C.* has not given the details of injuries sustained by the victim, that fact would not render his evidence untrustworthy.[60]

Similarly, omission to mention the names of the other eye-witnesses in the statement would not render such evidence at the trial to be not reliable. [61]

The evidence of the witness cannot be impeached with reference to the statement made by some other witnesses. [62]

A previous statement of a victim recorded under *s. 161 Cr.P.C.* can be used by the defence in a trial in some other cases, when he had been examined in that case also.[63]

14. Effect of failure to comply with sub-sec. (3).—

1. The recording of a joint statement of the witnesses is a contravention of s.161(3) and must be disapproved. [64]
2. But the failure to record a separate statement in respect of each witness does *not* render the testimony given by such witness *inadmissible.* [65] It is, however, for the Court to decide whether it will rely on such testimony or attach any weight to it. [66]

15. Copies of statements recorded under s. 161 to be delivered to accused.—

1. Under s. 173(5)(b) and (7), *post,* the investigating Police Officer should deliver copies of the statements recorded under s.161 of such witnesses as are proposed to be relied upon by the prosecution at the trial. Where he seeks to exclude any part of such statements from the accused in the interests of justice, he should, while forwarding the statements to the Magistrate, append a note to that effect.
2. Failure to furnish copies of these statements to the accused may prove fatal to the trial or conviction, where the accused has been or would be prejudiced, *e.g.* , where owing to lapse of a long time, the recorded statements themselves were not available. [67]

Copies of statement of witnesses recorded under s. 161 Cr P.C. are required to be supplied to the accused. The High Court cannot direct the police to supply the gist of the statement of the witnesses, as recorded by the Investigating Officer during the investigation under *s. 172 Cr.P.C.* [68]

Even if the statements of the witnesses do not support the prosecution case, the accused is entitled to its production to ensure fair trial. So, withholding of such evidence on the plea that they do not support the prosecution case is violative of *Article 21 of the Constitution* . [69]

16. Evidentiary value of statement under s. 161(3).—

See under s. 162,*below.*

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5 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 12 (w.e.f. 31-12-2009).

6 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 15 (w.e.f. 3-2-2013).

7 *Sirajuddin v. State of Madras,* [(1970) 1 SCC 595 : LNIND 1970 SC 112] (para 18) : [AIR 1971 SC 520 : LNIND 1970 SC 112]: 1971 Crlj 523 .

8 *Gajendra v. State of U.P.,* AIR 1975 SC 1703 : (para 10) : (1975) 4 SCC 241 : 1975 Crlj 1494 .

9 *Nandini v. Dani,* AIR 1978 SC 1025 : (para 19) : (1978) 2 SCC 424 : 1978 Crlj 968 .

10 *Nandini v. Dani,* AIR 1978 SC 1025 : (para 19) : (1978) 2 SCC 424 : 1978 Crlj 968 .

11 *Pakala v. Emp.,* [AIR 1939 PC 47 : LNIND 1939 PC 1]; *Mahabir v. State of Bihar,* [(1972) 1 SCC 748 : LNIND 1972 SC 135] (763) : [AIR 1972 SC 1331 : LNIND 1972 SC 135]: 1972 Crlj 860 .

12 *Mahabir v. State of Bihar,* [(1972) 1 SCC 748 : LNIND 1972 SC 135] (763) : [AIR 1972 SC 1331

LNIND 1972 SC 135]:
1972 Crlj 860 .

13 *Nandini v. Dani,*
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1978 Crlj 968 .

14 41st Rep., paras 14.09.

15 *State of Maharashtra v. Atma Ram,*
AIR 1966 SC 1786 (para 3) :
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16 *State of A.P. v. Venugopal,*
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18 *State of Maharashtra v. Atma Ram,*
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LNIND 1963 SC 159]: (1964) 1 Cr.LJ 16 :
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LNIND 1963 SC 159].

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20 *Ramesh v. State of Maharashtra,*
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1997 Crlj 760 :
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LNIND 1996 SC 1658]:
(1996) 11 SCC 547 [
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LNIND 2002 SC 538] : 2002 SCC (Cr) 1734.

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(2004) 11 SCC 282 [
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34 *State of U.P. v. Satish,* [2005 SC 124]: (2005) 3 SCC 114 [2005 SC 124] : 2005 Crlj 1428 : (2005) 1 Crimes 146 [2005 SC 124].

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36 *Prem Narayan v. State of M.P.,* (2007) 15 SCC 485 [2006 SC 1057].

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40 *Sankaralinga,* (1900) 23 Mad 544.

41 *Tilkeshwar v. State of Bihar,* (1955) 2 SCR 1043 (1046) : AIR 1956 SC 238 [1955 SC 109]: 1956 Crlj 441.

42 *Tilkeshwar v. State of Bihar,* (1955) 2 SCR 1043 (1046) : AIR 1956 SC 238 [*LNIND 1955 SC 109*] : 1956 Crlj 441 .

43 *Gurbachan v. State of Punjab,* AIR 1957 SC 623 (para 7) : 1957 Crlj 1009 .

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48 *Ranbir v. State of Punjab,* AIR 1973 SC 1409 [*LNIND 1973 SC 165*](para 7) : (1973) 2 SCC 444 [*LNIND 1973 SC 165*] : 1973 Crlj 1120 .

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50 *Ranbir v. State of Punjab,* AIR 1973 SC 1409 [*LNIND 1973 SC 165*](para 7) : (1973) 2 SCC 444 [*LNIND 1973 SC 165*] : 1973 Crlj 1120 .

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62 *Betal Singh v. State of M.P.,* AIR 1996 SC 2770 : 1996 Crlj 4006 : (1996) 8 SCC 205 : 1996 SCC (Cri) 571 .

63 *State of Kerala v. Babu,* (1999) 4 SCC 621 [LNIND 1999 SC 481] : 1999 SCC (Cri) 611 [LNIND 1999 SC 481] : AIR 1999 SC 2161 [LNIND 1999 SC 481].

64 *Tilkeshwar v. State of Bihar,* (1955) 2 SCR 1043 (1046) : AIR 1956 SC 238 [LNIND 1955 SC 109]: 1956 Crlj 441 .

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66 *Tilkeshwar v. State of Bihar,* (1955) 2 SCR 1043 (1046) : AIR 1956 SC 238 [LNIND 1955 SC 109]: 1956 Crlj 441 .

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CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 162
Statements to police not to be signed : Use of statements in evidence.

(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

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

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

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

1. Scope of s. 162.—

This section corresponds to *old* s. 162, with the addition of the *Explanation* , which seeks to solve the question whether an omission in the statement recorded by a Police officer would amount to a 'contradiction' for the purpose of applying the Proviso to s. 162(1).

2. S. 162 and s. 145, Evidence Act . —

See under 'contradict', *post.*

3. S. 162 and s. 157, Evidence Act.—

Section 157 of the Evidence Act is controlled by the special provision in s. 162 of this Code. Hence, a previous statement which may be admissible under s. 157 may still be inadmissible if it is a statement made to a Police officer within the purview of s. 162. [70]

4. S. 162 and s. 155, Evidence Act: Court questions.—

Though the ban imposed by s. 162 against the use of a statement of a witness recorded by the Police during investigation is sweeping, it does not take away the special powers of the Court itself, under *s. 165 of the Evidence Act* , in order to discover or to obtain proper proof of relevant facts "to ask any *question* he pleases, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant". [71]

Where, therefore, the Court considers the evidence of a particular witness to be important enough to examine him under s. 311 [*old* s. 540], the Court can make use of the statement made by such witness during the course of investigation, for testing its worth, putting alleged contradiction to the witness on a matter of some importance in the case. [72]

5. Object of s. 162.—

1. Under s. 161, the Police officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case he is investigating. He may also reduce into writing any statement made to him in the course of such examination, s. 162 lays down restrictions upon that power.

   (a) The first restriction is that *no* statement so reduced into writing by the Police Officer shall be signed by the person making it. The Legislature probably thought that the making of statement by witnesses might be thwarted if the witnesses were led to believe that because they had signed the statement they were bound by them, and that whether the statements were true or not, they must continue to stand by them.

   (b) The second restriction is that the statement so recorded or any part of it shall *not* be used for any purpose at the inquiry or trial in respect of the offence under investigation, except for the purposes mentioned in the section. The object behind this general exclusion of the statement from the

evidence is either "to encourage the free disclosure of the information to the Police or to protect the person making the statement from a supposed unreliability of Police testimony as to an alleged statement by *them* ". [73]

The exclusion is also based on the public policy that a confession made by an accused to a Police officer or when in Police custody should not be trusted to convict him. [74]

2. The *exceptions* to the above general rule of exclusion of the statement from the evidence are: [75] —

(a) When the maker of the statement is examined by the prosecution as a witness, the accused shall have the right to contradict such witness in the manner provided by *s. 145 of the Evidence Act* .

(b) When the accused used the statement for the purpose of contradiction as aforesaid, the prosecution shall have the right to use any part of such statement in the re-examination of the witness but only to explain any matter referred to by the witness is his cross-examination.

(c) With the permission of the court, the prosecution shall also be entitled to contradict the witness under *s. 145 of the Evidence Act* (in which case the accused shall have a right of re-examination).

(d) The statement will be admissible if it contains information leading to the discovery of a fact made to the Police, under *s. 27 of the Evidence Act* .

(e) It is admissible also under s. 32(1) if the person making the statement dies. In cases falling under s s. 27 and 32(1) of the *Evidence Act* , the exceptions are admitted because the circumstances furnish a safeguard against any untoward consequence following from such admission [sub-sec. (2), *below*].

3. The object behind the rule of exclusion contained in s. 162 is to prevent unfair use being made by the persecution of statements of witnesses to the Police during investigation, while the Proviso is intended to secure the ends of justice. [76]

6. Sub-sec. (1) : Conditions for the exclusion of statements under s. 162.—

For the exclusion from evidence of statements made to a Police officer, the following conditions must be fulfilled :

(i) The statement should have been made to a Police officer.

(ii) The statement should have been made 'in the course of an investigation' conducted by that Police-Officer Chap. XIV.

(iii) The rule of exclusion from evidence of such statement shall be confined to an inquiry or trial in respect of the offence which was under investigation at the time when the statement was made.

7. 'Statement'.—

1. 'Statement' means what is stated. It includes not only what is expressly recorded in the statement but also what follows by necessary implication from the recital so that it may be deemed to form part of the recorded statement. [77]

2. But it cannot include incidents which were expected to be recorded in the statement but were not, in fact, recorded. [78]

3. A statement may be made not only by word of mouth but also by pointing out by finger or nod of assent in answer to a question, [79] or by a drawing. [80] Thus,—

> The process of identification by identifying witnesses involves a statement by the identifying witness that the particular properties identified were the subject-matter of the offence or the persons identified were concerned with the offence. [81] This statement may be express or implied, including signs and gestures, and all such statements amount to a communication of the fact of identification by the identifier to another persons. [82] In the result, the evidence of a Police officer as to such statement of witnesses at identification is *inadmissible.* [83] The statement of the identifiers at an identification held by the Police are to be regarded as statements made to the Police during investigation. [84]

4. But the following are *not* statements:

   (a) The taking of a specimen of handwriting or thumb impression of the accused for comparison. [85]

   (b) A conversation between two persons, which was tape-recorded by the Police, without their knowledge and without any direction from the Police. [86]

5. When the statement of a witness is barred by s. 162, it cannot be indirectly introduced by other means, *e.g.* , a site plan or sketch map, prepared is consequence of a statement made by some witness during investigation; [87] obtaining a letter from the witness, instead of the Investigating Officer recording his statement. [88]

8. 'By any person'.—

These words are wide enough to include a person who subsequently becomes an accused person. [89] (See under s. 161,*ante*) or an approver. [90]

9. 'Statement to a Police Officer'.—

1. Every statement made to a person assisting the Police during investigation cannot be treated as a statement *to* the Police. Whether it was made to another person or was intended for the Police is a question of fact to be determined according to the circumstances of each case. [1]

2. But it is not necessary, in order to attract this prohibition, that the investigation must relate to any particular accused. [2] It is in general terms, to exclude *all* statements made to the Police during an investigation. [3]

3. If during a Police investigation, a draftsman is asked to prepare a map of the place of occurrence, and, if after ascertaining the relevant places from the witnesses, the draftsman measures the distances and puts them down on his plan and, if the witnesses corroborate his statement that they showed him the places, the evidence of the draftsman is not admissible. [4]

4. When there is no interrogation of any person by the Police, but the Police simply tap-recorded a voluntary conversation between the accused and a witness, the tape-recorded conversation was not hit by s. 162. [5]

5. But when there is no communication by a *panch* witness (*e.g.,* during a search) addressed to the Police [6] but the witness merely stated what had occurred in his presence, the *panchanama* may not be hit by s. 162. [7]

6. The Police officer cannot set at naught the prohibition under s. 162 by not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the Police officer. [8]

7. If a statement made by a person to a Police officer during investigation is inadmissible except for the purposes mentioned in s. 162, the same would be true of a letter containing narration of facts addressed by a person to a Police officer in course of an investigation. [9] , [10]

8. A statement recorded in the Police diary mentioned in s. 172(1),*post* , and a statement recorded under s.161(3), would come under the prohibition contained in s.162(1). [11]

9. The Officer conducting an enquiry under s. 8(1) of the Railway Properties 'Unlawful Possession' Act,. 1966 does not posses the attribute to an officer-in-charge of the Police Station. Therefore, a statement made by the witness before the Enquiry Officer is not hit by *s. 162 Cr.P.C.* and taking of signature of such witness by such officer of the Railway is not prohibited.[12]

10. Statement made before the Custom Official is not a statement recorded by a Police Officer and it is not hit by *s. 162 Cr.P.C.* [13]

10. Evidence relating to conduct of the accused.—

Section 162 Cr.P.C. does not exclude an evidence relating to the conduct of an accused person not amounted to statement when confronting or questioned by the Police Officer during the investigation. Moreover, the statement by a person in custody in another case does not amount to make a statement in connection with this case. It would be admissible under *s. 8 of the Evidence Act* .[14]

11. Second FIR not hit.—

Earlier investigation was started by the police when the Magistrate directed investigation under s. 156(3)

Cr.P.C. But that order of the Magistrate has been quashed by the Sessions Judge and the police did not commence any investigation on the basis of the said FIR. A subsequent information was received by the Investigating Officer about a cognizable case. Such second FIR is not barred under s. 162 Cr P.C., and the police can start investigation, but when a statement is made by any witness for such investigation that can be hit by *s. 162 Cr.P.C.* [15]

12. Sketch Map.—

When the Investigating Officer prepared a sketch map and no evidence was adduced with reference to the sketch map by the witness, such sketch map is admissible in evidence and not hit by *s. 162 Cr.P.C.* [16]

13. Section 162 Cr.P.C. and Section 32 of the Evidence Act.—

A statement was made by the victim woman before a police which was recorded as FIR. She wrongly mentioned the second part of the name of the accused but the same had been clarified by her by giving a declaratory statement under *s. 161 Cr.P.C.* But she succumbed to her injuries. Such statement relating to cause of her death along with clarifactory statement would be treated as a dying declaration of the deceased admissible under *s. 32 of the Evidence Act* and is not hit by *s. 162 Cr.P.C.* [17]

Statement of identifiers:

(i) In the case of a test identification parade arranged by the Police, statements made by identifiers to the *panch* witnesses would be statements 'made to the Police' if the identification is conducted by the Police in the presence of the Panch witness. [18]

(ii) If, however, the identification is carried out under the *exclusive* direction and supervision of the *Panch* witnesses and the Police had completely obliterated themselves from the parade, the statements made by the identifying witnesses to the *Panch* witnesses would be outside the purview of s. 162,[19] *e.g.* , where the Police officers hid themselves in the inner room and took no part in the drama. [20]

(iii) Even where a Magistrate is directed to conduct an identification, he cannot later depose as to statements recorded or unrecorded of witnesses at the identification (as it would by hit by s. 162) or any confessional statement of the accused, unless duly recorded under s. 164. [21] But he would be competent to depose that the witnesses were able to identify certain persons alleged to have committed the crime. [22] Sections 162, 164 would come into operation only if he transgresses this limit. [23]

14. 'Police officer ... investigation'.—

1. These words refer to a Police officer who is competent to make an investigation under Chap. XII of the Code .

2. When a question arises as to whether a non-Police officer who is making investigation under a special Act, such as the Opium Act, [24] or the Railway Property (Unlawful Possession Act), [25] is to be deemed to be a 'Police Officer' for attracting s. 162, the test to be applied is whether the officer concerned has been invested with *all* the powers exercisable by an Officer-in charge of a Police Station under Chap. XII, including the power to initiate prosecution by submitting a charge-sheet, under the provisions of the special Act . [26] If not, s. 162 would not operate as a bar. [27]

15. 'In the course of an investigation'.—

1. This expression does not include *every* statement made by any person to a Police officer during the period of time that elapses between the commencement and termination of an investigation but refers to those statements only which are made not only after the investigation has started but also as a *step* in, or in conscious prosecution of the *pending* investigation, [28] —as distinguished from a statement not relating to the subject-matter of the investigation. [29]

2. It follows, therefore, that the following are *not* statements made to a Police officer in the course of the investigation within the meaning of s. 162, and may, therefore, be used in evidence by the prosecution for the purpose of corroboration of contradiction, though not as a substantive evidence.

First Information Report. 1. An F.I.R. is *not* a statement made to the Police 'during investigation,' within the mischief of s. 162. [30] , [31] It is the complaint *upon* which the investigation commences, under s. 154 (see *ante*). It is accordingly admissible. [32]

2. Even where it contains an admission of guilt, it is admissible under *s. 21 of the Evidence Act* , and does not constitute a 'confession' under *s. 25, Evidence Act* . [33]

Cross-complaint by accused. If the accused makes a cross-complaint to the Police which is connected with the facts of the case under investigation, it would be hit by s. 162,[34] but if it is an independent complaint it would be outside the purview of s. 162.

3. On the other hand,—

(a) The evidence of a previous identification made at an identification parade held by the Police during investigation is inadmissible under s. 162 as a previous statement in the course of investigation. [35]

(b) Where the Investigating officer makes a site plan with notes in accordance with the various situations pointed out by the witnesses, such notes are statements recorded 'in the course of investigation' and can be used only for the purpose of contradicting the prosecution witnesses in court under *s. 145, Evidence Act* , and not for the purpose of contradicting the *account* given by the witnesses in court, in the absence of confrontation in the manner laid down in s. 145. [36]

(c) A statement recorded by the Police Officer at an inquest held under s. 174,*post,* would also come within the mischief of s. 174, so that no use can be made of it at the trial save for purposes of contradiction under *s. 145, Evidence Act* . [37]

(d) A complaint made by the accused to the Police *after,* the investigation had commenced by the lodging of F.I.R. [38]

4. A statement made to a Police Officer *prior* to the commencement of investigation is not hit by s. 162. [39]

16. Section 162 Cr.P.C. when attracted and when not.—

1. The report made to the Investigating Officer by the Government Official assisting the Investigating Officer in a case of alleged commission of fraud and forgery by a Government Engineer and the statement recorded by the I.O. of such official is hit but *s. 162 Cr.P.C.* [40]

2. List of stolen articles given in a statement of the Investigating Officer after lodging the FIR relating to theft is hit by *s. 162 Cr.P.C.* , as the said list has been given after the FIR has been recorded.[41]

The Police Inspector recorded the complaint and conducted a raid for trapping the bribe taker. Any statement made by such bribe taker at the time of such raid is a statement during the investigation and is hit by *s. 162 Cr.P.C.* [42]

An anonymous letter written by the accused to the Sub-Inspector of Police containing the motive of murder does not attract *s. 162 Cr.P.C.* and admissible in evidence before the Court as substantive evidence.[43]

A report regarding the incident was sent by one of the eye-witnesses on going to the Police Station. But the said report was made after the Police Officer had taken up investigation of the case. Such a statement is hit by *s. 162 Cr.P.C.* [44]

When the first informant made a supplementary statement after lodging the FIR when he was interrogated by the Investigating Officer during the investigation stating further details regarding the incident if is hit by

s. 162 Cr.P.C. *Fardbayan* of the first informant on the basis of which the formal FIR was entered into is not hit by *s. 162 Cr.P.C.* [45]

When preparing the site plant if he noted in the site plan by deriving knowledge from the witnesses as to when, where and how the incident happened such statement of the witnesses on the basis of which site plan was prepared is hit by s. 162(1) *Cr.P.C.* [46]

On the basis of telephonic communication received by the Police, the Police went to the spot and recorded the statement of the witness on reaching the spot, but before commencing investigation. The same can be treated as FIR and cannot be stated as statement of the witness during the course of investigation to be hit by *s. 162 Cr.P.C.* [47]

17. 'Investigation'.—

1. Section 162 would not be attracted unless the proceeding in which the statement was recorded was an 'investigation' under this Code.

2. As defined in s. 2(h), *ante,* investigation means a proceeding for the *collection of evidence,* conducted by a Police officer [48] or by any person other than a Magistrate who is so authorised by a Magistrate.

3. Investigation usually starts on 'information' relating to the commission of an offence given to an officer-in-charge of a Police station and recorded under s. 154 (see *ante*). He may also hold investigation without information, as provided in s. 157.

4. In a case of information under s. 154 the investigation starts as soon as the information is recorded under that station, and any statement recorded by the Police Officer, in any form, thereafter, would be hit by s. 162. [49]

5. On a complaint of taking bride, the Inspector of an Anti-Corruption Department, recorded the complaint and proceeded to detect the offence, visited the locality and questioned the accused and searched his person. The statement of the accused so recorded by the Inspector was hit by s. 162. [50]

6. But inquiries under the following special Acts have been held *not* to be 'investigation' under the Code, in view of the special provisions in such Acts, so that s. 162 is *inapplicable* to statements made to officers making inquiries under such Act s—

   (i) Inquiry under *s. 8(1) of the Railway Property (Unlawful possession) Act, 1966* . [51]

   (ii) Inquiry under s. 21(1) of the Central Excises and Salt Act, 1944. [52]

   (iii) A Customs Officer, acting under the *Customs Act, 1962* . [53]

7. Notwithstanding this express prohibition, however, it has been held that even if the informant's signature appears on the statement, it would not throw out the evidence of the informant, if he is examined as a witness, though it may sometimes diminish the value of his testimony. [54]

18. Statement in inquest report.

1.—An inquest being a step in investigation, statements in an inquest report, if any, would be hit by s. 162. [55]

2. The inquest report is to be made by the Investigating Officer just to indicate the injuries which he has found on the bodies of the deceased person. It may be witnessed by some person or persons but it is not necessary for the officer to record the statements of the witnesses or to get the report signed by them. Even the non-examination of such witnesses may not, *per se,* undermine the credibility of the prosecution case. [56]

As the statement in the inquest report, regarding the time of death of the deceased at 10.00 p.m. and not 10.00 a.m. by the witness in the inquest report cannot be used as substantive evidence as it is hit by *s. 162 Cr.P.C.* , the mere fact that it was a recital in the inquest report would not save it from the prohibition regarding *s. 162 Cr.P.C.* [57]

19. Sketch map prepared by the Investigating Officer.—

When the I.O. prepared the sketch map himself and no evidence was adduced by the witnesses with reference to the preparation of the sketch map by the Investigating Officer, it is admissible in evidence as substantive evidence and is not hit by *s. 162 Cr.P.C.* [58]

However, rough sketch map prepared by the Investigating Officer on the basis of the statement made by the witnesses during the investigation showing the place when the injured was hit would not be admissible in evidence in view of *s. 162 Cr.P.C.* [59]

20. Not to be signed by witness whose statement was recorded.—

1. This prohibition is based on the principle that a witness should not be tide down to his statement made to the Police [60] and that a witness at the trial should be free to tell the truth, unhampered by anything they might have said to the Police. [61]

2. If any witness states in court that he had put his signature or thumb-impression on his statement recorded during investigation, the trial judge should ask the Investigating Office on this point, instead of leaving it to the defence to exploit this statement of the witness. [62]

3. If any statement bears the signature of the witness making it, disregarding the prohibition in s. 162 (1), it would not be admissible, [63] unless such witness is examined in Court. [64]

A later Division Bench [65] has held that the evidence of a witness in Court should not be rejected outright on the ground that he put his signature in his statement under s. 162 at the request of the Investigating Officer. It would merely put the Court on caution to require in-depth scrutiny of his evidence. [66]

4. It is not axiomatic that whenever the police took the signature of a witness on his statement or on inquest report, the witness is held to be not reliable. It is a question of fact to be determined in the light of the circumstances of each case. [67]

5. Merely because a statement is recorded by the police personnel under *s. 161 Cr.P.C.* and the thumb impression of the deceased was affixed, it cannot straightway be rejected.[68]

6. When on the seizure memo of the recovery of weapons recovered in pursuance of the statement of the accused under *s. 27 of the Evidence Act* , two axes were seized by two seizure memos prepared by the Investigating Officer, only because the signature of the accused was taken in the said seizure memo, it would not vitiate the testimony of the witnesses in Court. Furthermore, the prohibition of s. 162(1) *Cr.P.C.* is not attracted to the seizure lists prepared by the Investigating Officer on recovery made in pursuance of the statement of the accused under *s. 27 of the Evidence Act* .[69]

7. The bar of s. 162(1) *Cr.P.C.* is not applicable when the signatures are made by the witnesses in the Panchnamas of Majhars which are not statement of witness.[70]

21. 'Save as hereinafter provided.'—

These words save the use of the statement for the purposes of—

(i) *S. 145 of the Evidence Act* [see Proviso, *below*].

(ii) S
s. 27 and
32 (1) of the
Evidence Act [see sub-sec. (2), *post*].

22. 'At any inquiry or trial in respect of any offence under investigation... was made'.—

These words circumscribe the bar raised by the section. It would *not* bar the use in evidence of the statements made before the Police in any proceeding *other than* an inquiry or trial in respect of the offence under investigation, *e.g.* —

(a) a civil proceeding; [71]

(b) a proceeding under *Art. 32* or *226* of the *Constitution*; [72]

(c) a proceeding for preventive detention. [73]

23. Effect of contravention of s. 162(1).—

1. The effect of the contravention of s. 162(1) depends on the prohibition which has been contravened. [74]

2. If the contravention consists in the signing of the statement made to a Police officer and reduced into writing, the evidence of the witness who signed it is not thereby rendered inadmissible. Still less can it be side that the statute has the affect of vitiating the whole proceeding when evidence is given by a witness who has signed such a statement. [75] But the value of his evidence will be seriously impaired as a consequence of the contravention. [76]

3. The use by a witness while he is giving evidence (*i.e.* consulting it while in the witness box) of a statement made by him to the Police raises different considerations. The categorical prohibition of such use would be disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible. The admission of such evidence vitiates the proceedings and s. 465 [*old* s. 537] is not applicable to such a case. [77]

4. Section 207 (iii) and 208 (ii), *post,* require that copies of the statements recorded under s. 161 must be furnished to the accused by the Magistrate, at the earliest opportunity : Where this is not done and the accused is deprived of his right to confront such witness with reference to the statement recorded under s. 161, there would be an inference, almost irresistible, that the accused has been prejudiced, [78] so as to vitiate the trial. [79]

24. Proviso.—

1. The Proviso enumerates the only exception to the general rule in sub-sec.(1) that a statement recorded by a Police officer during investigation cannot be utilised as evidence. Hence, it cannot be used for seeking corroboration or assurance for the testimony of the witnesses in court, or the prosecution story; [80] or for contradicting the evidence given by the prosecution witnesses in court, without confronting them with reference to the statement made while they were in the witness-box. [81]

2. The condition for the application of the Proviso, however, is that the person who made the statement before the Police is examined as a witness for the prosecution at the inquiry or trial. If he is *not* so examined, his statement will not be admissible for any purpose, even though such statement is mentioned in the inquest report. [82]

3. The use of a statement recorded under s s. 161-162, for the purposes under the Proviso to s. 162(1), would not be affected by the fact that there was a re-investigation after quashing the proceeding where the statement had been recorded, for some procedural irregularity or illegality in that investigation,— provided the statement had been recorded ‘in the course of that investigation. [83]

4. Even though s. 162 bars the use of the contents of a statement recorded under s. 161 for any purposes other than those specified in s. 162, the fact that he had made a statement to the Police which he denies may be relied upon to question his veracity or memory. [84]

5. A statement made during investigation of a cross-case would be inadmissible altogether [85] and cannot therefore be brought in under the Proviso to s. 162.

6. If the statement made before a police officer in course of an investigation under Chapter-XII is sought to be used in any proceeding enquiry or trial in respect of an offence than that which was under the investigation of the time, the Statement was made, bar of s. 162 will not be attracted. [86]

25. High Court using statement under s. 161 Cr.P.C. as substantive evidence.—

The Supreme Court has held that statement under *s. 161 Cr.P.C.* is never a substantive evidence. So, the High Court committed a manifest illegality in relying upon the whole inadmissible evidence *i.e.* the statements of witnesses under *s. 161 Cr.P.C.* in recording a finding that the Respondent No.2 could not have been present at the scene of the commission of the crime.[87]

26. '...With the permission of the Court, by the prosecution'.—

1. These words, inserted in 1955, give the prosecution also an opportunity of confronting any witness in Court with his statement recorded in the Police Diary, with the permission of the Court.

   Before the amendment, when any person whose statement had been reduced into writing by a Police officer was called as a witness for the prosecution, only the accused could use that statement for the purpose of contradicting the witness. The prosecution could not-make use of any statement recorded under this section to contradict a witness but could only use any part of the statement other then that used by the defence to contradict a witness, for explaining any matter referred to in cross-examination at the time of re-examination.

   After the amendment of 1955, it is open to the prosecution *with the permission of the Court* to use such a statement in order to contradict a witness in the manner provided under *s. 145 of the Evidence Act* . [88] No such permission is necessary in the case of the defence.

2. When the prosecution cross-examines its own witness under the present Proviso or under *s. 154 of the Evidence Act* , his evidence on oath under such cross-examined is substantive evidence which cannot be discarded altogether simply because he is being cross-examination by the party calling him. [89]

27. Use of the statement recorded under s. 162.—

1. The statement recorded in writing under s. 162 can be used, whether by the accused or by the prosecution, only for *one* purpose, namely, to contradict the witness who had made that statement, in the manner provided in s. 145. It cannot be used either as substantive evidence; or for the purpose of corroboration of any other witness—whether for the prosecution, [90] or the defence,—or a court witness. [91] , [92]

2. Statements made by a witness which have *not* been recorded by the Police officer cannot be used for contradiction. [93]

3. It follows that the Court should not bring on record what came to the knowledge of the Police officer during the investigation of same other case. [94]

4. The statement, made by a witness under *s. 161 Cr.P.C.* can be used contradict him if his statement under *s. 161 Cr.P.C.* contradicts his evidence given in the Court. Such statement cannot be used against him unless the statement has been put to the witness while he is deposing in the Court.[95]

5. For the purpose of contradiction during the trial the portions of the statement which are used for contradicting the witness must be proved by asking the Investigating Officer whether he recorded them or not unless the witness admits them. This is laid down in Tahsildar Singh's case. [96]

6. When it is alleged that the wife made allegations against the husband in her previous statement under *s. 161 Cr.P.C.* , the subsequent contradictory statement cannot be discarded as false unless the previous statement is proved according to law. Both the previous statement and subsequent statement if found to be contradictory to each other, the taking of cognizance of the offence against the husband on the complaint of the wife under s. 498-A I.P.C. cannot be quashed.[97]

7. Such statements under *s. 161 Cr.P.C.* cannot be made as exhibits before the Trial Court. Such unsigned statements under *s. 161 Cr.P.C.* can be used, during the course of the examination of the witnesses for contradiction as provided in *s. 145 of the Evidence Act* or for corroboration as provided in *s. 157 of the Evidence Act* . So, the Court cannot straightway exhibit them as evidence and consider such statements as part of evidence.[98]

28. "Contradict", s. 145, Evidence Act .—

1. *Section 145 of the Evidence Act* is in two parts :

   (a) The first part enables the accused to cross-examined a witness regarding a previous statement made by him in writing or reduced to writing without such writing being shown to him;

   (b) The second part deals with a situation where the cross-examine assumes the shape of contradiction. The procedure prescribed for contradiction is that if it is intended to contradict a witness by writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The Proviso to *s. 162 of the Cr. P.C.* only enables the use of such statement to contradict a witness in the manner provided by the second part of *s. 145 of the Evidence Act* . The cross-examining counsel shall put the part or parts of the statement which affirms contrary to what is stated in the

evidence. If the statement before the Police officer and the statement in the evidence before the court are so inconsistent or irreconcilable with each other that both of them cannot go together, it may be said that the one contradicts the other. While *s. 145 of the Evidence Act* deals with the cross-examination of a witness in respect of a previous statement made by him, the Proviso to s. 162 limits the cross-examination only to cross-examination by contradiction. The word 'cross-examination' in the last line of the Proviso should also be understood in this case.[1]

2. The proper procedure, under the Proviso is to confront the witness who had made the statement, with the contradictions when he is examined, and then ask the Investigating Officer regarding those contradictions. [2]

3. The proper mode of confrontation would be to read only those part of the previous statement which are inconsistent with his present statement, point by point. [3] But where the whole of it is read out, it would not make the evidence of the witness inadmissible, in the absence of prejudice. [4] Thus, where the witness says in Court that his statement before the Police was made under Police pressure, it was pointless to confront him with each sentence of that statement separately, and ask his explanation. [5]

4. The conditions for the use of such statement for contradiction are—

   (i) It can be used contradict only that witness whose statement was made to the Police officer. [6]

   (ii) It is only when the statements contained in the *Panchnama* are put to the *Panch* witnesses that notice can be taken of the contradictions between the evidence of Panch witnesses and what is contained in the Panchnama. But before the writing is proved his attention must be called to those parts which are to be used for contradicting him. [7]

   (iii) The part of statement that is put to him does not constitute substantive evidence. [8]

5. This right of the defence, under s. 145 (*Evidence Act*), is a valuable right, so that where the defence is not allowed to cross-examine a prosecution witness with reference to the statement under s. 162 on the ground that it was a mere 'omission' and not *contradiction,* and it related to a material point, the evidence of such witness, untested by cross-examination, cannot be accepted as corroborating the evidence of other prosecution witnesses. [9]

6. This right is founded on the principle that a witness who makes a statement inconsistent with a previous statement of his, would be unreliable. [10] In such a case, the accused would be entitled to benefit of doubt. [11]

29. Sub-sec. (2).—

Apart from the Proviso, just dealt with, sub-sec. (2) lays down two other exceptions to the rule of non-admissibility of a statement made to the Investigating Officer under sub-sec. (1) of s. 162. These two exceptions are those provided under (a) s. 32; and (b) *s. 27 of the Evidence Act* .

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Section 32, Evidence Act *:* Under this head would come a 'dying declaration'. Where the person has made the statement to the Investigating Officer and his statement constitutes a dying declaration within the purview of s. 32, it would be admissible for the purposes of that section, notwithstanding the bar under s. 162(1) of the Code as regards statement made to the Police during

investigation. [12] Of course, the evidentiary value of the dying declaration would depend on the circumstances. [13]

B. *Section 27*: This has been already dealt with.

31. Other uses of the statement.—

Inspite of the bar of s. 162 the statement recorded under s. 161 need not be taken as barring the Court from taking notice of such statement for certain limited purposes, such as, considering bail petition, for framing charges in warrant trials or sessions cases or for invoking s. 319. [14]

31. Expl.: Whether omission in statement may be used for contradiction.—

1. Under the *old* Code,—there was a conflict of High Court decisions [15] as to whether an omission in the statement can be used to show that the witness has said in Court something which was not in his previous statement to the Police officer.

   The controversy was set at rest by the Supreme Court decision in *Tahsildar v. State of U.P.,* [16] which laid down the following principles:

   (a) *Prima facie* , a statement cannot include that which is not stated.

   (b) It cannot be broadly contended that a statement includes all omissions which are material and are such as a witness is expected to mention in the normal course. [17]

   (c) But, though a statement cannot, *prima facie,* include an omission in order to make a statement sensible, it becomes sometimes necessary to imply words which are not act ually in the statement. In other words, though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. [18] Hence, though a particular statement is not expressly recorded, a statement that can be deemed to be part of that which has been expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement. This fiction is permissible by construction only in the following three cases:

      (a) When a recital is necessarily implied from the recital or recitals found in the statement.

         In the recorded statement before the Police the witness stated that he saw A stabbing B to death at a particular point of time, but in the witness-box he said that he saw A and C stabbing B to death at the same point of time; the Court can imply the word ‘only’ after ‘A’ in the statement before the Police.

      (b) A negative aspect of a positive recital in a statement:

In the recorded statement before the Police the witness says that a dark man stabbed B but in the witness-box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion.

(c) When the statement before the Police and that before the Court cannot stand together:

The witness said in the recorded statement before the Police that A after stabbing B ran away by a northern lane, but in the Court he said that immediately after stabbing he ran away towards the southern lane; he could not have run away immediately after the stabbing, *i.e.,* at the same point of time, towards the northern lane as well as towards the southern lane; if one statement is true, the other must necessarily be false.

32. Change made by the new Code. —

1. The *new* Explanation has been added to s. 162, in pursuance of the recommendation of the Joint Committee, [19] in order to remove any doubts on the question whether any omission in a statement recorded by the Police during investigation can be said to be a 'contradiction'.
2. Under the *new* Code, the question shall, therefore, have to be answered in terms of the *Explanation,* as follows, and not according to the previous case-law in so far as that is not in accord with this *Explanation.* An omission may now amount to contradiction, if the following conditions are fulfilled—

   (a) The omission must be the omission to state a fact or circumstance.

   (b) Such omission must be (i) significant and otherwise relevant, having regard to the context in which such omission occurs.

3. Under the *new* Code, it has been made clear that the question whether any omission amounts to a contradiction in a particular context shall be question of *fact.*

On this point, the observations in *Tahsildar's case* [20] will be useful; hence, they have been quoted *in extenso.*

33. Omission, when contradiction, when not.—

1. When the witness did not state a particular fact to the police in course of investigation, but the prosecution seeks to prove such vital fact through such witness, such is a vital omission and the Court should not rely on such evidence as it is a vital omission which is nothing but contradiction. [21]

2. However, a relevant fact which the police did not take from such witness, if stated in the Court, cannot be discarded only because the Investigating Officer failed to record such relevant fact, if the witness is trustworthy and reliable. [22]

> A witness of recovery in cross-examination stated that he was present at the time of occurrence and that the deceased told her before her death that she committed suicide. But he being a recovery witness his statement before the police only recorded that fact. If he really were present at the place of occurrence, he would have stated that fact to the police in his statement under *s. 161 Cr.P.C.* So, his evidence is not reliable and he appears to have been won once by the accused.[23]

3. In view of explanation to *s. 162 Cr.P.C.* omission to state a fact before the police in order to be contradiction must depend upon the specific question, the answer to which was omitted to be put to the witness. When the I.O. in his cross-examination was not asked as to whether he had put questions to the eye-witness regarding the injuries inflicted or of persons who had caused the injuries, omission of such details in his statement under *s. 161 Cr.P.C.* would not render his or her evidence unreliable when the Courts below relied on the evidence of such witnesses and the above omissions are not contradictory in the particular context.[24]

4. In order to determine that an omission in the statement under *s. 161 Cr.P.C.* amounts to contradiction, it is necessary to see the context to which such a statement was made.[25]

5. However, it is clear that minor omissions are not contradictory. [26]

6. So, whether an omission in the statement under *s. 161 Cr.P.C.* would amount to contradiction depends on facts of each case. It is neither possible nor desirable to lay down any hard and fast rule on this subject.[27]

7. Failure of the witness in the statement under *s. 161 Cr.P.C.* to give the manner of user of weapon *i.e.* axe by the accused persons does not amount to material omission to be treated as contradiction. [28]

8. When the statement of the witness related only to the actual attack by the assailant on the deceased, his omission to mention the names of the eye-witness is not a vital omission and only because of that omission his evidence otherwise trustworthy cannot be discarded. [29]

10. But the omission of the PW-5 to state before the police about exhortation made by all the accused persons to murder the deceased, according to the Supreme Court, would amount to vital omission and hence contradiction to disbelieve his testimony. [30]

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70 *Belurkar v. State of Maharashtra,* (1975) 81 Crlj 517 (para 6) Bom (FB).

71 *Raghunandan v. State of U.P.,* [AIR 1974 SC 463 LNIND 1974 SC 6](paras 14-16) : (1974) 4 SCC 186 [LNIND 1974 SC 6] : 1974 Crlj 453 .

72 *Raghunandan v. State of U.P.,* [AIR 1974 SC 463 LNIND 1974 SC 6](paras 14-16) : (1974) 4 SCC 186 [LNIND 1974 SC 6] : 1974 Crlj 453 .

73 *Pakala Naraswamy v. Emp.,* AIR 1939 PC 47 51 ; *Tahsildar v. State of U.P.,* AIR 1959 SC 1012 [LNIND 1959 SC 96]: 1959 Supp (2) SCR 875 : 1959 Crlj 1231 .

74 *Nagesia v. State of Bihar,* [AIR 1966 SC 119 LNIND 1965 SC 155](para 9) : (1966) 1 SCR 134 [LNIND 1965 SC 155] : 1966 Crlj 100 .

75 *Pakala Naraswamy v. Emp.,* AIR 1939 PC 47 51 ; *Tahsildar v. State of U.P.,* AIR 1959 SC 1012 [LNIND 1959 SC 96]: 1959 Supp(2) SCR 875 : 1959 Crlj 1231 .

76 *Raghunandan v. State of U.P.,* [AIR 1974 SC 463 LNIND 1974 SC 6](para 15) : (1974) 4 SCC 186 [LNIND 1974 SC 6] : 1974 Crlj 453 .

77 *Tahsildar v. State of Bombay,* AIR 1959 SC 1012 1023 : 1959 Supp (2) SCR 875 : 1959 Crlj 1231 .

78 *Tahsildar v. State of Bombay,* AIR 1959 SC 1012 1023 : 1959 Supp (2) SCR 875 : 1959 Crlj 1231 .

79 *Ramkishan v. State of Bombay,* AIR 1955 SC 104 114 : (1955) 1 SCR 903 : 1955 Crlj 196 .

80 Cf. *Santa Singh v. State of Punjab,* [AIR 1956 SC 526 *LNIND 1956 SC 192*]: 1956 Crlj 930 .

81 *Ramkishan v. State of Bombay,* : (1955) 1 SCR 903 : AIR 1955 SC 104 114 1955 Crlj 196 .

82 *Ramkishan v. State of Bombay,* : (1955) 1 SCR 903 : AIR 1955 SC 104 114 1955 Crlj 196 .

83 *Ramkishan v. State of Bombay,* : (1955) 1 SCR 903 : AIR 1955 SC 104 114 1955 Crlj 196 .

84 *Yusufalli v. State of Maharashtra,* [AIR 1968 SC 147 *LNIND 1967 SC 152*]: (1967) 3 SCR 720 [*LNIND 1967 SC 172*] : 1968 Crlj 103 .

85 *State v. Ismail,* [AIR 1959 Bom 408 *LNIND 1958 BOM 132*].

86 *Yusufalli v. State of Maharashtra,* [AIR 1968 SC 147 *LNIND 1967 SC 152*]: (1967) 3 SCR 720 [*LNIND 1967 SC 172*] : 1968 Crlj 103 .

87 *Sat Kumar v. State of Haryana,* (para 11) : AIR 1974 SC 294 (1974) 3 SCC 643 : 1974 Crlj 345 .

88 *Kali v. State of H.P.,* [AIR 1973 SC 2773 *LNIND 1973 SC 286*].

89 *Pakala v. Emp.,* [AIR 1939 PC 47 *LNIND 1939 PC 1*]; *Mahabir v. State of Bihar,* [AIR 1972 SC 1331 *LNIND 1972 SC 135*]: (1972) 1 SCC 748 [*LNIND 1972 SC 135*] : 1972 Crlj 860 .

90 *Balwant* *v.* *State,* (1978) Crlj 126 (NOC) (AP) .

1 *Rao Shiv Bahadur v. State of V.P.,* (1954) SCR 1098 (1111) : AIR 1954 SC 322 [*LNIND 1954 SC 30*]: 1954 Crlj 910 .

2 *Kali v. State of H.P.,* AIR 1973 SC 2773 [*LNIND 1973 SC 286*](para 17A) : (1973) 2 SCC 808 [*LNIND 1973 SC 286*] : 1974 Crlj 1 .

3 *Kali v. State of H.P.,* AIR 1973 SC 2773 [*LNIND 1973 SC 286*](para 17A) : (1973) 2 SCC 808 [*LNIND 1973 SC 286*] : 1974 Crlj 1 .

4 *Rao Shiv Bahadur v. State of V.P.,* (1954) SCR 1098 (1111) : AIR 1954 SC 322 [*LNIND 1954 SC 30*]: 1954 Crlj 910 .

5 *Yusufalli v. State of Maharashtra,* AIR 1968 SC 147 [*LNIND 1967 SC 152*]: (1973) 3 SCR 720 : 1968 Crlj 103 ; *Malkani v. State of Maharashtra,* (1973) 1 SCC 471 [*LNIND 1972 SC 457*] (para 32) : AIR 1973 SC 157 [*LNIND 1972 SC 457*]: 1973 Crlj 228 .

6 Cf. *Kali v. State of H.P.,* AIR 1973 SC 2773 [*LNIND 1973 SC 286*](para 17) : (1973) 2 SCC 808 [*LNIND 1973 SC 286*] : 1974 Crlj 1 .

7 *Santa Singh v. State of Punjab,* AIR 1956 SC 526 [*LNIND 1956 SC 192*]: 1956 Crlj 930 ; *Belurkar v. State of Maharashtra,* (1975) Crlj 517 Bom (para 7) FB.

8 Cf. *Kali v. State of H.P.,* AIR 1973 SC 2773 [*LNIND 1973 SC 286*](para 17) :

(1973) 2 SCC 808 [
LNIND 1973 SC 286] :
1974 Crlj 1 .

9 Cf. *Kali v. State of H.P.,*
AIR 1973 SC 2773 [
LNIND 1973 SC 286](para 17) :
(1973) 2 SCC 808 [
LNIND 1973 SC 286] :
1974 Crlj 1 .

10 *Vinod v. State of M.P.,*
AIR 1984 SC 911 [
LNIND 1984 SC 65](para 5) :
(1984) 2 SCC 350 [
LNIND 1984 SC 65] :
1984 Crlj 814 .

11 *State of Kerala v. Ammini,*
(1988) Crlj 107 (para 57) Ker (FB).

12 *State of U.P. v. Durga Prosad,*
1974 Crlj 1465 All ; *Srilal Shaw v. State of West Bengal,*
1997 Crlj 423 .

13 *Naresh v. Union of India,*
1995 SCC (Cri) 11 .

14 *State of NCT of Delhi v. Navjot Sandhu,*
(2005) 11 SCC 600 [
LNIND 2005 SC 580] :
2005 SCC (Cri) 1715 :
2005 Crlj 3950 :
(2005) 122 DLT 194 :
AIR 2005 SC 3820 [
LNIND 2005 SC 580].

15 *Adarsh Kumar Tripathi v. State of U.P.,*
2005 Crlj 4204 All (DB).

16 *State of H.P. v. Prem Chand,*
AIR 2003 SC 708 [
LNIND 2002 SC 806]:
(2002) 10 SCC 518 [
LNIND 2002 SC 806] :
2003 SCC (Cri) 1475 :
2003 Crlj 872 .

17 *Patel Hiralal Joilaram v. State of Gujrat,*
AIR 2001 SC 2944 [
LNIND 2001 SC 2382]:
(2002) 1 SCC 22 [
LNIND 2001 SC 2382] : 2002 SCC (Cr)

18 *Yusufalli v. State of Maharashtra,* [
AIR 1968 SC 147]:
LNIND 1967 SC 152 [
(1967) 3 SCR 720] :
LNIND 1967 SC 172
1968 Crlj 103 .

19 *Yusufalli v. State of Maharashtra,* [
AIR 1968 SC 147]:
LNIND 1967 SC 152 [
(1967) 3 SCR 720] :
LNIND 1967 SC 172
1968 Crlj 103 .

20 *Yusufalli v. State of Maharashtra,* [
AIR 1968 SC 147]:
LNIND 1967 SC 152 :
(1963) 3 SCR 720
1968 Crlj 103 .

21 *Harnath v. State of M.P.,* [
AIR 1970 SC 1619]:
LNIND 1968 SC 295 [
(1969) 2 SCR 289] :
LNIND 1968 SC 295
1970 Crlj 1422 (5 Judges, reviewing earlier cases).

22 *Harnath v. State of M.P.,* [
AIR 1970 SC 1619]:
LNIND 1968 SC 295 [
(1969) 2 SCR 289] :
LNIND 1968 SC 295
1970 Crlj 1422 (5 Judges, reviewing earlier cases).

23 *Harnath v. State of M.P.,* [
AIR 1970 SC 1619]:
LNIND 1968 SC 295 [
(1969) 2 SCR 289] :
LNIND 1968 SC 295
1970 Crlj 1422 (5 Judges, reviewing earlier cases).

24 *Padmeswar v. State of Assam,*
(1984) Crlj 1661 (para 8) Gau.

25 *Bal Kishan v. State of Maharashtra,* [
AIR 1981 SC 379]:
LNIND 1980 SC 298 [
(1980) 4 SCC 600] :
LNIND 1980 SC 298
1960 Crlj 1424 .

26 *Bal Kishan v. State of Maharashtra,* [
AIR 1981 SC 379]:
LNIND 1980 SC 298 [
(1980) 4 SCC 600

LNIND 1980 SC 298] :
1960 Crlj 1424 .

27 *Bal Kishan v. State of Maharashtra,*
AIR 1981 SC 379 [
LNIND 1980 SC 298]:
(1980) 4 SCC 600 [
LNIND 1980 SC 298] :
1960 Crlj 1424 .

28 *Jaddi v. State of M.P.,*
(1964) 6 SCR 313 [see also *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

29 *Baleshwar v. State of Bihar,*
(1963) 2 SCR 433 [
LNIND 1962 SC 190] (439) :
(1964) 1 Crlj 564 .

30 *Jaddi v. State of M.P.,*
(1964) 6 SCR 313 [see also *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10) :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

31 *Soma v. State of Gujarat,* A,
1975 SC 1453 (paras 18-19) :
(1975) 4 SCC 257 [
LNIND 1975 SC 183] :
1975 Crlj 1201 .

32 *Jaddi v. State of M.P.,*
(1964) 6 SCR 313 [see also *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10)] :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

33 *Jaddi v. State of M.P.,*
(1964) 6 SCR 313 [see also *Mohar v. State,*
AIR 1968 SC 1281 [
LNIND 1968 SC 82](para 10)] :
(1968) 3 SCR 525 [
LNIND 1968 SC 82] :
1968 Crlj 1479 .

34 *Soma v. State of Gujarat,* AIR,
1975 SC 1453 (paras 18-19) :
(1975) 4 SCC 257 [

LNIND 1975 SC 183] :
1975 Crlj 1201 .

35 *Santa Singh v. State of Punjab,*
AIR 1958 SC 526 530 .

36 *Jit Singh v. State of Punjab,*
AIR 1976 SC 1421 (paras 19-20) :
(1976) 2 SCC 836 :
1976 Crlj 1162 .

37 *Razik Ram v. Chouhan,*
AIR 1975 SC 667 [
LNIND 1975 SC 58](para 95) :
(1975) 4 SCC 769 [
LNIND 1975 SC 58].

38 *Soma v. State of Gujarat,* AIR,
1975 SC 1453 (paras 18-19) :
(1975) 4 SCC 257 [
LNIND 1975 SC 183] :
1975 Crlj 1201 .

39 *Sital v. State,*
AIR 1956 Cal 82 [
LNIND 1955 CAL 61]; *State v. Husain,*
AIR 1959 Bom 534 [
LNIND 1958 BOM 154].

40 *C. Changa Reddy v. State of Andhra Pradesh,*
(1996) 10 SCC 193 [
LNIND 1996 SC 1046] :
1996 Crlj 3461 :
1996 SCC (Cri) 1205 [
LNIND 1996 SC 1046] :
AIR 1996 SC 3390 [
LNIND 1996 SC 1046].

41 *Mohammed Aman v. State of Rajasthan,*
AIR 1997 SC 2960 : (1997) 10 SCC 44 :
1977 SCC (Cri) 777 :
1997 Crlj 3567 .

42 *Mahasin v. Delhi Administration,*
1996 Crlj 346 Del .

43 *Tori v. State,*
AIR 1962 SC 399 [
LNIND 1961 SC 297]:
(1962) 1 Crlj 469 .

44 *B. Subbarao v. Public Prosecutor,*
(1997) 11 SCC 478 [

LNIND 1997 SC 1065] :
AIR 1997 SC 3427 [
LNIND 1997 SC 1065]:
1997 Crlj 4072 .

45 *Sheikh Isaque v. State of Bihar,*
(1995) 3 SCC 392 [
LNIND 1995 SC 368] :
1995 SCC (Cri) 534 [
LNIND 1995 SC 368] :
1995 Crlj 2682 .

46 *Jagdish Naraiyan v. State of U.P.,*
(1996) 8 SCC 199 [
LNIND 1996 SC 554] :
AIR 1996 SC 3136 [
LNIND 1996 SC 554]: 1996 SCC (Cr) 565; *State of Rajasthan v. Bhawani,*
(2003) 7 SCC 291 [
LNIND 2003 SC 611] :
2003 SCC (Cri) 1628 [
LNIND 2003 SC 611] :
AIR 2003 SC 4230 [
LNIND 2003 SC 611]:
(2003) 3 Crimes 228 .

47 *Joydev Das v. State of West Bengal,*
1999 Crlj 1816 .

48 Cf. *Maha Singh v. State,*
AIR 1976 SC 449 [
LNIND 1976 SC 6]:
(1976) 1 SCC 644 [
LNIND 1976 SC 6] :
1976 Crlj 346 .

49 *Sat Kumar v. State of Haryana,*
AIR 1974 SC 294 (para 11) :
(1974) 3 SCC 643 :
1974 Crlj 345 .

50 Cf. *Maha Singh v. State,*
AIR 1976 SC 449 [
LNIND 1976 SC 6]:
(1976) 1 SCC 644 [
LNIND 1976 SC 6] :
1976 Crlj 346 .

51 *State of U.P. v. Durga Prasad,*
AIR 1974 SC 2136 [
LNIND 1974 SC 248](para 21, 23) :
(1975) 3 SCC 210 [
LNIND 1974 SC 248] :
1974 Crlj 1465 .

52 *State of U.P. v. Durga Prasad,*
AIR 1974 SC 2136 [

LNIND 1974 SC 248](paras 21, 23) :
(1975) 3 SCC 210 [
LNIND 1974 SC 248] :
1974 Crlj 1465 ; *Badaku v. State of Mysore,*
AIR 1966 SC 1746 [
LNIND 1966 SC 68]:
1966 Crlj 1353 .

53 *Remesh v. State of W.B.,*
AIR 1970 SC 940 [
LNIND 1968 SC 317]:
1970 Crlj 863 : *Jethmal v. Union of Inida,*
AIR 1970 SC 1310 (para 8) :
(1970) 2 SCC 301 .

54 *Narpal v. State of Haryana,*
AIR 1977 SC 1066 [
LNIND 1977 SC 65](paras 16, 24) :
(1977) 2 SCC 131 [
LNIND 1977 SC 65] :
1977 Crlj 642 DB; *Kanu v. State of Maharashtra,*
(1971) 1 SCC 503 (para 13) :
(1977) 2 SCC 131 [
LNIND 1977 SC 65] :
1977 Crlj 642 .

55 *Narpal v. State of Haryana,*
AIR 1977 SC 1066 [
LNIND 1977 SC 65](paras 16, 24) :
(1977) 2 SCC 131 [
LNIND 1977 SC 65] :
1977 Crlj 642 DB.

56 *Narpal v. State of Haryana,*
AIR 1977 SC 1066 [
LNIND 1977 SC 65](paras 16, 24) :
(1977) 2 SCC 131 [
LNIND 1977 SC 65] :
1977 Crlj 642 DB.

57 *Periasami v. State of Tamil Nadu,*
(1996) 6 SCC 457 [
LNIND 1996 SC 1552] :
1997 SCC (Cri) 121 [
LNIND 1996 SC 1552] :
1997 Crlj 219 :
(1996) 4 Crimes 39 .

58 *State of H.P. v. Prem Chand,*
AIR 2003 SC 708 [
LNIND 2002 SC 806]:
(2002) 10 SCC 518 [
LNIND 2002 SC 806] : 2003 SCC (Cri) 1475 :
2003 Crlj 872 .

59 *Lalit Singh v. State of U.P.,* 2007 Crlj NOC 560Uttar .

60 *Razik Ram v. Chouhan,*
AIR 1975 SC 667
[*LNIND 1975 SC 58*](para 95) :
(1975) 4 SCC 769
[*LNIND 1975 SC 58*].

61 *Tahsildar v. State of U.P.,*
AIR 1959 SC 1012
[*LNIND 1959 SC 96*]:
1958 Crlj 1231 : 1959 Supp(2) SCR 875; *Sirajuddin v. State of Madras,*
(1970) 1 SCC 595
[*LNIND 1970 SC 112*] (para 18).

62 *Makan v. State of Gujrat,*
(1971) 3 SCC 297 (para 13).

63 *Makan v. State of Gujrat,*
(1971) 3 SCC 297 (para 13).

64 *Makan v. State of Gujrat,*
(1971) 3 SCC 297 (para 13).

65 *State of U.P. v. Anthony,*
AIR 1985 SC 46 (para 9); *Abraham v. S.P.,*
(1988) Crlj 1144 (para 13) Ker.

66 *State of U.P. v. Anthony,*
AIR 1985 SC 46 (para 9); *Abraham v. S.P.,*
(1988) Crlj 1144 (para 13) Ker.

67 *Gurnam Kaur v. Bakshish Singh,*
AIR 1981 SC 632 : 1981 SCC (Cri) 498 :
1981 Crlj 34 : 1980 Supp SCC 567.

68 *State of Rajasthan v. Wakting,*
AIR 2007 SC 2020
[*LNIND 2007 SC 790*]:
(2007) 14 SCC 550
[*LNIND 2007 SC 790*].

69 *Ronny v. State of Maharasthra,*
(1998) 3 SCC 625
[*LNIND 1998 SC 302*] :
1998 SCC (Cri) 859 :
1998 Crlj 1638 :
AIR 1998 SC 1251
[*LNIND 1998 SC 302*]; *State of Rajasthan v. Teja Ram,*
AIR 1999 SC 1776
[*LNIND 1999 SC 279*]:
(1999) 3 SCC 507
[*LNIND 1999 SC 279*] :
1999 SCC (Cri) 436
[*LNIND 1999 SC 279*] :
1999 Crlj 2588 .

70 *Purushottam v. State of Kerala,* 1989 Crlj NOC 184Ker : (1989) 2 Crimes 44 [*LNIND 1989 KER 65*] : (1989) 1 KLT 521 [*LNIND 1989 KER 65*].

71 *Khatri v. State of Bihar,* AIR 1981 SC 1068 [*LNIND 1981 SC 146*](para 3) : (1981) 2 SCC 493 [*LNIND 1981 SC 146*] : 1981 Crlj 597.

72 *Khatri v. State of Bihar,* AIR 1981 SC 1068 [*LNIND 1981 SC 146*](para 3) : (1981) 2 SCC 493 [*LNIND 1981 SC 146*] : 1981 Crlj 597.

73 *Vellanai v. Distt. Magistrate,* (1984) Crlj 68 (para 4) Mad.

74 *Zahiruddin v. K.E.,* AIR 1947 PC 75 ; *State of U.P. v. Anthony,* AIR 1985 SC 46 (para 9).

75 *Zahiruddin v. K.E.,* AIR 1947 PC 75 ; *State of U.P. v. Anthony,* AIR 1985 SC 46 (para 9).

76 *Zahiruddin v. K.E.,* AIR 1947 PC 75 ; *State of U.P. v. Anthony,* AIR 1985 SC 46 (para 9).

77 *Zahiruddin v. K.E.,* AIR 1947 PC 75 ; *State of U.P. v. Anthony,* AIR 1985 SC 46 (para 9).

78 *Kotayya,* (1946) 76 IA 65.

79 *Purshottam,* AIR 1954 SC 700 : 1954 Crlj 1751; *Noor Khan v. State of Rajasthan,* AIR 1964 SC 286 [*LNIND 1963 SC 194*]: (1964) 1 Crimes 167.

80 *Sat Paul v. Delhi Administration,* AIR 1976 SC 295 (para 54).

81 *Jit Singh v. State of Punjab,* AIR 1976 SC 1421 (paras 19-20) : (1976) 2 SCC 836 : 1976 Crlj 1162 .

82 *Makan v. State of Gujrat,* (1971) 3 SCC 297 (para 13).

83 *Bhanuprasad v. State of Gujarat,* AIR 1968 SC 1323 [*LNIND 1968 SC 119*](para 5) : (1969) 1 SCR 22 [*LNIND 1968 SC 119*] : 1968 Crlj 1505 .

84 *Rameshwar v. State of J &K.,* AIR 1972 SC 102 [*LNIND 1971 SC 446*](para 7) : (1971) 2 SCC 715 [*LNIND 1971 SC 446*] : 1972 Crlj 15 .

85 *Gajendra v. State of U.P.,* AIR 1975 SC 1703 (para 10) : (1975) 4 SCC 241 : 1975 Crlj 1494 .

86 *Vinay D. Nagar v. State of Rajasthan,* AIR 2008 SC 1558 [*LNIND 2008 SC 548*]: (2008) 5 SCC 597 [*LNIND 2008 SC 548*] : (2008) 2 SCC 666 (Cri) : 2008 Crlj 1907 .

87 *Rejendra Singh v. State of U.P.,* AIR 2007 SC 2786 [*LNIND 2007 SC 932*]: (2007) 7 SCC 378 [*LNIND 2007 SC 932*] : (2007) 3 SCC 375 (Cri) : 2007 Crlj 4281 .

88 *Gurbachan v. State of Punjab,* AIR 1957 SC 623 : 1957 Crlj 1009 : 1957 SCJ 539 .

89 *Tara Chand v. State,* (1974) CrLJ 1346 (1355) Del.

90 *Rameswar v. State of J. & K.,* (1971) 2 SCC 715 [*LNIND 1971 SC 446*] (para 8); [*Paresh Kalyandas Bhavsar v. Sadip Yakbbhai Jamadar,* AIR 1993 SCC 1544 (para 14) :

(1993) 3 SCC 95 [
LNIND 1993 SC 264] :
1993 Crlj 1857 is not quite clear].

91 *Sat Paul v. Delhi Administration,*
AIR 1976 SC 295 (para 54).

92 *Tahsildar v. State of U.P.,*
AIR 1959 SC 1012 1023 : 1959 Supp(2) SCR 875 :
1959 Crlj 1231 ; *Shakila v. Nausher,*
AIR 1975 SC 1324 (para 4) :
(1975) 4 SCC 122 :
1975 Crlj 1105 .

93 *Tahsildar v. State of U.P.,*
AIR 1959 SC 1012 1023 : 1959 Supp(2) SCR 875 :
1959 Crlj 1231 ; *Shakila v. Nausher,*
AIR 1975 SC 1324 (para 4) :
(1975) 4 SCC 122 :
1975 Crlj 1105 .

94 *Hamidulla v. State of Gujarat,*
(1988) Crlj 981 (paras 16-17) DB.

95 *State Delhi Administration v. Tribhuban Nath,*
(1996) 8 SCC 250 [
LNIND 1996 SC 761] :
1996 SCC (Cri) 665 :
(1995) 5 JT 417 .

96 *State Delhi Administration v. Tribhuban Nath,*
(1996) 8 SCC 250 [
LNIND 1996 SC 761] :
1996 SCC (Cri) 665 :
(1995) 5 JT 417 .

97 *K.K. Sharma v. State of Rajasthan,*
1998 Crlj 2609 Raj .

98 *P. Prasad v. State of Kerala,*
1998 Crlj 2122 Ker .

1 *Tahsildar v. State of U.P.,*
AIR 1959 SC 1012 1023 : 1959 Supp(2) SCR 875 :
1959 Crlj 1231 ; *Shakila v. Nausher,*
AIR 1975 SC 1324 (para 4) :
(1975) 4 SCC 122 :
1975 Crlj 1105 .

2 *Podda v. State of A.P.,*
AIR 1975 SC 1252 [
LNIND 1975 SC 147](para 10) :
(1975) 4 SCC 153 [

LNIND 1975 SC 147] :
1975 Crlj 1062 .

3 *Bhagwan* ,
AIR 1952 SC 218 [
LNIND 1952 SC 29]:
1952 SCR 645 [
LNIND 1952 SC 29].

4 *Ram v. State of Maharashtra,* (1967) SC, dated 27-11-1967.

5 *State of Rajasthan v. Kartar Singh,*
AIR 1970 SC 1305 [
LNIND 1970 SC 147](para 10) :
(1970) 2 SCC 61 [
LNIND 1970 SC 147] :
1970 Crlj 1144 .

6 *Kanu v. State of Maharashtra,*
(1971) 1 SCC 503 :
AIR 1971 SC 2256 : 1971 Crlj 1547.

7 *Kanu v. State of Maharashtra,*
(1971) 1 SCC 503 :
AIR 1971 SC 2256 : 1971 Crlj 1547.

8 *Kanu v. State of Maharashtra,*
(1971) 1 SCC 503 :
AIR 1971 SC 2256 : 1971 Crlj 1547.

9 *Badri v. State of Rajasthan,*
AIR 1976 SC 560 [
LNIND 1975 SC 426](para 6) :
(1976) 1 SCC 442 [
LNIND 1975 SC 426] :
1976 Crlj 496 .

10 Cf. *Dahyabhai v. State of Gujarat,*
AIR 1964 SC 1563 [
LNIND 1964 SC 88]:
(1964) 7 SCR 361 [
LNIND 1964 SC 88] :
(1964) 2 Crimes 472 .

11 *Sukhiram v. State of M.P.,* (1989) Supp (1) SCC 214 :
AIR 1989 SC 772 [
LNIND 2016 MP 593]:
1989 Crlj 838 .

12 *Tapinder v. State of Punjab,*
(1970) 1 SCC 113 (para 15).

13 *Tapinder v. State of Punjab,* (1970) 1 SCC 113 (para 15); *Kushal v. State of Bombay,* (1958) SCR 552 [*LNIND 1957 SC 97*] (568-69) : AIR 1958 SC 22 [*LNIND 1957 SC 97*]: 1958 Crlj 106 ; *Harbans v. State of Punjab,* (1962) Supp 1 SCR 104 : AIR 1962 SC 439 [*LNIND 1961 SC 333*]: 1962 Crlj 479 .

14 *Minati v. Radhakanta,* (1994) Crlj 305 (Cal) (para 7).

15 *Sakhawat v. Emp.,* AIR 1937 Nag. 50 53 ; *Yusuf v. Emp.,* AIR 1938 Pat 582 ; *Rudder v. State,* AIR 1957 All 239 [*LNIND 1956 ALL 106*](*240*); *State of M.P. v. Bansilal,* AIR 1958 MP 13 [*LNIND 1957 MP 36*]; *Emp. v. Ajit Kumar,* AIR 1945 Cal 159 (*173*).

16 *Tahsildar v. State of U.P.,* AIR 1959 SC 1012 [*LNIND 1959 SC 96*](1023-26) : 1959 Supp (2) SCR 875 : 1959 Crlj 1231 .

17 This proposition thus overruled the view taken in *Yusuf v. Emp.,* AIR 1938 Pat 582 .

18 Cf. *Dahyabhai,* AIR 1964 SC 1563 [*LNIND 1964 SC 88*]: (1967) 7 SCR 361 : (1964) 2 Crimes 472 .

19 Rep. of the Joint Committee, p. xvi.

20 *Tahsildar v. State of U.P.,* AIR 1959 SC 1012 [*LNIND 1959 SC 96*](1023-26) : 1959 Supp (2) SCR 875 : 1959 Crlj 1213 .

21 *Vimal Suresh Kamble v. Chaluverapinake Apal S.P.,* AIR 2003 SC 818 [*LNIND 2003 SC 13*]: (2003) 3 SCC 175 [*LNIND 2003 SC 13*] : 2002 SCC (Cri) 596 : 2003 Crlj 910 .

22 *Alamgir v. State (NCT, Delhi),* AIR 2003 SC 282 [*LNIND 2002 SC 693*]:

(2003) 1 SCC 21 [
LNIND 2002 SC 693] :
2003 Crlj 456 :
(2003) 1 Crimes 212 [
LNIND 2002 SC 693].

23 *Sohan Lal v. State of Punjab,*
AIR 2003 SC 4466 [
LNIND 2003 SC 873]:
(2003) 11 SCC 534 [
LNIND 2003 SC 873] :
2004 SCC (Cri) 226 [
LNIND 2003 SC 873] :
2003 Crlj 4569 .

24 *Jamaur Singh v. State of Hariyana,*
2002 SCC (Cri) 991 :
2002 Crlj 2212 .

25 *S. Kaur v. Baldev Singh,*
(1997) 11 SCC 292 :
AIR 1999 SC 1581 : 1998 SCC (Cr) 161.

26 *State of Karnataka v. Moin Patel,*
(1996) 8 SCC 167 [
LNIND 1996 SC 444] :
1996 SCC (Cri) 632 [
LNIND 1996 SC 444] :
AIR 1996 SC 3041 [
LNIND 1996 SC 444].

27 *Indrajit Roy v. Republic of India,*
1999 Crlj 4727 Ori .

28 *Satpal v. State of Punjab,* 1995 Supp (4) SCC 1 :
1996 SCC (Cri) 11 [
LNIND 1995 SC 1011] :
(1995) 4 Crimes 301 .

29 *S. Kaur v. Baldev Singh,*
(1997) 11 SCC 292 :
AIR 1999 SC 1581 : 1998 SCC (Cr) 161.

30 *Goapl v. Subhash,*
AIR 2004 SC 4900 [
LNIND 2004 SC 103]:
(2004) 13 SCC 174 [
LNIND 2004 SC 103] :
2005 SCC (Cri) 98 [
LNIND 2004 SC 103] :
2004 Crlj 3349 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 163
No inducement to be offered.

(1) No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in *Sections 24 of the Indian Evidence Act, 1872* (1 of 1872).

(2) But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will :

Provided **that nothing in this sub-section shall affect the provisions of sub-section (4) of Section 164.**

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1. Scope of s. 163.—

1. This section corresponds to *old* s. 163, with the addition of the Proviso to sub-sec. (2).
2. The object of this section is to ensure that the statement made by a person before the Investigating Officer is voluntary. For this purpose, it is laid down :

(a) The Investigating Officer, whether he is a Police Officer or any other person in authority with respect to the investigation, [31] should not offer any inducement, threat or promise to procure a statement from any witness, [32] —leading him to suppose that he would gain any advantage or

avoid any evil in reference to his conduct as disclosed in the proceedings, by making a statement. [33]

(b) Conversely, such Police Officer or other person should not do anything which might prevent or deter such person to make any *voluntary* confession or self-incriminating statement As regards such voluntary statement, the *new* Proviso makes it clear that if it is a confession, it must comply with the requirements of s. 164(4), that is—

(a) Such statement can be recorded only by a Metropolitan or Judicial Magistrate.

(b) In recording the statement, the Magistrate must comply with the requirements of s. 281,*post.*

(c) The statement must be signed by the person making the confession.

(d) The Magistrate must make a memorandum as specified in s. 164(4),*post* .

In other words, the fact that the person makes the statement voluntarily would not dispense with the requirements of s. 164(4) as regards the recording of a confession. [34]

2. Sub-sec. (1) : Effect of contravention—

If it appears that statements under s s. 161-162 were obtained from persons after giving them a threat or inducement (*e.g.* , by granting them certificates of immunity for their own misdeeds) and a charge-sheet is founded on such statement, it may be a good ground for quashing the proceedings, or for a direction to reconsider the framing of charge after excluding the statements so vitiated by a contravention of s. 163(1). [35]

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31 *Sirajuddin v. State of Masdras,* (1970) 1 SCC 595 [LNIND 1970 SC 112] (paras 18, 21, 24) : AIR 1971 SC 520 [LNIND 1970 SC 112]: 1971 Crlj 523 .

32 *State of Maharashtra v. Atma Ram,* AIR 1966 SC 1786 : 1966 Crlj 1498.

33 *Sirajuddin v. State of Masdras,* (1970) 1 SCC 595 [LNIND 1970 SC 112] (paras 18, 21, 24) : AIR 1971 SC 520 [LNIND 1970 SC 112]: 1971 Crlj 523 .

34 *Sirajuddin v. State of Masdras,* [(1970) 1 SCC 595 : *LNIND 1970 SC 112*] (paras 18, 21, 24) [AIR 1971 SC 520 : *LNIND 1970 SC 112*] [1971 Crlj 523].

35 *Sirajuddin v. State of Masdras,* [(1970) 1 SCC 595 : *LNIND 1970 SC 112*] (paras 18, 21, 24) [AIR 1971 SC 520 : *LNIND 1970 SC 112*] [1971 Crlj 523].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 164
Recording of confessions and statements.

(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial :

[[36] ***Provided*** **that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence :**

Provided further **that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.]**

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

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect :—

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B. Magistrate."

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

[(37 5A) (a) **In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D,** ***section 376E*** **or** ***section 509*** **of the** ***Indian Penal Code (45 of 1860)*** **, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:**

Provided **that if the person making the statement is temporarily or permanently mentally or physically disabled, the magistrate shall take the assistance of an interpreter or a special educator in recording the statement:**

Provided further **that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.**

(b) **A Statement recorded under clause (** ***a*** **) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in** ***Sections 137 of the Indian Evidence Act, 1872*** **(1 of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.]**

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

STATE AMENDMENT

Andaman and Nicobar Islands and Lakshadweep Islands (U.T.). — *The following amendments were made by Regulation No. 1 of 1974, S. 5 (w.e.f. 30-4-1974)* .

S. 164. —In its application to the Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands after S. 164(1), insert the following:—

"(1-A) Where, in any island, there is no Judicial Magistrate for the time being and the State Government is of

opinion that it is necessary and expedient so to do, that Government may after consulting the High Court specially empower any Executive Magistrate (not being a police officer), to exercise the powers conferred by sub-section (1) on a Judicial Magistrate and thereupon reference in Section 164 to a Judicial Magistrate shall be construed as reference to the Executive Magistrate so empowered."

The *Criminal Law (Amendment) Act, 2013* has made certain important amendments in section 164 of the Code. These amendments have been carried out on the recommendations of the Justice J.S. Verma Committee, which submitted its report on 23-1-2013. Newly added clause (a) of sub-section (5A) empowers the Judicial Magistrate to record the statement of the victim of offences enumerated in the clause as soon as the offence is brought to the notice of the police. Two provisos have been appended to clause (a) of sub-section (5A) which lay down the procedure in case of the victim being temporarily or permanently physically or mentally disabled and for video graphing of the said recording. Clause (b) of sub-sec. (5A) lays down that the statement of the victim so recorded shall be as a statement of the victim so recorded shall be as a statement in lieu of the examination-in-chief, without the need for recording the same at the time of trial, so that the maker of the statement can be cross-examined on such statement.

1. Scope of s. 164. —

This section corresponds to *old* s. 164, with the following substantive changes, as indicated by italics:

(i) The Provisos to sub-sec. (1) and sub-sec. (3) have been added.

(ii) In sub-sec. (1), Executive Magistrate have been excluded.

(iii) Instead of s. 364, reference has been given to *new* s. 281 in sub-sec. (4), as regards the recording of confessions.

(iv) As regards *other* statements under s. 164, the manner has been left to the discretion of the Magistrate, under *new* sub-sec. (5).

(v) Sub-sec. (6) has been framed to include the concluding portion of *old* sub-sec. (2).

2. S. 164, Crpc and s. 24, Evidence Act.—

1. Section 164 of the Code is not exhaustive of the conditions for the admissibility of confessions. If must be read along with s s. 24-30 of the *Evidence Act* , which deal with the substantive law relating to confessions. [38]

2. A confessions is an admission of the offence by a person charged with the offence. [39] But a statement which contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of same fact which, if true, would *negative* the offence alleged to be confessed. [40]

3. In general, a confession is evidence against the person making it, unless excluded by same provision of law (*s. 21, Evidence Act*). [41]

4. A study of the relevant provisions of the Code together with those of the *Evidence Act* leads to the following results :

I. When the confession is made before a Magistrate and during the course of Police investigating, it would *not* be admissible unless recorded by the Magistrate in accordance with the procedure laid down in *s. 164, Crpc* .

II. Where it is made *to* a Police officer, it would *not* be admissible against the accused [*s. 25, Evidence Act*], except in the case provided for in *s. 27 of the Evidence Act* .

This is an absolute bar excluding confessions made to the Police not only when the person was in Police custody, but also when he was free, and when the investigation may not have begun and when he was not an 'accused'; it is also *not* subject to the provision in s. 26. [42]

A confession made to a Police officer during investigation is also excluded by s. 162 of the Code. [43]

III. Where it is made to a person other then a Police officer while the person is in the *custody* of the Police, it shall not be admissible unless it is made in the immediate presence of a Magistrate [s. 26], or *s. 27 of the Evidence Act* is attracted.

IV. Where *s. 27 of the Evidence Act* is attracted, *i.e.* , some material fact is discovered in consequence of the information supplied by the confession made to a Police officer or while in custody of a Police officer, *s. 162 of the Cr.P.C.* shall not apply, as has been specifically excepted by sub-sec. (2) of that section.

Section 27 constitutes a total exception to s s. 24—26 of the *Evidence Act* . [44]

V. A confession may also be made before the Court at any stage of the trial, to which s. 164 shall have no application, [45] *e.g.* during examination under s. 313,*post.* [46]

VI. Section 164 shall have no application when the confession is made to a person other then a Magistrate. Such confession is called *'extra-judicial* confession' (as distinguished from 'judicial confession' recorded under s. 164),—which has to be proved like any other evidence, by examining the person to whom the confession was made. Usually, such evidence requires corroboration by other witnesses, unless *s. 27 of the Evidence Act* is attracted; [47] or the witness to whom the confession was made was an independent or responsible person, having no animus against the accused, and could, therefore, be relied upon without corroboration. [48] In the absence of such special reasons, it is a weak piece of evidence. [49] But, if corroboration, the Court may convict an accused even on his retracted extra-judicial confession. [50]

5. When a confession is excluded by law, the entire confessional statement in all its parts, including the admissions of minor incriminating facts must also be excluded, unless proof of its being permitted by some other provisions, *e.g.*, *s. 27 of the Evidence Act*.[51]

6. If the F.I.R. amounts to a confession of the accused, it is not receivable in evidence against the accused (*s.25 of the Evidence Act*), unless it comes under s. 27 of that Act.[52] When hit by s. 25, the *entire* F.I.R. is to be so excluded.[53]

3. Conditions for the application of s. 164.—

Under the *new* section, the following conditions must be satisfied before this section can be attracted :

(i) It applies only to statement made before a Magistrate, during an investigating held under Chap. XII and before the inquiry or trial has started.

When a confession is made during trial,[54] the provision applicable will be s. 281,[55] *post,* and not s. 164.

(ii) If the preceding condition is satisfied, s. 164 would be attracted whether it is the statement of a would-be accused or that of a witness, and whether the statement is confessional or otherwise.[56] But—

(a) If the statements amount to a 'confession', the procedure laid down in sub-secs. (2)-(4) must be complied with.

(b) If, however, the statement does not constitute a confession, sub-sec. (5) shall be attracted, but not sub-secs. (2)-(4).

(c) But whether confessional otherwise, sub-secs. (1) and (7) shall be attracted, that is —

(i) The Magistrate recording it must be competent under sub-sec.(1).

(ii) If the Magistrate recording the statement or confession has to forward it to the Magistrate who is going to inquire into try the case [sub-sec.(7)].

4. Sub-sec. (1) : Magistrate competent to record statement of confession during investigation.—

1. Under the *new* Code only the following persons are competent to record any statement made by the accused (confessional or otherwise), after the 'investigating' has started, and before commencement of the inquiry or trial:

   (a) Any Metropolitan Magistrate;

   (b) *Any* Judicial Magistrate, *whether or not* he has *jurisdiction to try the case.* Hence, even a second class Judicial Magistrate would be competent, without being specially empowered.

2. The following would *not* be competent :

   (i) Any executive Magistrate;

   (ii) Any Police officer empowered to exercise the power of a Magistrate,—where the statement is confessional [Prov. to s. 164(1)].

3. If the person recording the statement or confession under S.164 was *not* competent to do so, such statement cannot be proved by the oral evidence of such person. [57]

4. Where it was recorded by a competent Magistrate, the statement is admissible without examining the Magistrate; in fact, it would be undesirable or improper to examine that Magistrate. [58] , [59]

5. As the power is conferred upon the Judicial Magistrate alone to record confession under *s. 164 Cr.P.C.* , even a police officer upon whom the power of the Magistrate has been conferred is forbidden from recording a confession under *s. 164 Cr.P.C.* [60]

6. Mere fact that the C.J.M. has nominated not the Judicial Magistrate of the Taluk where the accused was locked up in sub-jail and instead nominated another Judicial Magistrate for recording the confession by such Magistrate does not in any way vitiate the confession only on that ground. [61]

5. Magistrate' s power to record statement or confession.—

1. Apart from the power conferred by s. 162(1) upon a Police Officer, under s. 164(1), a Metropolitan or Judicial Magistrate has the power to record a statement made to him by a person during investigation of a cese, without any initiation by the Police, or even where the Investigation Police Officer refuses to record the statement. [62]

2. The word 'may' indicates that the power is discretionary [63] and that a Magistrate is not bound to record the statement of a person brought before him, in every case, whether the statement is confessional or otherwise; thus, he may refuse to record a confession which does not appear to be voluntary or which is incredible or would be useless for the purpose of justice; [64] or because the Police has already submitted its final report and that the person seeking to make the statement would have an opportunity to disclose the facts at the trial stage. [65]

3. A statement, duly recorded by a competent Magistrate, which is voluntary, is not to be discarded merely because it was recorded not in open Court, but in the Magistrate's chamber, [66] or outside the Court. [67]

   But a confession recorded in Jail, without adequate reasons therefore, and in disregard of a

Government order, would be improper. [68]

4. When an investigation has already started, any statement made before a Magistrate,—confessional or non-confessional,—must be recorded in the manner laid down in s. 164, so that in the absence of such record, contents of the statement cannot be proved by oral evidence of the Magistrate. [69] , [70]

5. Under the *old* Code it was held that a Magistrate who took part in assisting the investigating should not record the confession. [71] As a principle of natural justice, that still subsists.

6. Use of non-confessional statement recorded under s. 164.—

1. A statement made under *s. 164,Cr.P.C.* , can never be used as substantive evidence of the facts stated, but it can be used to support or challenge[72] evidence (under s *s. 145* , *157* of the *Evidence Act*) given in Court by the person who made the statement. [73] Thus, the statement can be used to cross-examine the person who made it, that the evidence of the witness is false. But that does not establish that what he stated out of Court under s. 164 is true. [74]

2. Nor does such statement become substantive evidence where the witness says in Court that a statement of his was recorded under s. 164 and that what he had then stated was true. [75]

3. When, in view of a statement made by a witness under s. 164, the Court considers that he has been won over by the defence, his evidence in Court must be entirely ignored. [76]

   But only because the statements of eye-witnesses were recorded under *s. 164,Cr.P.C.* , evidence given by them cannot be treated as tainted evidence when they appear to be disinterested witnesses.[77]

4. But a statement made by an approver under s. 164 does not amount to the corroboration in material particulars which the Courts require in relation to the evidence of an accomplice. An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition. [78]

7. Non-confessional statement by accused. —

1. When the statement made by an accused does not constitute a ‘confession’ within the purview of s. 24, it may be admissible against him under ss. 18-21. [79]

2. This principle is applicable where the first information is given by the accused himself; [80] or where a statement is made by the accused before a Magistrate previous to the starting of investigating of the case. [81] Such statement, though not admissible as a confession (being outside s. 164), can yet be used as an ‘admission’ along with other evidence. [82]

8. Evidentiary value of statement of witness recorded under s. 164(1).—

1. The statement of a witness recorded by a Magistrate under s. 164(1) is evidence and it cannot be discarded merely because the Police officer got it recorded during investigation. [83]

2. But the Court must approach it with caution in view of the fact that the witness had no freedom when he made it. [84]

3. Under s. 164(1), an Executive Magistrate has no power to record a statement. If he does, such statement shall have no value in the eye of law. [85]

9. Appraisal of evidence of witness who has a previous statement recorded under s. 164.—

1. Since a witness whose statement was recorded under s. 164 came from custody of the Police, [86] and such witness feels tied to that previous statement, the Court must received the evidence in Court of such witness with caution. [87]

2. This does not mean that the evidence of such witness in Court must be discarded. If there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon. [88] It only means that the Court has to scrutinise such evidence a little *more closely* and see if the other circumstances lend support to it. [89]

There is no universal rule that the evidence of a witness whose statement has been recorded under *s. 164 Cr.P.C.* should be seen with mistrust, though sometimes the police gets the statement of the witnesses recorded under *s. 164 Cr.P.C.* [90]

However, such statement cannot be used as substantive evidence but can only be used either to contradict or to corroborate the maker. [91]

Even though the evidence of the witnesses whose statements have already been recorded under *s. 164 Cr.P.C.* cannot be discarded only because the statements were recorded under *s. 164 Cr.P.C.* , all that is required as a matter of caution is to make a careful analysis of the evidence before accepting their evidence in Court.[92]

The statement of a witness were recorded under *s. 164 Cr.P.C.* in presence of the Special Judicial Magistrate. However, the witness subsequently resiled from the statements made by him. His statement is not substantive piece of evidence and can be used only to corroborate or contradict him.[93]

So, it is clear that the statement of the witnesses recorded under *s. 164 Cr.P.C.* by the Magistrate would not discredit his evidence when he was an independent witness and no omission, contradiction or improvements were brought by the defence counsel in his evidence before the Court as compared with the statements recorded under s. 164 Cr. PC. So his evidence is believable.[94]

In a gang rape case, the witnesses in their statements under *s. 164 Cr. P.C* , had confirmed that three accused persons had brought a girl in late evening hours on the date of occurrence to their house and all three had committed rape upon her. However, in the Court all the witnesses retracted from their previous statement. Therefore, the prosecution cannot avail of any assistance from their earlier statements.[95]

10. Locus standi of any person of said one's statement recorded.—

A person is neither an accused nor sponsored by the Investigating Officer has not *locus standi* to apply to the Magistrate to record his statement under *s. 164 Cr.P.C.* which he prefers to make in the Court.[96]

11. Non-production of witness whose statement was recorded under s. 164(1).—

If a witness whose statement had been recorded under s. 164 is not produced by the prosecution, the accused may invoke in his favour the presumption under s. 114, ill. (g) of the *Evidence Act* that if she had been produced and offered for cross-examination by the accused, it would have damaged the prosecution case. [1]

12. Use of confessional statement.—

See under sub-sec. (4), *below* .

13. Penalty for making a false statement.—

A person who makes a statement under this section, which is knowingly false, is punishable for an offence under s. 193, I.P.C. [2]

14. Sub-sec. (2): Duty of Magistrate in recording confessional.—

1. The act of recording confessions is a very solemn act . In discharging his duties in this respect, the Magistrate must take care to see that the requirements of sub-sec.(2) of s. 164 are fully satisfied. [3]
2. In particular, the Magistrate should, before recording a confession, take the following precautions, following from decisions and High Court instructions (which should be followed) [4] —

(a) The Magistrate should remove the hand-cuffs of the prisoner and direct all Police officers to leave the room. [5]

(b) The prisoner should be told that he was no longer in Police custody but before a Magistrate. [6]

(c) The prisoner must be told that—

(i) He was not bound to make any statement at all;

(ii) Whatever statement he would make might be used against him in evidence [s. 164(2)].

(d) The Magistrate should put question to the accused whether the statement he was going to make was voluntary; whether the Police had offered any threat, inducement or promise [s. 164(2)] and, if so, whether its influence is still continuing. [7]

(e) The Magistrate should ascertain for how long the confessing accused was in Police custody prior to his production for recording the confession. [8]

(f) If there are marks of injury on the person of the accused, the Magistrate should ask how he came by them. [9]

(g) After giving the accused the warning that he was not bound to confess and giving him time to consider whether he should make a confession at all, the Magistrate should send him to jail custody, free from influence of the Police. [10] , [11]

(h) The Magistrate should maintain a record to show where the accused was sent after he was given time for reflection. [12] On his return, he should again be asked whether he was voluntarily making the confession. [13] He should be asked why he was making the confession and must also be told that he would not be remanded to the Police lock-up even if he did not confess. [14]

(i) He must make memorandum that the confession was voluntarily made, in terms of s. 164(4). [15]

3. Question intended to be put under sub-sec. (2) should not be allowed to become a matter of mere mechanical inquiry. No element of casualness should be allowed to creep in and the Magistrate should be fully satisfied that the confessional statement, which the accused wants to make, is in fact and in substance voluntary. [16] , [17] The whole object of putting question to an accused person, who offers to confess, is to obtain an assurance of the fact that the confession is not caused by any inducement, threat or promise having reference to the charge, as mentioned in *s. 24 of the Evidence Act* . [18]

The confessional statement was made freely and voluntarily by the accused while on bail. It cannot be rejected only because the Magistrate used the word "evidence", instead of "confession" while giving, warning to the accused. The Magistrate having recorded in the statement that she gave statutory warning and advice that the accused was not bound to make the statement, s. 164(2) *Cr.P.C.* has been complied with.[19]

The question before the Magistrate at that stage is not whether the confession is true or false but whether it was *voluntary* . [20] It is not voluntary if any threat or coercion was used against the person and it was still operating on his mind at the time he was making the confession [21] [vide *s. 28, Evidence Act*].

15. Sufficient time for reflection.—

1. After warning the prisoner as to the consequence of making a statement or confession, the Magistrate should instead of recording it immediately, allow the prisoner sufficient time to reflect and to collect his mind, after putting him out of reach of the Investigating Officer. [22]

2. Though no rigid rule as to how much time should to given for this purpose can be laid down, speaking generally, it would be reasonable upon giving the prisoner at least *24 hours* to decide whether or not be should make a confession. [23] One hour's time after Police custody was held to be insufficient for cool reflection in order to make the confession voluntary. [24] Where there may be reason to suspect that the accused has been persuaded or coerced to make a confession, even a longer period may have to be given before his statement is recorded. [25], [26]

But where, though the accused had been in prolonged custody, for some three days before the Magistrate's warning and one day after it, the accused was out of the influence of the investigating agency, *held* the confession was voluntary. [27] Even 15 minutes' time for reflection was held sufficient where there was no evidence of threat or coercion and the accused was in *judicial* custody prior to the confession. [28]

16. Omission to inform the accused of his constitutional right to consult a lawyer.—

1. Under *Art. 22 (1) of the Constitution*, an arrested person has "the right to consult, and to be defended by, a legal practitioner of his choice". It has been held that this right is available to the accused from the moment of his arrest to all stages of the trial. [29]

2. It has been held that the foregoing right is available in course of the Police investigation under s. 161. [30]

3. The question is, whether the observations made in *Nandini' case,* [31] which were made in relation to statements made to the Police, are applicable to a confession made to Magistrate.

   On this point, there has a divergence of opinion as between two Division Benches of the Gauhati [32] and Calcutta [33] High Courts. I would prefer the view of the Gauhati High Court, for the following reasons:

   (a) Of course, s. 164 (2) of the Code which lays down the conditions of a valid confession, does not refer to any right of the accused to consult a lawyer before making the confession. But the *Constitution*, being the supreme law of the land, its mandates need not be incorporated in an ordinary statute in order to make them enforceable.

   (b) The Calcutta decision [34] does not discuss the implications of Art. 22 (1) at all. On the other hand, the Gauthati view [35] is in accord with the view taken under the International Charters to which India is a party.

(c) Deducing from Art. 22(1), the Supreme Court [36] has held that a trial will be invalid if an indigent accused is not provided with free legal aid.

(d) A person who is not *informed* of this right cannot possibly ask for an opportunity to consult a lawyer, or, if he is indigent, to ask for free legal aid. [37]

(e) If the accused is not informed of his right to consult a lawyer before making any statement, he cannot properly exercise another fundamental right of his, namely, not to incriminate himself, under Art. 20(3). It is true that he is not being physically compelled to make the confession, but a confession obtained by depriving him of the opportunity of exercising his fundamental right to legal aid cannot be side to be a voluntary confession and is only an indirect way of compelling him to incriminating himself. At least, such a procedure cannot be said to constitute a fair procedure under Art. 21, as interpreted in the case of *Maneka* . [38]

(f) Of course, in *Nandini's case,* [39] the Supreme Court did not specifically consider the applicability of Art. 22(1) to a confession recorded by a Magistrate under *s. 164 of the Crpc* .

But IYER, J., speaking for a three-judge Bench, spoke of the 'sprit and sense of Art. 22(1)', which led him to conclude—

> "....the observance of the right against *self-incrimination* is best promoted by conceding to the accused the right to consult a legal practitioner of his choice."

If this proposition be correct, the fact that under s. 164(1), the confession takes place in the presence of a Magistrate would make no difference. *Secondl* y, if a prosecution [40] or a trial [41] be liable to be quashed on the ground that the accused was not informed of his or her right to consult a lawyer, at the stage of investigation or of the trial, how can conviction founded on a confession recorded without informing the accused of his right to consult a lawyer, be sustained?

In view of all the foregoing considerations it would be reasonable to conclude that, before recording a confession under s. 164(2), the Magistrate should inform the accused of his right to consult a lawyer, apart from the statutory warning required by sub-sec.(1) and (4) of s. 164, and that the decision of the Calcutta High Court (para. 70) [42] is not sound.

17. Time and Place of recording.—

See under sub-sec.(1), *ante.*

18. Sub-sec. (3).—

Prior to the insertion of this sub-section by the *new* Code, it was observed in some cases that the Magistrate, while giving the accused the warning under s. 164(2) also assures the accused of protection from any sort of apprehended oppression from the Police in case he declined to make a confession. [43] This principle has now been codified in sub-sec.(3) that in case the accused who was brought by the Police to the Magistrate for recording a confession eventually declines to make a statement before it is recorded, the Magistrate should remove him from Police custody to jail custody.

This sub-section was added by the Joint Committee with these words—

"As a further safeguard to ensure that the confession is voluntary, a new sub-clause has been added prohibiting a remand to Police custody of a person who expresses his unwillingness to make the confession when produced before the Magistrate. This does not of course mean or imply that remand has to be made if the accused wants to confess."

19. Sub-sec.(4): Mode of recording confession.—

1. This sub-section has been drafted by combining parts of *old* sub-secs.(2) and (3).
2. Sub-section (4), read with sub-sec.(5), now makes it clear that—

(a) When the statement is not confessional, the Magistrate shall have power to administer oath to the person making the statement.

But when it is confessional, it will be in the from of examination of an accused under s. 281[*old* s. 346], *post* , so that oath cannot be administered.

(b) A confession, must be recorded in accordance with s. 281,*post,* while a non-confessional statement may be recorded in such manner required for recording other evidence as the Magistrate thinks fit.

(c) A confessional statement must bear the signature of the person making it while that is not required for non-confessional statement.

A Division the Bombay High Court [44] has held that the language of s. 164(4) as well as s. 281(5) of the *new* Codes shows that the requirement of obtaining the signature of the accused on the confession is mandatory and failure to do it is not curable under s. 463. Omission to obtain the signature of the accused renders the confession inadmissible, even though the recording Magistrate is examined. [45]

(d) In the memorandum, the Magistrate must categorically certify that 'I *believe* that this confession was voluntarily made'. Where he merely states that 'I hope .....', there is a violation of s. 164(4), which renders the confession *inadmissible,* unless the Magistrate is examined to say that the word 'hope' was used owing the mere *inadvertence* or accident. [46]

20. Proper procedure, to be followed.—

1. Before recording confession, the Magistrate should properly question the accused and as far as may be necessary elicit from him whether he is willing to make the confession voluntarily . He must record the question put to the accused as to whether the confession was voluntary or not. He has to be informed that after he made the confession he would not go back to the police custody. He has to enquire as to whether the police or any other person has subjected him to ill-treatment etc. However, no hard and fast rule could or should be laid down as to the procedure which would be adopted if the accused is brought before the Judicial Magistrate to record the confession. [47]

2. The Magistrate must comply not merely the form but also the essence of the provisions of *s. 164 Cr.P.C.* and also rules and guidelines framed by the High court and non-compliance thereof renders the confession to be recorded unworthy of credence.[48]

3. When it is proved that the Magistrate did not ask any question to the accused as to whether he was making the confession voluntarily or not the same is not admissible in evidence as a valid confession. [49]

4. However, at any time before the Supreme Court, no allegation was made that the proper procedure was not adopted by the Magistrate for recording the confession. Such plea at the special leave petition before the Supreme Court for the first time is not tenable. [50]

5. When the Judicial Magistrate as PW-2 did not state in his evidence that before recording the confession, he had stated to the accused appellant that he was not bound to make the confession and if he did the same, it would go against him, the Magistrate did not adopt proper precaution to ascertain as to whether the confession was voluntarily made or not, such confession has to be kept out of consideration to prove the charge against the accused. [51]

6. The Magistrate recorded a confession and appended a certificate that the statement was made voluntarily but he failed to record in that certificate that he put any question to the accused as to whether there was any coercion on her to make such confession. The confession cannot be held to be not valid when in the evidence the Magistrate has stated that he had asked that question to her and there was nobody else in that room when he recorded the statement. So, the Supreme Court has held that the confession was validly recorded by the Magistrate. [52]

7. But the question intended to be asked by the Magistrate should not be casual or mechanical, and the Magistrate has to be fully satisfied on putting appropriate question that the confession was voluntarily made. [53]

8. The accused was brought before the Magistrate handcuffed. So, the Magistrate must ask specific question to ensure that no physical or mental torture was put to him by the Investigating Officer to make the confession. The Magistrate must also specifically ask the question to the accused as to why he wanted to make the confession which could be used against him at the trial. The confession should also be recorded in question and answer form. But when from the evidence of the Magistrate it is clear no such precaution was taken by the Magistrate before recording the confession, the alleged confessional statement is not reliable. [54]

9. Adequate time for reflection has to be given by the Magistrate so that accused gets time to think as to whether he would make the confession or not. But when two hours time was given to the accused for making statement. It cannot be argued that sufficient time was not given to the accused for reflection. [55]

10. In case of rape and murder the accused made confession in a series of offences. Two confessions were recorded one after the other in quick succession. No legal aid was provided to the accused. The confessional statement is inconsistent with the prosecution case. So, the connection cannot be

sustained on the basis of such confession. Moreover, oath was administered to the accused before recording the confession. So, no conviction can be sustained on the basis of such confession. [56]

21. Requirements of s. 281. —

Though a treatment of s. 281 must be postponed, the salient requirements of that section as recast by the *new* Code should be noted in the present context, because s. 164(4) expressly requires that a confession *shall* be recorded in accordance with those requirements, which are, broadly,—

(i) When the recording Magistrate is a Metropolitan Magistrate, he is empowered to make a memorandum as to such examination of the person making the confession, in the language of the Court and signed by himself.

(ii) When the confession is recorded by a Judicial Magistrate—

(a) He must record it in the form of questions and answers, in full. But though the recording is to be made in the *form* of questions and answers, anything which affects its voluntary character, will vitiate its use as a confession, *e.g.* where the Magistrate puts *leading* questions [57] (which are permissible in the case of examination of ordinary witnesses), or it appears that the accused was virtually cross-examined. In such a case, a conviction founded on such confession shall be liable to be quashed. [58]

(b) If such Judicial Magistrate is unable to record the confession himself owing to personal incapacity, he may get it recorded, under his direction and superintendence, by an officer of the Court, appointed by the Magistrate in this behalf.

(c) Under the *new* Code a Magistrate other than a Metropolitan Magistrate is not empowered to make a memorandum of the confession. If he fails to make a full account of the confession in the from of question and answers or if the recording had been made by some other person in the absence or due to the physical incapacity of the Magistrate or on behalf of such officer of Court as appointed by him in this behalf [S. 281(2)], such statement cannot be admitted as a confession to convict the accused. [59]

22. Effect of contravention of s. 164 in recording confession.—

1. Though there was difference amongst the High Courts under the *old* Code, the Supreme Court [60] has laid down in several decisions, that a confession of the accused, which is not recorded in compliance with the requirements of s. 164, would be *inadmissible,* and that where this is not done, it cannot be proved by any statement made by the Magistrate, oral or documentary, *e.g.*—

(a) When it has been recorded by a Magistrate not empowered under sub-sec. (1), after the investigation has commenced. [61]

(b) Where the procedure laid down in sub-sec. (2) and (4) has not been complied with. [62]

2. Where a statement is inadmissible for contravention of s. 164(3), it cannot be admitted under *s. 9 of the Evidence Act* .[63]

3. The foregoing should be read subject to the provisions of s. 463,*post* [*old* s. 533], which provides that if any confession or other statement of the *accused* is challenged in Court as not recorded in accordance with s. 164 or s. 281, the Court should—

   (a) admit *oral* evidence that the formalities of those provisions were compiled with, [64] though the record, on its face, does not show that;

   (b) if the Court finds that the provisions of those section have not been complied with may nevertheless admit that statement a confession into evidence if it finds that the statement or confession was duly made by the accused and that such non-compliance has not injured the accused in his defence *on the merits, e.g.*—

      (i) It does not bear the signature of the accused, as required by s. 164(4). [65]

      (ii) The omission of the Magistrate to tell the accused, that he was a Magistrate—where the other circumstances on the record satisfied the condition of voluntaries. [66]

      (iii) Even where the Magistrate's endorsement under the confession is not in proper form according to sub-sec. (4), it cannot *ipso facto* be inferred that the confession was not voluntary. [67]

4. By allowing oral evidence to prove that the requirements of s. 164 or s. 281 were complied with though the recorded statement does not *ex facie* show that, s. 463 of the Code offers an exception to *s. 91 of the Evidence Act* .[68] Thus, the Magistrate who recorded the confession may be allowed to depose in Court that he had told the accused before he made the confession, that he was before a Magistrate—though the record does not mention that. [69]

5. Section 463, however, admits oral evidence to prove the *procedure* that was followed in recording the confession and not the contents of the confession itself. [70]

6. But where the accused has been prejudiced or a valuable safeguard to protect his interest has been violated, the proceedings resulting in conviction would be quashed, *e.g.*—

   (i) Where the Magistrate recorded a confession without being satisfied that it was *voluntary* [71], [72]

   (ii) Where any of the provisions of s s. 24-28 of the *Evidence Act* has been violated, it will be *inadmissible.* [73] If, however, the confession is admissible, not being violative of s s. 24-28. but is tainted with some other defect or irregularity, it would attract s. 463,*post,* involving the question of injury to the accused.

In this latter category would come cases of violation of the *mandatory* requirements of s. 164 of the Code or the instructions of the High Court relating to the recording of confessions. [74] The reason is that these provisions

are intended to ensure the voluntariness of the confession but they are not concerned with the relevancy or admissibility of the confessional statement. If it is admissible, the Court should ascertain *from all the circumstances* whether the statement was in fact voluntary and whether was true. If it is satisfied on that point from other materials on the record, the Court may act upon such confession even though the accused was not given the warning required by s. 164(2). [75] [This is expressly provided by *s. 29 of the Evidence Act* , [76] which has not so far been amended.]

Similar would be the case of a failure of the Magistrate to record *all* the questions he put to the accused to ascertain that he was making his confession voluntarily s. 164(2). [77]

23. Confessional statements made before Magistrate at identification parade. —

1. Identification parades are held during investigation for the purpose of enabling witnesses to identify the *properties* which are the subject-matter of the offence or the *persons* who are concerned therein. [78] Its object is—(a) to satisfy the investigating authorities that a certain person not previously known to the witnesses was involved in the commission of the crime or a particular property was the subject-matter of the crime; (b) to furnish evidence to corroborate the testimony which the witnesses concerned tender before the Court. [79]

2. The act of 'identification' having been held to be a statement, the evidence of a Police officer as to identification by witnesses would be hit by s. 162. [80]

3. For the same reason when the identification is conducted by a Magistrate, he cannot give any evidence as to what the witnesses had stated otherwise then by way of identification. Nor can he give evidence as to any confessional statement before him at such identification, unless he is competent to record it under s. 164(1) and it is duly recorded in accordance with the provisions of that section. [81] The only function of the Magistrate at an identification parade is to ensure that the witnesses were able to identify the person or property involved. [82]

4. The net result is that the Magistrate's evidence would be admissible to show how the identification parade was conducted and the fact that the witnesses had identified a particular person or property [*s. 9, Evidence Act*]. [83] But if he records any other statement beyond mere identification, such statement should be excluded, unless admissible under any specific provision. [84]

24. Evidentiary value of confession. —

1. A confession is substantive evidence against its maker, so that it has been duly recorded and suffers from no legal infirmity, it would suffice to convict the accused who made the confession, [85] though as a matter of *prudence,* the Court expects some corroboration before act ing upon it. Even then slight corroboration would suffice. [86]

2. But before acting upon a confession, the Court must be satisfied that it is *voluntary* and *true.* (a) Voluntaries depends upon whether there was any threat, inducement or promise. (b) Its truth is to be judged in the context of the entire prosecution case,—whether it fits into the proved facts and does not run counter to them. [87] If these two conditions are satisfied, it becomes the most portent piece of evidence *against the maker.* [88]

3. The confession would not ordinarily be considered the basis for conviction. However, it is admissible and conviction may also be based upon it if it is found truthful and voluntary and in a given case some

corroboration is necessary. Confession which is not retracted even at the later stage of the trial and even accepted by the accused in the statement under *s. 313 Cr.P.C.* can be fully relied upon. So, the conviction based thereon together with other circumstantial evidence is sustainable.[89]

4. The accused in his statement under *s. 313 Cr.P.C.* or during cross-examination never suggested that his statement under *s. 164 Cr.P.C.* is false. Allegation of presence of police officers at the time of recording the confession was without any material. Requirements of s. 164(2) *Cr.P.C.* have been complied with. Such a confessional statement was fit to be accepted.[90]

25. Confession of co-accused.—

The confession of the accused is *not* substantive evidence against a co-accused; but it can be used to support conclusion of guilt based on *other* evidence. [91] It does not constitute evidence against a co-accused under *s. 3 of the Evidence Act* but may be taken into consideration, under s. 30, provided the Court does not start with such confession, but begins with the other evidence against the co-accused and then turn to the confession of the other accused in order to receive an assurance to the conclusion of guilt which the judicial mind would feel inclined to reach on the other evidence. [92] For instance, in a case of conspiracy in which only circumstantial evidence is forthcoming, the confessional statement of a co-accused can be considered as relevant material lending assurance to the conclusions of the Court founded on other circumstances. [93]

2. On the other hand, the confession of a co-accused cannot be used to corroborate the evidence of an approver which is a weak type of evidence, particularly when the approver has retracted from a confession made by himself. [94]

26. Evidentiary value of retracted confession .—

1. It is a settled rule of evidence that unless a retracted confession is *corroborated* in material particulars, it is not *prudent* to pass a conviction on its strength alone. [1] Corroboration should not be dispensed with merely because the confession contains a wealth of detail. [2]
2. When a confession is retracted, the Court must look for the reasons for the making of the confession as well as for its retraction, and must weight the two to determine whether or not the retraction affects the voluntary nature of the confession. [3]

(a) If the Court is satisfied that it was retracted because it was an *after-thought or advice,* the retraction may not weight with the Court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant it user. [4] (b) All the same, the Court would not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. [5] In short, while a true confession voluntarily made may be act ed upon with slight evidence to corroborate it, a retracted confession requires the general assurance that the retracted confession was an after-thought and that the earlier statement was true. [6]

The fact that the confession was retracted not at the earliest opportunity but only when the accused was examined under s. 313 (*post*) would be a circumstance to show that the confession had been made voluntarily. [7]

3. What is sufficient corroboration of a retracted confession is to be decided in each case on its own facts and circumstances. It may, however, be generally stated that where the prosecution, by the production of reliable evidence which is *independent* of the confession and which is also not tainted evidence like that of an accomplice or of a co-accused establishes the truth of certain parts of the account given in the confession and these parts are so integrally connected with other parts of the accused's confession, that a prudent judge of facts would think it reasonable to believe that what the accused has stated in the confession as regards his own participation in the crime is also true,—that is sufficient corroboration. [8] More than this is not needed; less than this is ordinarily insufficient. [9]

   What is required is *substantial* corroboration, *i.e.,* a general corroboration of important incidents, [10] and not an independent corroboration of each and every circumstance mentioned in the confessional statement. [11]

4. If substantial corroboration is available, a valid conviction can be founded on a retracted confession. [12]

5. But corroboration is a rule of prudence, not of law, so that there may be circumstances under which a conviction can be based solely on a retracted confession, [13] provided the Court is satisfied that the confession was voluntary and true. [14] The fact that the confession was retracted at a late stage—during examination under s. 313 reinforces the conclusion that it was voluntary. [15] The fact that the statement was lengthy and covered minute details goes to ensure its truth. [16]

6. Its value weakens when it is sought to be used against a co-accused. [17]

7. But a confession cannot be taken as involuntary merely because it has been retracted and, therefore, in the absence of evidence as to coercion, the use of retracted confession would not be hit by *Art. 20(3) of the Constitution* . [18]

8. Retracted confession is a weak piece of evidence. So, conviction cannot be solely based on such confession, unless it is voluntary, truthful and is corroborated by independent and cogent evidence. [19]

27. Sub-sec. (5).—

This sub-section has two parts—(a) recording of a confession of an accused; (b) recording of the non-confessional statement of any person.

(a) According to sub-sec. (4), a confessional statement is to be recorded in the manner provided in s. 281 and not in the manner of recording evidence. Neither s. 164(4) nor s. 281 provides for administering oath. In fact, apart from s. 315, there is no provision for administering oath to the accused. At any rate

if oath is administered to an accused making a confession, it would violate s. 281. Hence, such confession would be inadmissible and a conviction founded on such confession shall be illegal. [20]

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36 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 13 (w.e.f. 31-12-2009) for the following: "*Provided* that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force."

37 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), s. 16 (w.e.f. 3-2-2013).

38 *Nazir Ahmed v. K.E.*, AIR 1936 PC 253 .

39 *Nagesia v. State of Bihar*, AIR 1966 SC 119 [*LNIND 1965 SC 155*](paras 11-12) : (1966) 1 SCR 134 [*LNIND 1965 SC 155*] : 1966 Crlj 100 .

40 *Nagesia v. State of Bihar*, AIR 1966 SC 119 [*LNIND 1965 SC 155*](paras 11-12) : (1966) 1 SCR 134 [*LNIND 1965 SC 155*] : 1966 Crlj 100 ; *Pakala v. Emp.*, AIR 1939 PC 47 52 .

41 *Nagesia v. State of Bihar*, AIR 1966 SC 119 [*LNIND 1965 SC 155*](paras 11-12) : (1966) 1 SCR 134 [*LNIND 1965 SC 155*] : 1966 Crlj 100 .

42 *Nagesia v. State of Bihar*, AIR 1966 SC 119 [*LNIND 1965 SC 155*](paras 11-12) : (1966) 1 SCR 134 [*LNIND 1965 SC 155*] : 1966 Crlj 100 .

43 *Nagesia v. State of Bihar*, AIR 1966 SC 119 [*LNIND 1965 SC 155*](paras 11-12) : (1966) 1 SCR 134 [*LNIND 1965 SC 155*] : 1966 Crlj 100 .

44 *Nagesia v. State of Bihar,* AIR 1966 SC 119 [*LNIND 1965 SC 155*] (1966) 1 SCR 134 [*LNIND 1965 SC 155*] 1966 Crlj 100 [(paras 11-12) :] : .

45 *Hemraj v. State of Ajmer,* AIR 1954 SC 462 465 : 1954 SCR 1133 : 1954 Crlj 1313 .

46 Cf. *Narain v. State of Punjab,* (1963) II SCJ 324 (326).

47 *Piara Singh v. State of Punjab,* (1977) UJSC 753 (para 9).

48 *Piara Singh v. State of Punjab,* (1977) UJSC 753 (para 9).

49 *State of Punjab v. Bhajan Singh,* AIR 1975 SC 258 (1975) 4 SCC 472 1975 Crlj 282 (para 15) : : .

50 *Maghar v. State of Punjab,* AIR 1975 SC 1320 ; *Wakil v. State of Bihar,* (1972) Crlj 566 (SC) .

51 *Nagesia v. State of Bihar,* AIR 1966 SC 119 [*LNIND 1965 SC 155*] (1966) 1 SCR 134 [*LNIND 1965 SC 155*] 1966 Crlj 100 [(paras 11-12) :] : .

52 *Nagesia v. State of Bihar,* AIR 1966 SC 119 [*LNIND 1965 SC 155*] (1966) 1 SCR 134 [*LNIND 1965 SC 155*] 1966 Crlj 100 [(paras 11-12) :] : .

53 *Nagesia v. State of Bihar,* AIR 1966 SC 119 [*LNIND 1965 SC 155*] (1966) 1 SCR 134 [*LNIND 1965 SC 155*] 1966 Crlj 100 [(paras 11-12) :] : .

54 Cf. *Hemraj v. State of Ajmer,* (1954) SCR 1133 (1143) AIR 1954 SC 462 [*LNIND 1954 SC 45*] 1954 Crlj 1313 : [ ]: .

55 *Mohammad* *v.* *Emp.,*
AIR 1934 All 81 (FB) .

56 Cf. *Shiv Bahadur* *v.* *State of V.P.,*
(1954) SCR 1098 [
LNIND 1954 SC 30] :
AIR 1954 SC 322 [
LNIND 1954 SC 30]:
1954 Crlj 910 .

57 *State of U.P.* *v.* *Singhara,*
AIR 1964 SC 358 [
LNIND 1963 SC 192]:
(1964) 4 SCR 485 [
LNIND 1963 SC 192] :
(1964) 1 Crimes 263 (2).

58 *Nazir Ahmed* *v.* *K.E.,*
AIR 1936 PC 253 .

59 *Kashmira* *v.* *State of M.P.,*
(1952) SCR 526 [
LNIND 1952 SC 15] (538) :
AIR 1952 SC 159 [
LNIND 1952 SC 15]:
1952 Crlj 839 .

60 *Assistant Collector of Central Excise v. Duncan Agro Industries Ltd.,*
AIR 2000 SC 2901 [
LNIND 2000 SC 1064]:
(2000) 7 SCC 53 [
LNIND 2000 SC 1064] :
2000 SCC (Cri) 1275 [
LNIND 2000 SC 1997] :
2000 Crlj 4035 .

61 *State of Maharasthra* *v.* *Damu,*
AIR 2000 SC 1691 [
LNIND 2000 SC 780]:
(2000) 6 SCC 269 [
LNIND 2000 SC 780] :
2000 SCC (Cri) 1088 [
LNIND 2000 SC 780] :
2000 Crlj 2301 .

62 *Kunjakutty* *v.* *State of Kerala,*
(1988) Crlj 504 (paras 2, 4) Ker.

63 *Kunjakutty* *v.* *State of Kerala,*
(1988) Crlj 504 (paras 2, 4) Ker.

64 *Nazir Ahmed* *v.* *K.E.,*
AIR 1936 PC 253 .

65 *Kunjakutty v. State of Kerala,* (1988) Crlj 504 (para 2, 4) Ker.

66 *Abed v. State,* (1988) Crlj 354 (para 54) Cal (DBO).

67 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

68 *Ram v. State of U.P.,* AIR 1957 SC 381 : 1957 Crlj 559.

69 *State of U.P. v. Singhara,* AIR 1964 SC 358 [*LNIND 1963 SC 192*] : (1964) 4 SCR 485 : (1964) 1 Crimes 263 (2).

70 *Shiv Bahadur v. State of V.P.,* (1954) SCR 1098 [*LNIND 1954 SC 30*] : AIR 1954 SC 322 [*LNIND 1954 SC 30*]: 1954 Crlj 910 ; Cf. *Deep Chand,* AIR 1961 SC 1527 [*LNIND 1961 SC 146*]: (1962) 1 SCR 662 [*LNIND 1961 SC 146*] : (1961) 2 Crimes 705 .

71 *Babu Singh v. State of Punjab,* (1963) 3 SCR 749 [*LNIND 1962 SC 279*] : (1964) 1 Crlj 566 .

72 *Ram Kishan Singh v. Harmit Kaut,* AIR 1972 SC 468 (para 8) : (1972) 3 SCC 280 : 1972 Crlj 267 .

73 *Ram Kishan Singh v. Harmit Kaut,* AIR 1972 SC 468 (para 8) : (1972) 3 SCC 280 : 1972 Crlj 267 ; *Bhubani v. King,* AIR 1949 PC 257 [*LNIND 1949 PC 11*].

74 *Brij Bhushan v. Emp.,* AIR 1946 PC 38 .

75 *State of Delhi v. Ram Lohia,* AIR 1960 SC 490 .

76 *Mamand v. Emp.,* AIR 1946 PC 45 .

77 *Kanwar Pal Singh v. State of Haryana,* (1994) Crlj 1392 : AIR 1994 SC 1045 .

78 *Bhubani v. King,* AIR 1949 PC 257 [*LNIND 1949 PC 11*].

79 *Ghulam Hossain,* 54 CWN 464 (467) PC.

80 *Aghnoo v. State of Bihar,* AIR 1966 SC 119 [*LNIND 1965 SC 155*]; *Faddi v. State of U.P.,* AIR 1964 SC 1850 [*LNIND 1964 SC 13*]: (1964) 6 SCR 312 [*LNIND 1964 SC 13*] : (1964) 2 Crimes 744 .

81 *Ghulam Hossain,* 54 CWN 464 (467) PC.

82 *State of Orissa v. Chanashyam,* (1987) Crlj 1008) (Or) FB.

83 *Balak Ram v. State of U.P.,* AIR 1974 SC 2165 [*LNIND 1974 SC 236*]: (1975) 3 SCC 219 [*LNIND 1974 SC 236*] : 1974 Crlj 1486 .

84 *Ram Charan v. State of U.P.,* AIR 1968 SC 1270 [*LNIND 1968 SC 58*]: 1968 Crlj 1473 .

85 *Ashim v. State of Assam,* (1988) Crlj 1533 (para 16) Gau (DB).

86 *State of Bihar v. Kapil,* AIR 1969 SC 53 [*LNIND 1968 SC 415*](para 7) : 1969 Crlj 279 .

87 *Ram v. State of U.P.,* AIR 1968 SC 1270 [*LNIND 1968 SC 58*](paras 10-11); *Balak v. State of U.P.,*

AIR 1970 SC 2165 (para 48) : 1968 Crlj 1473 .

88 *Ram v. State of U.P.,* AIR 1968 SC 1270 [LNIND 1968 SC 58](paras 10-11).

89 *Baburao v. State of Maharashtra,* (1971) 3 SCC 432 (para 6) : 1971 SCC (Cr) 680.

90 *Kanwar Pal Singh v. State of Haryana,* AIR 1994 SC 1045 : 1994 SCC (Cri) 150 : 1994 Crlj 1392 .

91 *George v. State of Kerala,* AIR 1998 SC 1376 [LNIND 1998 SC 325]: (1998) 4 SCC 605 [LNIND 1998 SC 325] : 1998 Crlj 2034 : (1998) 2 Crimes 27 [LNIND 1998 SC 325].

92 *State of M.P. v. Man Singh,* (2003) 10 SCC 414 [LNIND 2003 SC 661] : (2007) 2 SCC 390 (Cr) : (2003) 3 Crimes 381 .

93 *Ramanand Pandey v. State,* 2008 Crlj NOC 68Bom .

94 *Navin Kumar Dr. v. State of M.P.,* 2007 Crlj 2110 MP .

95 *Sahjad Ansari v. State of Jharkhand,* 2007 Crlj 3086 Jhar .

96 *Jogendra Nahak v. State of Orissa,* AIR 1999 SC 2565 [LNIND 1999 SC 645]: 2000 (1) SCC 272 : 2000 SCC (Cri) 210 : 1999 Crlj 3976 .

1 *Sawal v. State of Bihar,* AIR 1974 SC 778 [LNIND 1974 SC 2](para 12) : (1974) 4 SCC 193 [LNIND 1974 SC 2] : 1974 Crlj 664 ; *State of Bihar v. Kapil,* AIR 1969 SC 53 [LNIND 1968 SC 415](para 8).

2 *Public Prosecuter v. Nagalinga,* [AIR 1959 AP 250 *LNIND 1958 AP 37*]; *Suppa v. Emp.,* (1906) 29 Mad 89.

3 *Sarwan Singh v. State of Punjab,* [AIR 1957 SC 637 *LNIND 1957 SC 39*]: [1957 SCR 953 *LNIND 1957 SC 39*] : 1957 Crlj 1014 .

4 *Sarwan Singh v. State of Punjab,* [AIR 1957 SC 637 *LNIND 1957 SC 39*]: [1957 SCR 953 *LNIND 1957 SC 39*] : 1957 Crlj 1014 ; *Dagdu v. State of Maharashtra,* AIR 1977 SC 1579 (paras 48-51).

5 *Madegowda,* in re., AIR 1957 Mys 50 .

6 *Madegowda,* in re., AIR 1957 Mys 50 .

7 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

8 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

9 *Sarwan Singh v. State of Punjab,* [AIR 1957 SC 637 *LNIND 1957 SC 39*]: [1957 SCR 953 *LNIND 1957 SC 39*] : 1957 Crlj 1014 .

10 *Sarwan Singh v. State of Punjab,* [AIR 1957 SC 637 *LNIND 1957 SC 39*]: [1957 SCR 953 *LNIND 1957 SC 39*] : 1957 Crlj 1014 .

11 *Chinna v. State of Mysore,* [(1963) 2 SCR 517 *LNIND 1962 SC 194*] (532).

12 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

13 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

14 *Davendra v. State of U.P.,* AIR 1978 SC 1544 : (1978) 4 SCC 474 : 1978 Crlj 1614 .

15 *Hem Raj v. State of Ajmer,* AIR 1954 SC 462 464 : 1954 SCR 1133 : 1954 Crlj 1313 .

16 *Sarwan Singh v. State of Punjab,* AIR 1957 SC 637 [*LNIND 1957 SC 39*]: 1957 SCR 953 [*LNIND 1957 SC 39*] : 1957 Crlj 1014 .

17 *Dagdu v. State of Maharashtra,* AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 Crlj 1206 (paras 48-51).

18 *Sarwan Singh v. State of Punjab,* AIR 1957 SC 637 [*LNIND 1957 SC 39*]: 1157 SCR 953 : 1957 Crlj 1014 .

19 *M.A. Antony v. State of Kerala,* (2009) 6 SCC 220 [*LNIND 2009 SC 961*] : (2009) 2 SCC 959 (Cri) : AIR 2009 SC 2549 [*LNIND 2009 SC 961*].

20 *Dagdu v. State of Maharashtra,* AIR 1977 SC 1590 : (1977) 3 SCC 68 : 1977 Crlj 1206 (para 48-51); *Aher Raja v. State of Saurashtra,* AIR 1956 SC 217 [*LNIND 1955 SC 117*]: (1955) 2 SCR 1285 [*LNIND 1955 SC 117*] : 1956 Crlj 426 .

21 *Aher Raja v. State of Saurashtra,* AIR 1956 SC 217 [*LNIND 1955 SC 117*]: (1955) 2 SCR 1285 [*LNIND 1955 SC 117*] : 1956 Crlj 426 .

22 *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637
LNIND 1957 SC 39
1157 SCR 953
1957 Crlj 1014
[ ]: : .

23 *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637
LNIND 1957 SC 39
1157 SCR 953
1957 Crlj 1014
[ ]: : .

24 *Babu v. State of Punjab,*
(1964) 1 Crlj 566
(SC) .

25 *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637
LNIND 1957 SC 39
1157 SCR 953
1957 Crlj 1014
[ ]: : .

26 *Ram v. State of Punjab,*
AIR 1959 SC 1
LNIND 1958 SC 96
1959 SCR 1219
LNIND 1958 SC 96
1959 Crlj 90
[ ]: [ ] : .

27 *Abdul v. State of Maharashtra,*
AIR 1970 SC 283
LNIND 1969 SC 205
(1969) 2 SCC 234
LNIND 1969 SC 205
1970 Crlj 373
[ ](para 9) : [ ] : .

28 *Shankaria v. State of Rajasthan,*
AIR 1978 SC 1399
LNIND 1978 SC 138
(1978) 4 SCC 453
LNIND 1978 SC 138
1978 Crlj 1414
[ ]: [ ] : .

29 *State of M.P. v. Shobharam,*
AIR 1966 SC 1910 1917
1966 Crlj 1521
: 1966 Supp SCR 239 : .

30 *Nandini v. Dani,*
AIR 1978 SC 1025
1978 Crlj 968
: (1978) 2 SCC 424 : .

31 *Nandini v. Dani,*
AIR 1978 SC 1025
1978 Crlj 968
: (1978) 2 SCC 424 : .

32 *State of Assam v. Rabindra,* (1982) Crlj 216 (Gau) .

33 *Abed v. State,* (1988) Crlj 354 (para 70) Cal.

34 *Abed v. State,* (1988) Crlj 354 (para 70) Cal.

35 *State of Assam v. Rabindra,* (1982) Crlj 216 (Gau) .

36 *Khatri v. State of Bihar,* AIR 1981 SC 928 [*LNIND 1980 SC 473*]: (1981) 1 SCC 635 [*LNIND 1982 SC 16*] : 1981 SCC (Cri) 235 .

37 *Khatri v. State of Bihar,* AIR 1981 SC 928 [*LNIND 1980 SC 473*]: (1981) 1 SCC 635 [*LNIND 1982 SC 16*] : 1981 SCC (Cri) 235 .

38 *Maneka v. Union of India,* AIR1978 (SC) 597 : (1978) 1 SCC 248 [*LNIND 1978 SC 25*].

39 *Nandini v. Dani,* AIR 1978 SC 1025 : (1978) 2 SCC 424 : 1978 Crlj 968 .

40 *Nandini v. Dani,* AIR 1978 SC 1025 : (1978) 2 SCC 424 : 1978 Crlj 968 .

41 *Khatri v. State of Bihar,* AIR 1981 SC 928 [*LNIND 1980 SC 473*]: (1981) 1 SCC 635 [*LNIND 1982 SC 16*] : 1981 SCC (Cr) 235.

42 *Abed v. State,* (1988) Crlj 354 (para 70) Cal.

43 *Shanti v. State,* (1977) CrLJ 2053 (2059) Or (FB).

44 *Abdul v. State of Maharashtra,* (1988) Crlj 382 (para 7) Bom (DB).

45 *Abdul v. State of Maharashtra,* (1988) Crlj 382 (para 7) Bom (DB).

46 *Chandran v. State of Madras,* (1978) UJSC 671.

47 *Kartar Singh v. State of Punjab,* (1994) 3 SCC 569 : 1994 SCC (Cri) 899 : 1994 Crlj 3139 : (1994) 1 Crimes 1031 .

48 *Shivappa v. State of Karnataka,* AIR 1995 SC 980 [*LNIND 1994 SC 1111*]: 1995 SCC (Cri) 323 : (1995) 1 Crimes 138 [*LNIND 2008 SC 789*](SC) .

49 *Preetam v. State of M.P.,* (1996) 10 SCC 432 [*LNINDORD 1996 SC 224*] : 1996 SCC (Cri) 1343 [*LNINDORD 1996 SC 224*] : 1996 Crlj 4458 ; *Tulsi Singh v. State of Punjab,* (1996) 6 SCC 63 [*LNINDORD 1996 SC 165*] : 1996 SCC (Cri) 1118 [*LNIND 1996 SC 1203*] : AIR 1996 SC 3477 [*LNINDORD 1996 SC 165*].

50 *Lokeman Shah v. State of West Bengal,* AIR 2001 SC 1760 : (2001) 5 SCC 235 : 2001 SCC (Cri) 829 : 2001 Crlj 2196 .

51 *Mahabir Singh v. State of Harayana,* AIR 2001 SC 2503 [*LNIND 2001 SC 1485*]: (2001) 7 SCC 148 : 2001 Crlj 3945 .

52 *Ram Singh v. Sonia,* AIR 2007 SC 1218 [*LNIND 2007 SC 174*]: 2007 Crlj 1642 : (2007) 3 SCC 1 [*LNIND 2007 SC 174*] : (2007) 2 SCC 1 [*LNIND 2007 SC 35*](Cri) .

53 *Ayyub v. State of U.P.,* AIR 2002 SC 1192 [

LNIND 2002 SC 156]:
(2002) 3 SCC 510 [
LNIND 2002 SC 156] :
(2002) 2 Crimes 84 .

54 *Bhagwan Singh v. State of M.P.,*
AIR 2003 SC 1088 [
LNIND 2003 SC 82]:
(2003) 3 SCC 21 [
LNIND 2003 SC 82] :
2003 SCC (Cri) 712 [
LNIND 2003 SC 82] :
2003 Crlj 1262 .

55 *Sidharth v. State of Bihar,*
AIR 2005 SC 4352 [
LNIND 2005 SC 752]:
(2005) 12 SCC 545 [
LNIND 2005 SC 752] :
2005 Crlj 4499 ; *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637 [
LNIND 1957 SC 39]distinguished.

56 *Babubhai Udesinh Parmar v. State of Gujarat,*
AIR 2007 SC 420 : 2007 Crlj 786 :
(2006) 12 SCC 368 :
(2007) 1 SCC 702 (Cri) .

57 *Tilak v. State of M.P.,*
(1978) Crlj 112 (para 14-15) MP.

58 *State of M.P. v. Dayaram,*
AIR 1981 SC 2007 : 1981 Supp SCC 14 :
1981 Crlj 1688 .

59 Cf. *Babu Singh* v. *State of Punjab,*
(1963) 3 SCR 750 (756-57).

60 *Hem Raj v. State of Ajmer,*
AIR 1954 SC 462 464 : 1954 SCR 1133 :
1954 Crlj 1313 .

61 Cf. *Nika Ram v. State of H.P.,*
AIR 1972 SC 2077 [
LNIND 1972 SC 266]:
(1972) 2 SCC 80 [
LNIND 1972 SC 266] :
1972 Crlj 1317 .

62 Cf. *State of U.P. v. Singhara Singh,*
AIR 1964 SC 358 [
LNIND 1963 SC 192]:
(1964) 1 Crimes 263 (2); *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637 [
LNIND 1957 SC 39]:

1957 SCR 953 [
LNIND 1957 SC 39] :
1957 Crlj 1014 ; *Deep Chand v. State of Rajahthan,*
AIR 1961 SC 1527 [
LNIND 1961 SC 146]:
(1962) 1 SCR 662 [
LNIND 1961 SC 146] :
(1961) 2 Crimes 705 .

63 *Deep Chand v. State of Rajasthan,*
AIR 1961 SC 1527 [
LNIND 1961 SC 146]:
(1962) 1 SCR 662 [
LNIND 1961 SC 146] :
(1961) 2 Crimes 705 .

64 Cf. *State of U.P. v. Singhara Singh,*
AIR 1964 SC 358 [
LNIND 1963 SC 192]:
(1964) 1 Crimes 263 (2); *Sarwan Singh v. State of Punjab,*
AIR 1957 SC 637 [
LNIND 1957 SC 39]:
1957 SCR 953 [
LNIND 1957 SC 39] :
1957 Crlj 1014 .

65 Cf. *Kaushal v. State,*
(1977) Crlj 203 (NOC) (All) .

66 *State of Orissa v. Chhaganlal,*
(1977) Crlj 319 (para 16) Or (DB).

67 *Ram v. State of U.P.,*
AIR 1968 SC 1270 [
LNIND 1968 SC 58]:
1968 Crlj 1473 .

68 *Bala v. State of Orissa,*
AIR 1951 Or 168 172 .

69 *Paramahansa v. State,*
AIR 1964 Or 144 149 .

70 *State of U.P. v. Singhara,*
AIR 1964 SC 358 [
LNIND 1963 SC 192]:
(1964) 1 Crimes 263 (2).

71 Cf. *Babu Singh v. State of Punjab,*
(1963) 3 SCR 750 (756-57).

72 *State of Maharashtra v. Rukhmini,*
AIR 1977 SC 1579 (para 50).

73 *State of Maharashtra v. Rukhmini,* AIR 1977 SC 1579 (para 50).

74 *Dagdu v. State of Maharashtra,* AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 Crlj 1206 .

75 *Dagdu v. State of Maharashtra,* AIR 1977 SC 1579 : (1977) 3 SCC 68 : 1977 Crlj 1206 .

76 Cf. *Shanti v. State,* (1977) Crlj 2053 (*2066*) Or (FB); *Vellamoonji v. Emp.,* AIR 1932 Mad 431 .

77 *Bala v. State of Orissa,* AIR 1951 Or 168 (*175*); *State of Kerala v. Ammini,* (1988) Crlj 107 (para 55) Ker (FB).

78 *Harnath v. State of M.P.,* AIR 1970 SC 1619 [*LNIND 1968 SC 295*](para 9) : (1969) 2 SCR 289 [*LNIND 1968 SC 295*] : 1972 Crlj 1422 .

79 *Harnath v. State of M.P.,* AIR 1970 SC 1619 [*LNIND 1968 SC 295*](para 9) : (1969) 2 SCR 289 [*LNIND 1968 SC 295*] : 1972 Crlj 1422 .

80 *Harnath v. State of M.P.,* AIR 1970 SC 1619 [*LNIND 1968 SC 295*](para 9) : (1969) 2 SCR 289 [*LNIND 1968 SC 295*] : 1972 Crlj 1422 .

81 *Harnath v. State of M.P.,* AIR 1970 SC 1619 [*LNIND 1968 SC 295*](para 9) : (1969) 2 SCR 289 [*LNIND 1968 SC 295*] : 1972 Crlj 1422 .

82 *Harnath v. State of M.P.,* AIR 1970 SC 1619 [*LNIND 1968 SC 295*](para 9) : (1969) 2 SCR 289 [*LNIND 1968 SC 295*] : 1972 Crlj 1422 .

83 *Deep Chand v. State of Rajasthan,* [AIR 1961 SC 1527 LNIND 1961 SC 146]: [(1962) 1 SCR 662 LNIND 1961 SC 146] : (1961) 2 Crimes 705 .

84 *Harnath v. State of M.P.,* [AIR 1970 SC 1619 LNIND 1968 SC 295](para 9) : [(1969) 2 SCR 289 LNIND 1968 SC 295] : 1972 Crlj 1422 ; *Deep Chand v. State of Rajasthan,* [AIR 1961 SC 1527 LNIND 1961 SC 146]: [(1962) 1 SCR 662 LNIND 1961 SC 146] : (1961) 2 Crimes 705 .

85 *Kandaswamy v. State of T.N.,* [(1972) 1 SCR 450 LNIND 1971 SC 418] : [AIR 1972 SC 66 LNIND 1971 SC 418]: [(1971) 2 SCC 641 LNIND 1971 SC 418].

86 *Bharat v. State of U.P.,* [(1971) 3 SCC 950 LNIND 1998 SC 1112] (para 6).

87 *Bharat v. State of U.P.,* [(1971) 3 SCC 950 LNIND 1998 SC 1112] (para 6).

88 *Bharat v. State of U.P.,* [(1971) 3 SCC 950 LNIND 1998 SC 1112] (para 6).

89 *Bishnu Prasad Sinha v. State of Assam,* [AIR 2007 SC 848 LNIND 2007 SC 52]: [(2007) 11 SCC 467 LNIND 2007 SC 52] : 2007 Crlj 1145 .

90 *M.A. Antony v. State of Kerala,* [(2009) 6 SCC 220 LNIND 2009 SC 961] : (Cri) : [AIR 2009 SC 2549 LNIND 2009 SC 961].

91 *Hari v. State of Bihar,* AIR 1964 SC 1184 [LNIND 1964 SC 27] (1964) 6 SCR 623 [LNIND 1964 SC 27] (1964) 2 Crimes 344 [(1188, 1190) :] : .

92 *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112] AIR 1964 SC 1184 [LNIND 1964 SC 27] (1964) 6 SCR 623 [LNIND 1964 SC 27] (1964) 2 Crimes 344 [(para 6); *Hari v. State of Bihar,* [(1188, 1190) :] : ; *Chinna v. State of Mysore,* (1963) 2 SCR 517 [LNIND 1962 SC 194] (1952) SCR 526 [LNIND 1952 SC 15] AIR 1952 SC 159 [LNIND 1952 SC 15] 1952 Crlj 839 (1949) 76 IA 147 [(*531*); *Kashmira v. State of M.P.,* [(530) :]: ; *Bhuboni v. K.E.,* (157).

93 *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112] [(para 6).

94 *Chinna v. State of Mysore,* (1963) 2 SCR 517 [LNIND 1962 SC 194] (1952) SCR 526 [LNIND 1952 SC 15] AIR 1952 SC 159 [LNIND 1952 SC 15] 1952 Crlj 839 (1949) 76 IA 147 [(531); *Kashmira v. State of M.P.,* [(*530*) :]: ; *Bhuboni v. K.E.,* (157).

1 *Puran v. State of Punjab,* AIR 1953 SC 459 462 AIR 1953 SC 411 1953 Crlj 1633 (1963) 2 Crlj 702 [: 1953 Crlj 1925; *Arjuna v. State,* (*413*) : ; *Nand v. State of Rajasthan,* (SC) .

2 *Muthuswami v. State of Madras,* AIR 1954 SC 4 [LNIND 1964 MAD 332] 1954 Crlj 236 1953 SCJ 619 []: : .

3 *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112] [(para 6).

4 *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112] [(para 6).

5 *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112] (para 6).

6 *Subramania v. State of Madras,* AIR 1958 SC 66 [LNIND 1957 SC 86]: 1958 Crlj 238.

7 *Shankaria v. State of Rajasthan,* (1978) SC [Cr AIR184/78], dated 26-4-1978.

8 *Nand v. State of Rajasthan,* (1963) 2 SCR 890 [LNIND 1962 SC 219] (898).

9 *Nand v. State of Rajasthan,* (1963) 2 SCR 890 [LNIND 1962 SC 219] (898).

10 *State of U.P. v. Boota,* AIR 1978 SC 1770 [LNIND 1978 SC 528]: (1979) 1 SCC 31 [LNIND 1978 SC 528] : 1979 SCC (Cr) 115; *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112]; *Srishail v. State of Maharashtra,* AIR 1985 SC 866 [LNIND 1985 SC 100]: (1985) 2 SCC 341 [LNIND 1985 SC 100] : 1985 Crlj 1173; *Ganga v. State of Orissa,* AIR 1981 SC 1165 : (1981) 2 SCC 224 : 1981 Crlj 628.

11 *Balbir v. State of Punjab,* AIR 1957 SC 216 : 1957 Crlj 481.

12 *State of U.P. v. Boota,* AIR 1978 SC 1770 [LNIND 1978 SC 528]: (1979) 1 SCC 31 [LNIND 1978 SC 528] : 1979 SCC (Cr) 115; *Bharat v. State of U.P.,* (1971) 3 SCC 950 [LNIND 1998 SC 1112]; *Srishail v. State of Maharashtra,* AIR 1985 SC 866 [LNIND 1985 SC 100]: (1985) 2 SCC 341 [LNIND 1985 SC 100] : 1985 Crlj 1173; *Ganga v. State of Orissa,* AIR 1981 SC 1165 : (1981) 2 SCC 224 : 1981 Crlj 628.

13 *Ram v. State of Bihar,* AIR 1967 SC 349 352 : 1967 Crlj 409 :

(1966) 3 SCR 517 [
LNIND 1966 SC 44]; *Pyarelal v. State of Rajasthan,*
AIR 1963 SC 1094 [
LNIND 1962 SC 341]: 1963 Supp(1) SCR 689 :
(1963) 3 Crimes 178 .

14 *Shankaria v. State of Rajasthan,*
AIR 1978 SC 1248 [
LNIND 1978 SC 138]:
(1978) 3 SCC 435 [
LNIND 1978 SC 138] :
1978 Crlj 1251 .

15 *Shankaria v. State of Rajasthan,*
AIR 1978 SC 1248 [
LNIND 1978 SC 138]:
(1978) 3 SCC 435 [
LNIND 1978 SC 138] :
1978 Crlj 1251 .

16 *Henry v. State of Assam,*
AIR 1985 SC 823 [
LNIND 1985 SC 105]:
(1985) 3 SCC 291 [
LNIND 1985 SC 105] :
1985 Crlj 1079 .

17 *Haroom v. State of Maharashtra,*
AIR 1968 SC 832 [
LNIND 1967 SC 374]:
(1968) 2 SCR 641 [
LNIND 1967 SC 374] :
1968 Crlj 1017 ; *Hari v. State of Bihar,*
AIR 1964 SC 1184 [
LNIND 1964 SC 27]:
(1964) 2 Crimes 344 .

18 *Kalawati v. State of H.P.,*
AIR 1953 SC 131 [
LNIND 1953 SC 5]:
1953 Crlj 668 .

19 *Aloke Nath Dutta v. State of West Bengal,*
(2007) 12 SCC 230 [
LNIND 2006 SC 1131] :
(2008) 2 SCC 264 (Cri) .

20 *Akanman v. State of Assam,*
(1988) Crlj 573 (DB) ; *Philips v. State of Karnataka,*
(1980) Crlj 171 (Knt) ; *State v. Suram,*
(1976) Crlj 96 (J & K).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

[21] [S. 164-A. Medical examination of the victim of rape

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay, forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation. **—For the purposes of this section, "examination" and "registered medical practitioner" shall have the same meanings as in section 53.]**

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1. Enforcement.—

Section 164A has been brought into force with effect from 23.06.2006.

2. Notes on Clause 17.—

Clause 17 of the Criminal Court (Amendment) Bill, 2005 enacted as s. 17 of the said Amendment Act which incorporates s. 164 A to the Code ready as follows:

Clause 17 seeks to insert a new s. 164A in the Code to provide for medical examination of the victim of rape by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner.

3. Object.—

It is true that even before s. 164A has been incorporated in the Code, Investigating agency used to send the rape victims, for medical examination by a registered medical practitioner. But s. 164A has necessitated to streamline the said medical examination by making the details of such examination by a registered medical practitioner and making a statutory provision for examination within 24 hours of the report of such incident and making it incumbent on the medical practitioner to submit such report to the Investigating Officer and the Investigating Officer has the obligation to send such report to the Magistrate as part of the report to be submitted while submitting charge sheet under *s. 173 Cr.P.C.*

4. Consent of the woman necessary.—

The investigation officer has to propose the victim girl to be examined by the registered medical practitioner but only on the consent of the victim of rape or of a person competent to give such consent such examination shall

be conducted.

5. The registered medical practitioner to whom the victim shall be sent for medical examination.—

The victim girl with whom rape is alleged or attempted to have been committed or attempted shall be sent by the Investigating agency with the consent of the victim girl or any other person competent to give such consent to the registered medical practitioner.—

(i) employed in the Hospital run by the Government, or

(ii) by a local authority, or

(iii) in the absence of any such registered medical practitioner to any other registered medical practitioner.

6. The time limit.—

The time limit of 24 hours has been prescribed in sub-section (1) of s. 164A for sending the victim for medical examination. This is important because any delay in sending the victim of rape any frustrate the purpose for which the medical examination of the victim of rape or attempted rape is required to be done for the purpose of the proper decision of the Court of the accused charged with rape or attempted rape.

7. Duty of the registered medical practitioner.—

Sub-section (2) of s. 164A enjoins upon the registered medical practitioner to whom the woman is sent to examine her without any delay and prepare a report of his examination giving the following particulars, namely:

(i) the name and address of the woman and of the person by whom she was brought before him;

(ii) the age of the woman;

(iii) the description of the material taken from the person of the woman for her DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable details.

The materials taken from the victim girl for DNA profiling may be necessary for ascertaining the present age of the person who is alleged to have perpetrated the rape of as a result of which the victim girl and conceived or has in the meantime delivered a child. Moreover, the marks of injury on the person of the victim are also necessary to be noted which would go long away to prove as to whether rape was committed or whether the victim girl had consent to have sexual intercourse with the victim girl, though there are plethora of decision to indicate that absence of injury would not invariably lead that the sexual intercourse was with the consent of the

rape.

Sub-section (3) enjoins upon the registered medical practitioner to specifically state in the report that the consent of the victim girl or the person who is competent to give consent for her has been obtained. If necessary if the victim girl or the person competent to give consent is a literate, the registered medical practitioner shall get the endorsement on the report of the receipt of such consent by taking the signature. In case of illiterate person the thumb impression noting her consent or the consent of the person competent to give such consent should be taken as a precaution so that if in future the victim girl or the other person competent to give consent denies giving such consent that signature or thumb impression would be evidence that consent has been obtained. This is important because sub-section (7) declares that nothing in s. 164A shall be construed as lawful any examination without obtaining the consent of the woman or of the other person who is competent to give such consent. Such examination by the registered medical practitioner without obtaining such consent is invalid and cannot be treated as part of the record sent by the Investigating Officer to the Magistrate along with the charge sheet submitted under s. 173 of the Code.

Sub-section (6) enjoins upon the registered medical officer to forward the report to the investigating officer who shall forward it to the Magistrate at the time of filing the charge as part of the documents referred to Clause (a) of sub-section (5) of *s. 173 Cr.P.C.*

8. Examination meaning.—

The explanation to *s. 164 Cr.P.C.* States the expression ‘examination’ in s. 164A shall have same meaning as in s. 53 of the Code.

Explanation (a) to s. 53 explains:

‘Examination’ shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum, sweat, hair samples, and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the medical practitioner thinks necessary in a particular case’.

9. ‘Registered medical practitioner’.—

The expression registered medical practitioner’ has been defined in Explanation (b) to *s. 53 Cr.P.C.* as follows:

‘registered medical practitioner’ means a practitioner who possesses any medical qualifications as defined in Clause (h) of *Sections 2 of the Indian Medical Council Act, 1956* and his name has been entered in a State Medical Register.

10. Section 53A.—

Section 164A has to be read with s. 53A providing for medical examination of the person accused of rape by a registered medical practitioner which has also been incorporated in the Code by the Criminal Procedure (Amendment) Act, 2005 which has also come into force with effect from 23.06.2006.

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21 New S. 164-A inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 17 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 165
Search by police officer.

(1) Whenever an officer-in-charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in-charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in Section 100 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

1. Scope of s. 165.—

1. This section corresponds to *old* s. 165, with slight change in sub-sec. (5).

2. While ss. 96 and 98 provide the normal mode of making a search, on obtaining a search-warrant from a Magistrate, s. 165 authorises the officer-in-charge of Police station or a Police officer making an investigation to make a search without obtaining a search-warrant, provided the conditions laid down in the section are fulfilled. [22]

3. In short, s. 165 is meant to be used in cases where a search-warrant would be made use of in the ordinary course but lack of time renders it impolitic to use it. [23] This power can be used any time after the investigation has started. [24]

4. The section has no application where it is alleged and proved that the stolen articles were produced by the accused himself. [25]

5. The power of search given under s s. 165-166 is incidental to the conduct of investigation which a Police Officer is authorised to make under Chap. XII. [26] These provisions have also provided certain safeguards which have to be followed by the Police Officer in making such search, in order that it may be lawful. [27]

6. Section 165 is applicable only where the search is to be made for a *thing* and not for arrest of a person. [28]

2. Conditions precedent for a search under s. 165.—

1. It is now established that search being a process arbitrary in character, the conditions laid down in this section must be strictly complied with; in default, the search becomes invalid [29], [30] and the things seized in course of such search must be returned. [31]
2. These conditions [32] are—

   (i) The Police officer must have reasonable ground for believing that anything necessary for the purposes of an investigation of an offence may be found within his jurisdiction but cannot, in his opinion, be obtained otherwise then by making a search;

   (ii) He must be of the opinion that such thing cannot be otherwise got without undue delay;

   (iii) He must record in writing the grounds of his belief;

   (iv) He must specify [33] in such writing, as far as possible, the things for which the search is to be made;

   (v) He must conduct the search, if practicable, in person; if it is not practicable to make the search himself, he must record in writing the reasons for his inability and shall authorise a subordinate officer to make the search after specifying in writing the place to be searched and, so far as possible, the thing for which the search is to be made.

3. An exception as to search beyond jurisdiction of the Police officer is offered by s. 166(3),*post.*

3. Effects of non-compliance with s. 165.—

1. A distinction has to be made between illegality and irregularity:

   A. *Illegality.* 1. If the contravention of s. 165 amounts to an illegality, it would vitiate that part of the investigation which relates to the actual search and seizure. [34]

2. It would also justify an obstruction to the search by the person affected. [35] But this right of obstruction cannot justify the doing of any unlawful act after the search is over, *e.g.* , after the searching officer has left the premises, to bring him back and make him do things against his will. [36]

   B. *Irregularity.* If it is mere 'irregularity' within the meaning of s. 465(5) [*old* s. 537], the proceedings are not vitiated, and the conviction in such proceedings shall not be set aside,—unless it is shown that such irregularity has accused a failure of justice. [37]

      Instances of such irregularity would be—

      (a) The witnesses were not *local* persons. [38]

      (b) Omission to record the grounds as required by s.165(1). [39] , [40] [At any rate, no such plea should be entertained where the Investigating Officer was not questioned on this point.] [41]

      (c) Sending the record to a Magistrate other then the nearest Magistrate. [42]

3. But even where the search itself becomes illegal by reason of non-compliance with s. 165, the property recovered at search may be used in evidence against the person concerned accused of an offence on the basis of such recovery, [43] because the illegality of the search itself will not render the seizure illegal. [44]

   Even though a person may resist an illegal search, the illegality will not vitiate the seizure or the *evidence* collected by such seizure; [45] or the trial which follows on the basis of such evidence. [46]

4. Of course, if any breach of s. 165 is brought to the notice of the trial Court at an early stage,—

   (a) It may direct re-investigation instead of proceeding to trial. [47]

   (b) The Court may also be inclined to examine carefully the evidence regarding the seizure, [48] and also be cautious in dealing with the evidence or materials collected by such seizure,

4. Sub-sec. (4): Applicability of s. 100. —

1. Since s. 165 confers extraordinary power where any delay on the part of the Investigating Officer may lead to a disappearance of the thing, the seizure where of may be immediately necessary for promoting the investigation, the rigours of s. 100 in conducting the search have been relaxed where such circumstances exist, [49] while, in general, the provisions of s. 100 [*old* s.103] are applicable to a search made under s. 165.

2. As to such circumstances, see under s.100, *ante.*

5. S. 165, Crpc. and s. 27, Evidence Act. —

Section 27 of the Evidence is not controlled by anything in *s. 165 of the Cr.P.C.* and no formalities are provided for cases coming under *s. 27 of the Evidence Act* .[50]

6. Remedies for illegal search.—

1. When a search is illegal, an obstruction or resistance offered to it may not be punishable under s. 323, 332 or 353, I.P.C, [51] unless the offence is constituted by acts done subsequent to the conduct of the search, [52] during which no resistance had been offered. [53]

II. *Revision.*— A conviction may be set aside where the evidence as to the search and recovery is untrustworthy. [54]

But an illegality in making a search does not by itself make the seizure of incriminating articles at such search illegality, so that the conviction based on such recovery cannot be set aside on the ground of illegality in the search, though the Court may, by reasons therefore, be inclined to examine carefully the evidence regarding seizure. [55] Where a conviction is challenged on the ground of irregularity at any stage of the investigation, the point for determination for the superior Court is not whether the Police have disregarded the provisions of the law, but whether the accused has been prejudiced by such disregard in the matter of his defence at the trial. [56]

7. Remedy under Art. 226 of the Constitution.—

Though the trial, when completed, may not be vitiated where the non-compliance with a requirement of s. 165 amounts to a mere ‘irregularity’ anything seized at a search held in contravention of the requirements of s. 165 may be recovered in a proceeding for *mandamus.* [57]

When a police officer conducted the search in a house without registration of a complaint as to concealment of any material in the house and no general diary was made at the police station before going to conduct the search, the search was held to be illegal, more so, when no search report was prepared nor was any respectable person of the locality was called between conducting the such search. This is observed by the

Allahabad High Court when such a search and seizure was challenged before the High Court in a petition under *Article 226 of the Constitution* . The High Court having held such search to be illegal directed the concerned police officer holding such illegal search to pay compensation of Rs.6000/- to the petitioner for causing invasion on his privacy. [58]

Special Acts

8. Foreign Exchange Regulation Act, 1973. —

Though the provisions in *s. 165 of the Cr.P.C.* are generally applicable to searches made under *Sections 37 of the Foreign Exchange Regulation Act, 1973* , the requirement of furnishing written reasons in s. 165(1) is not mandatorily applicable to searches under that Act.[59]

9. Narcotic Drugs and Psychotropic Substances Act, 1985.—

Section 41- 52 and 57 of this Act lays down a special procedure regarding search and seizure during investigation of offences under this Act.

"If a Police-officer without any prior information as contemplated under the provisions of the *NDPS Act* makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provisions of *Cr.P.C.* and when such search is completed at that stage *s. 50 of the NDPS Act* would not be attracted and the question of complying with the requirements thereunder would not arise.....[60]

Under s. 41(1) only an empowered Magistrate can issue warrant for the arrest or for the search in respect of offences punishable under Chap. IV of the Act *etc.* , when he has reason to believe that such offences have been committed or such substances are kept or concealed in any building, conveyance or place..... [61]

Such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the Proviso to s. 42(1). To that extent they are mandatory. Consequently the failure to comply with these requirements affects the prosecution case and therefore, vitiates the trial.... [62]

But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case. If a Police-officer, even if he happens to be an 'empowered' officer while effecting an arrest or search during normal investigation into offences purely under the provisions of *CrPC* fails to strictly comply with the provisions of s *s. 100* and *165* , *CrPC* including the requirement to record reasons such failure would only amount to an irregularity.....[63]

On prior information, the empowered officer or authorised officer while acting under s. 41(2) or 42 should comply with the provisions of s. 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazette Officer or a Magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched. Failure to inform the person to be searched and if such person so requires failure to take him to the Gazetted Officer or the Magistrate, would amount to non-compliance of s. 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial....." [64]

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22 *Malakhan* *v.* *Emp.,* AIR 1946 PC 16 .

23 *Malakhan* *v.* *Emp.,* AIR 1946 PC 16 .

24 *State of Assam* *v.* *Rajkhowa,* (1975) Crlj 354 (para 72).

25 *Malakhan* *v.* *Emp.,* AIR 1946 PC 16 .

26 *State of Rajasthan* *v.* *Rehman,* AIR 1960 SC 210 [LNIND 1959 SC 183]: (1960) 1 SCR 991 [LNIND 1959 SC 183] : 1960 Crlj 286 .

27 *Board of Revenue* *v.* *Jhaver,* AIR 1968 SC 59 [LNIND 1967 SC 224]: (1968) 1 SCR 148 [LNIND 1967 SC 224].

28 *Lachman,* AIR 1942 Pat 281 .

29 *Malakhan* *v.* *Emp.,* AIR 1946 PC 16 ; *State of Assam v. Rajkhowa,* (1975) Crlj 354 (para 72).

30 *State of Rajasthan* *v.* *Rehman,* AIR 1960 SC 210 [LNIND 1959 SC 183]: (1960) 1 SCR 991 [LNIND 1959 SC 183] : 1960 Crlj 286 .

31 *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*]: (1968) 1 SCR 148 [*LNIND 1967 SC 224*].

32 *State of Rajasthan v. Rehman,* AIR 1960 SC 210 [*LNIND 1959 SC 183*]: (1960) 1 SCR 991 [*LNIND 1959 SC 183*] : 1960 Crlj 286 ; *Board of Revenue v. Jhaver,* AIR 1968 SC 59 [*LNIND 1967 SC 224*]: (1968) 1 SCR 148 [*LNIND 1967 SC 224*].

33 Section 165 would not authorise a general search or inspection [*Sitaram,* AIR 1944 Pat 228].

34 *Shyamlal v. State of M.P.,* AIR 1972 SC 886 [*LNIND 1972 SC 100*](para 7) : (1972) 1 SCC 764 [*LNIND 1972 SC 100*] : 1972 Crlj 638 .

35 *Shyamlal v. State of M.P.,* AIR 1972 SC 886 [*LNIND 1972 SC 100*](para 7) : (1972) 1 SCC 764 [*LNIND 1972 SC 100*] : 1972 Crlj 638 ; *State of Rajasthan v. Rehman,* AIR 1960 SC 210 [*LNIND 1959 SC 183*]: (1960) 1 SCR 991 [*LNIND 1959 SC 183*] : 1960 Crlj 286 .

36 *Shyamlal v. State of M.P.,* AIR 1972 SC 886 [*LNIND 1972 SC 100*](para 7) : (1972) 1 SCC 764 [*LNIND 1972 SC 100*] : 1972 Crlj 638 .

37 *Shyamlal v. State of M.P.,* AIR 1972 SC 886 [*LNIND 1972 SC 100*](para 7) : (1972) 1 SCC 764 [*LNIND 1972 SC 100*] : 1972 Crlj 638 .

38 *Sunder v. State of U.P.,* AIR 1956 SC 411 : 1956 Crlj 801; *Ramshrista v. State of Bihar,* (1976) Crlj 38 (para 5) Pat (DB). [But condemned in *State of Rajasthan v. Rehman,*

AIR 1960 SC 210 [
LNIND 1959 SC 183](para 8-9) :
(1960) 1 SCR 991 [
LNIND 1959 SC 183] :
1960 Crlj 286 .

39 *Shyamlal v. State of M.P.,*
AIR 1972 SC 886 [
LNIND 1972 SC 100](para 7) :
(1972) 1 SCR 764 [
LNIND 1972 SC 100] :
1972 Crlj 638 .

40 *Parshottam v. State of U.P.,*
(1975) Crlj 309 (para 8).

41 *Gopi v. State of U.P.,*
(1970) 2 SCC 68 [
LNIND 1970 SC 26] : 1970 SCC (Cr) 304.

42 *Govindan,*
AIR 1959 Mad 544 [
LNIND 1958 MAD 141].

43 *State v. Sant Prakash,* 1976) Crlj 274 (para 20) FB.

44 *Radha Kishun v. State of U.P.,*
AIR 1963 SC 822 [
LNIND 1962 SC 315]: 1963 Supp(1) SCR 408 :
(1963) 1 Crimes 809 .

45 *State of Maharashtra v. Natwarlal Demodardas Soni,*
AIR 1980 SC 593 [
LNIND 1979 SC 482]:
(1980) 4 SCC 669 [
LNIND 1979 SC 482] :
1980 Crlj 429 ; *Pratap v. Director,*
AIR 1985 SC 989 [
LNIND 1985 SC 153]:
(1985) 3 SCC 72 [
LNIND 1985 SC 153] : 1985 Crlr (SC) 589.

46 *State of Maharashtra v. Natwarlal Demodardas Soni,*
AIR 1980 SC 593 [
LNIND 1979 SC 482]:
(1980) 4 SCC 669 [
LNIND 1979 SC 482] :
1980 Crlj 429 ; *Pratap v. Director,*
AIR 1985 SC 989 [
LNIND 1985 SC 153]:
(1985) 3 SCC 72 [
LNIND 1985 SC 153] : 1985 Crlr (SC) 589.

47 Cf. *Sharma v. Delhi Administration,*
AIR 1973 SC 913 [

LNIND 1973 SC 30]:
(1973) 1 SCC 726 [
LNIND 1973 SC 30] :
1973 Crlj 902 .

48 *Radha Kishun v. State of U.P.,*
AIR 1963 SC 822 [
LNIND 1962 SC 315]: 1963 Supp (1) SCR 408 :
(1963) 1 Crimes 809 .

49 *Parshottam v. State of U.P.,*
(1975) Crlj 309 (para 6).

50 *Manheri v. State,*
(1987) Crlj 563 (para 17).

51 *Thakur v. State,*
AIR 1964 Pat 493 ; *Prem v. State,*
(1965) 2 Crlj 843 Punj.

52 *State v. Sant Prakash,*
(1976) Crlj 274 (para 20) FB.

53 *State v. Sant Prakash,*
(1976) Crlj 274 (para 20) FB.

54 *Islamuddin v. State,*
(1975) Crlj 841 (Del) .

55 *Radha Kishun v. State of U.P.,*
AIR 1963 SC 822 [
LNIND 1962 SC 315]: 1963 Supp(1) SCR 408 :
(1963) 1 Crimes 809 .

56 *State of U.P. v. Bhagwant,*
(1964) 3 SCR 71 [
LNIND 1963 SC 114] (83).

57 *Bd. of Revenue v. Jhaver,*
AIR 1968 SC 59 [
LNIND 1967 SC 224](para 19) :
(1968) 1 SCR 148 [
LNIND 1967 SC 224]; *Keshoram Industries,*
(1973) 78 Crlj 121 .

58 *Sharda Singh v. State of U.P.,*
1999 Crlj 1880 All .

59 *Pratap Singh v. Dir. of Enforcement,*
AIR 1985 SC 989 [
LNIND 1985 SC 153]:

(1985) 3 SCC 72 [
LNIND 1985 SC 153] : 1985 Crlr (SC) 589.

60 *State of Punjab v. Balbir Singh,*
(1994) Crlj 3702 (paras 1, 26) :
AIR 1994 SC 1872 : (1994) 3 SCC 299.

61 *State of Punjab v. Balbir Singh,*
(1994) Crlj 3702 (paras 1, 26) :
AIR 1994 SC 1872 : (1994) 3 SCC 299.

62 *State of Punjab v. Balbir Singh,*
(1994) Crlj 3702 (paras 1, 26) :
AIR 1994 SC 1872 : (1994) 3 SCC 299.

63 *State of Punjab v. Balbir Singh,*
(1994) Crlj 3702 (paras 1, 26) :
AIR 1994 SC 1872 : (1994) 3 SCC 299.

64 *State of Punjab v. Balbir Singh,*
(1994) Crlj 3702 (paras 1, 26) :
AIR 1994 SC 1872 : (1994) 3 SCC 299.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 166
When officer-in-charge of police station may require another to issue search-warrant.

(1) An officer-in-charge of a police station or a police officer not being below the rank of sub-inspector making an investigation may require an officer-in-charge of another police station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of Section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer-in-charge of another police station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer-in-charge of a police station or a police officer making any investigation under this Chapter to search, or cause to be searched, any place in the limits of another police station in accordance with the provisions of Section 165, as if such place were within the limits of his own police station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer-in-charge of the police station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under Section 100, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in sub-sections (1) and (3) of Section 165.

(5) The owner or occupier of the place searched shall, on application, be furnished free of cost with a copy of any record sent to the Magistrate under sub-section (4).

1. Scope of s. 166.—

Besides verbal changes and the change in sub-sec. (5), making it obligatory to supply free copies to the owner or occupier of the place searched, this sections corresponds to *old* s. 166.

2. Sub-sec. (3).—

1. Section 166(3) should be read as supplemental to the general rule enacted in s. 165(1) that the jurisdiction of a Police Officer to make a search is confined to the territorial limits of his Police station. [65]

2. The present sub-section enables the Officer in charge of one Police station to make or cause a search to be made within the jurisdiction of another Police station where he finds that the delay involved in having the search made by the Police of the other Police station might result in a removal of the property to be seized, *e.g.,* stolen cattle. [66]

Sub-section (3) of s. 166Cr.P.C if complied with, the search and seizure cannot be challenged. In that case, the investigating officer or the murder case by invoking sub-section (3) of s. 166 conducted the search and in his evidence stated that he had sent two letters to the officer-in-charge of the police station within whose jurisdiction the search and seizure was conducted. Only because the Investigating Officer did not produce copies of the two letters before the Court, the search and seizure by him cannot be held to be invalid and the presumption under illustration (e) of *s. 114 of the Evidence Act* that the official acts would be deemed to have been performed duly would be attracted and it cannot be held that there was non compliance of sub-section (3) of *s. 166 Cr.P.C.* [67]

Similarly when the police officers of Jaipur conducting search in Delhi had given information of their search to their superior officer who agreed to forward the same to the police officers of the Delhi concerned, it has to be held that there was compliance of both sub-section (3) and sub-section (4) of *s. 166 Cr.P.C.* [68]

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65 *Gopi v. State of U.P.,* (1970) 2 SCC 68 [*LNIND 1970 SC 26*] : (1970) 3 SCR 490 [*LNIND 1970 SC 26*] : 1970 SCC (Cr) 304.

66 *Gopi v. State of U.P.,* (1970) 2 SCC 68 [*LNIND 1970 SC 26*] : (1970) 3 SCR 490 [

LNIND 1970 SC 26] :
1970 SCC (Cri) 304 .

67 *Ronny v. State of Maharashtra,*
(1998) 3 SCC 625 [
LNIND 1998 SC 302] :
1998 SCC (Cri) 859 :
1998 Crlj 1638 :
(1998) 2 Crimes 65 [
LNIND 1998 SC 302].

68 *Manish Dixit v. State of Rajasthan,*
AIR 2001 SC 93 [
LNIND 2000 SC 1363]:
(2001) 1 SCC 596 [
LNIND 2000 SC 1363] :
2001 SCC (Cri) 235 :
2001 Crlj 133 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

[69] [S. 166-A. Letter of request from a country or place outside India to a Court or an authority for investigation in India.

(1) Notwithstanding anything contained in this Code, if, in the course of an investigation into an offence, an application is made by the investigating officer or any officer superior in rank to the investigating officer that evidence may be available in a country or place outside India, any Criminal Court may issue a letter of request to a Court or an authority in that country or place competent to deal with such request to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and to forward all the evidence so taken or collected or the authenticated copies thereof or the thing so collected to the Court issuing such letter.

(2) The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

(3) Every statement recorded or document or thing received under sub-section (1) shall be deemed to be the evidence collected during the course of investigation under this Chapter.

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69 Added by the *Code of Criminal Procedure* (Amendment) Act, 1990 (Act 10 of 1990) S. 2 (w.e.f. 19.2.1990).

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 166-B.
Letter of request to competent authority for investigation in a country of place outside India.

(1) Upon receipt of a letter of request from a Court or an authority in a country or place outside India competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to an office under investigation in that country or place, the Central Government may, if it thinks fit,—

(i) forward the same to the Chief Metropolitan Magistrate or Chief Judicial Magistrate or such Metropolitan Magistrate or Judicial Magistrate as he may appoint in this behalf, who shall thereupon summon the person before him and record his statement or cause the document or thing to be produced; or

(ii) send the letter to any police officer for investigation, who shall thereupon investigate into the offence in the same manner,

as if the offence had been committed within India.

(2) All the evidence taken or collected under sub-section (1), or authenticated copies thereof or the thing so collected, shall be forwarded by the Magistrate or police officer, as the case may be, to the Central Government for transmission to the Court or the authority issuing the letter of request, in such manner as the Central Government may deem fit].

1. Object of s s. 166A-B.—

The object of these two sections is to facilitate investigations in foreign countries of criminal offences committed by Indian nationals.

A. Under the previous law, criminal courts in India were enabled to issue summons to accused persons or warrants for arrest or seek documents from accused persons abroad if reciprocal arrangements had been made by the Government with the country concerned.

A witness could be summoned, but only for the purpose of attendance or production of documents and only during a trial.

The law did not enable the recording of statements, not the collection of the oral or documentary evidence available at the investigation stage.

B. Under the *new* sections, assistance from authorized foreign investigating agencies can now be sought at the investigation stage itself for oral or documentary evidence. It will not be necessary for a person to be formally accused in a criminal case before such assistance is requested. And evidence can be sought from people who would, at best, be witnesses in a trial.

It will also not be necessary for a prior reciprocal arrangement to seek assistance from its counterparts abroad, it also permits courts in India to request for help of a similar nature.

Another feature of the amendment is that foreign Governments can now make similar requests to the Government of India.

2. Issue of Letter Rogatory.—

The provisions regarding issue of Letter Rogatory have been introduced in the *Criminal Procedure Code, 1973* . 'Letter Rogatory' is a formal communication in writing sent by a Court in which act ion is pending to a foreign Court or Judge requesting the taking of testimony of a witness residing within the jurisdiction of the foreign Court, to be transmitted to the issuing Court making such request for use in a pending legal contest or action. This request entirely depends upon the comity of Courts towards each other, that is to say, on the friendly recognition by the Court of one nation to the laws and usages of the Court of another nation. Issue of Letter Rogatory can be challenged by the Accused.

In the case known as *Bofors,* Letter Rogatory was issued, with request to the authorities in Switzerland for freezing certain bank accounts. The accused or any other person is not claiming that any amount connected with *Bofors* is standing to his credit in Swiss Banks. The accused cannot be said to be deprived of his property and is, therefore, not entitled to prior notice and opportunity of being heard before the Letter Rogatory was issued, and the issue of Letter Rogatory cannot be vitiated on the ground of absence of a full-dressed enquiry.[70]

3. Section 166B, when can be invoked.—

In view of *s. 166B Cr.P.C.* the Foreign Government can also make similar request to the Central Government which shall be processed by the Central Government in accordance with the provision of *s. 166B Cr.P.C.* When the oral evidence, document or thing is received from the accused or authority competent to deal with such request, every statement, recorded, or document or thing received shall be deemed to be evidence collected during investigation under Chapter XII of the Code.

A letter of request was received from the Government of Canada addressed to the Government of India to obtain the appellant's statement and his blood sample on voluntary basis to conform with the Canadian Law prohibiting compulsion in this regard. The Supreme Court has held that in such a case s. 166B was wrongly applied by the C.B.I. since the direction of the Magistrate under the *Cr.P.C.* necessarily implied compulsion which was contrary to the request of the Canadian authority. So, the impugned order of the Magistrate to the appellant to draw the appellant's blood sample not being on voluntary basis cannot be sustained in law.[71]

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70 *Union of India v. W.N. Chadha,* (1993) Crlj 859 : AIR 1993 SC 1082 : (1993) 1 SCC 154 : AIR 1993 SC 796 [*LNIND 1992 SC 793*].

71 *Narinder Singh Bogarh v. State of Punjab,* (2004) 11 SCC 180 [*LNIND 2004 SC 177*] : AIR 2004 SC 1686 [*LNIND 2004 SC 177*]: 2004 Crlj 1446.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 167
Procedure when investigation cannot be completed in twenty-four hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

[72]

Provided **that—**

(a) The Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,—

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

(ii) sixty days, where the investigation relates to any other offence,

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

73 [(b) no Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage;]

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

74 [*Explanation I.*—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

75 [*Explanation II.*—If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be :]

76 [*Provided* further that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognized social institution.]

77 [(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period

of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2) :

Provided **that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer-in-charge of the police station or the police officer making the investigation, as the case may be.]**[78]

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

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

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

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

STATE AMENDMENTS

Andaman and Nicobar Islands and Lakshadweep Islands. — *The following amendments were made by Regulation 1 of 1974, S. 5(b) (w.e.f. 30-3-1974)* .

S. 167. —In its application to the Union Territories of Andaman and Nicobar Islands and Lakshadweep Islands in S. 167—

(i) in sub-section (1), after the words "nearest Judicial Magistrate," insert the words "or, if there is no Judicial Magistrate in an Island, to an Executive Magistrate functioning in that Island;"

(ii) after sub-section insert the following—

"(1-A) Where a copy of the entries in the diary is transmitted to an Executive Magistrate, references in Section 167 to a Magistrate shall be construed as references to such Executive Magistrate".

(iii) to sub-section (3) add the following proviso—

" *Provided* that no Executive Magistrate, other than the District Magistrate or Sub-divisional Magistrate, shall, unless he is specially empowered in this behalf by the State Government,

authorise detention in the custody of the police," and

(iv) to sub-section (4) add the following proviso—

" *Provided* that, where such order is made by an Executive Magistrate, the Magistrate making the order shall forward a copy of the order, with his reasons for making it, to the Executive Magistrate to whom he is immediately subordinate."

Andhra Pradesh. — *The following amendments were made by Andhra Pradesh Act 31 of 2001 (w.e.f. 6-12-2000)* :—

(i) to clause (b) of sub-section (2), the following shall be added at the end, namely :

"either in person or through the medium of electronic video linkage;"

(ii) in the Explanation II thereunder for the words "an accused person was produced", the words "an accused person was produced in person or as the case may be through the medium of electronic video linkage" shall be substituted.

Delhi.— *The following amendments were made by the Code of Criminal Procedure (Delhi Amendment) Act, 2004 (Delhi Act 4 of 2004), sec. 2 (w.e.f. 16-8-2004)*:—

In the *Code of Criminal Procedure, 1973* (2 of 1974), in section 167 in its application to the National Capital Territory of Delhi, in sub-section (2)—

(i) for clause (b), the following shall be substituted, namely:—

"(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him either in person or through the medium of electronic video linkage:

Provided that if the accused is in police custody, no Magistrate shall authorise his detention in any custody unless the accused is produced before him in person;";

(ii) for the Explanation II thereunder, the following shall be substituted, namely:—

" *Explanation II.* —If any question arises whether an accused person was produced in person or, as the case may be, through the medium of electronic video linkage before the magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising his detention or by video recording of the proceedings, as the case may be."

Gujarat. — *The following amendments were made by Gujarat Amendment Act, Presi. 21 of 1976, S. 2 (w.e.f. 7-5-1976)* .

S. 167. —In its application to the State of Gujarat in S. 167—

(i) in proviso to sub-section (2), substitute para (a) as follows:—

"(a) the Magistrate may authorise detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding—

(i) one hundred and twenty days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

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

(ii) in para (b) for the words "no Magistrate shall" read "no Magistrate shall, except for reasons to be recorded in writing,"

(iii) the Explanation be numbered as Explanation II, and before so re-numbered Explanation insert as follows:—

"Explanation I. —For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused person shall be detained in custody so long as he does not furnish bail."

The following amendments were made by Code of Criminal Procedure (Gujarat Amendment) Act, 2003 (31 of 2003), Section 2 (w.e.f. 16-8-2003)—

(iv) in the proviso, for paragraph (b), substitute the following paragraph, namely:—

"(b) no Magistrate shall authorise further detention in any custody under this section unless—

(i) where the accused is in the custody of police, he is produced in person before the Magistrate, and

(ii) where the accused is otherwise than in the custody of the police, he is produced before the Magistrate either in person or through the medium of electronic video linkage, in accordance with the direction of the Magistrate.";

(v) in *Explanation II* , after the words "whether an accused person was produced before the Magistrate", insert "in person or, as the case may be, through the medium of electronic video linkage".

Maharashtra.— The amendments were made in its application to the State of Maharashtra by Maharashtra Act 8 of 2005 (w.e.f. 25.11.2004)

S. 167.— In sub-section (2) of Section 167:

(a) in the proviso, for paragraph (b), the following paragraph shall be substituted:

"(b) no Magistrate shall authorise detention in any custody, of the accused person under this section unless, the accused person is produced before him in person, and for any extension of custody otherwise than the extension in the police custody, the accused person may be produced either in person or through the medium of electronic video linkage.";

(b) in Explanation II, for the words "an accused person was produced" the words "an accused person was produced in person, or as the case may be, through the medium of electronic video linkage" shall be substituted. (w.e.f. 25.11.2004).

Orissa. —In *Section 167 of the Code of Criminal Procedure, 1973* (2 of 1974), in paragraph (a) of the proviso to sub-section (2),—

(i) for the words "under this paragraph" the words "under this section" shall be substituted; and

(ii) for the words "ninety days" wherever they occur, the words "one hundred and twenty days" shall be substituted. [*vide* Orissa Act 11 of 1997, S. 2 (w.e.f. 20-10-1997).] **Punjab.** — *The following amendments were made by Punjab, Act 9 of 1986, S. 2 (w.e.f. 8-4-1986)* .

S. 167(2). —In sub-section (2) of Section 167, as amended in its application to the State of Punjab for the words "fifteen days", at both places where they occur, the words "thirty days" shall be substituted.

Rajasthan. — *The following amendments were made by Rajasthan Act 16 of 2005, S. 2*. **S. 167.** —In its application to the State of Rajasthan, in S. 167, sub-section (2),—

(i) for the existing paragraph (b), substitute the following paragraph, namely:—

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

(bb) where the accused is in judicial custody, no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him either in person or through the medium of electronic video linkage;"

(ii) for the existing *Explanation* II, substitute the following *Explanation* , namely:—

" *Explanation II.* —If any question arises whether an accused person was produced before the Magistrate as required under paragraphs (b) and (bb), the production of the accused person may be proved—

(i) by his signature on the other authorising detention, if he is produced in person; or

(ii) by a certificate to the effect that he was produced through the medium of electronic video linkage recorded by the Magistrate on the order authorising detention, if he is produced through the medium of electronic video linkage".

Tamil Nadu.— The following amendments were made in its application to the State of Tamil Nadu by Tamil Nadu Act (29 of 2003), (w.e.f. 22.9.2003)

S. 167.— In *Section 167 of the Code of Criminal Procedure, 1973* (Central Act No. 2 of 1974)

(1) in the proviso to sub-section (2), for clause (b), the following clause shall be substituted, namely:—

"(b) no Magistrate shall authorise the detention of an accused person under this section,—

(i) if the accused is in the custody of police, unless the accused is physically produced before him, and

(ii) if the accused is detained otherwise than in the custody of police, unless the accused is produced before him either in person or through the media of electronic video linkage"

(2) in the Explanation-II under sub-section (2), after expression "an accused person was produced" the expression "in person or as the case may be, through the media of electronic video linkage" shall be inserted..

Tripura. — *The following amendments were made by Tripura Act 6 of 1992, S. 2 (w.e.f. 29-7-1992)* .

S. 167(2). —In Section 167, in its application to the State of Tripura, in paragraph (a) of the proviso to sub-section (2),—

(a) for the words "ninety days" wherever they occur, the words "one hundred eighty days" shall be substituted;

(b) for the words "sixty days" wherever they occur, the words "one hundred twenty days" shall be substituted.

West Bengal. — *The following amendments were made by W.B. Act 24 of 1988* . **S. 4.** —

(1) For sub-section (5), the following sub-section shall be substituted:—

"(5) If, in respect of—

(i) any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months, or

(ii) any case exclusively triable by Court of Session or a case under Chapter XVIII of the *Indian Penal Code* s (45 of 1860), the investigation is not concluded within period of three years, or

(iii) any case other than those mentioned in Clauses (i) and (ii), the investigation is not concluded within a period of two years, from the date on which the accused was arrested or made his appearance, the Magistrate shall make an order stopping further investigation into the offence and shall discharge the accused unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the periods mentioned in this sub-section is necessary."

(2) in sub-section (6) after the words "any order stopping further investigation into an offence has been made" the words "and the accused has been discharged" shall be inserted.

The following amendment was made by W.B. Act (20 of 2004),—

S. 167.— In its application to the State of West Bengal, in the proviso to sub-section (2) of Section 167 of the principal Act, for clause (b) the following clause shall be substituted:—

"(b) no Magistrate shall authorise detention under this section—

(i) in the police custody, unless the accused is produced before him in person everytime till the accused is in police custody;

(ii) in the judicial custody, unless the accused is produced before him either in person or through the medium of electronic video linkage;".

Union Territory of Chandigarh. —Amendment of S. 167 as under—

" S. 167 shall be so read as if the words "Executive Magistrate" were substituted for the words "Judicial Magistrate" or "Magistrate" and the words "District Magistrate" were substituted for the words "Chief Judicial Magistrate."

SECTION 167-A

Haryana. — *The following amendments were made by Haryana Act 20 of 1981, S. 2 (w.e.f. 22-12-1981)* .

After section 167 insert the following section 167 A, namely.—

"167-A. Procedure on arrest by Magistrate. —For the avoidance of doubt, it is hereby declared that the provisions of Section 167 shall, so far as may be, apply also in relation to any person arrested by, or under any order or direction of a Magistrate, whether executive or judicial."

Uttar Pradesh. — *The following amendments were made by U.P. Act 18 of 1977, S. 2 (w.e.f. 5-11-1977)* .

S. 167-A. —In its application to the State of Uttar Pradesh after S. 167 insert the following:—

"167-A. Procedure on arrest by Magistrate. —For the avoidance of doubts, it is hereby declared that the provisions of Section 167 shall, so far as may be, apply also in relation to any

person arrested by, or under any order or direction of, a Magistrate, whether executive or judicial."

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1. Scope of s. 167.—

1. This section corresponds to *old* s. 167 with the following changes:

   (a) The power has been given to Judicial Magistrate only, by amending sub-sec.(1).

   (b) Apart from verbal changes, Provisos (a)-(b) and the *Expl.* have been added to sub-sec.(2).

   (c) Sub-sec. (5), (6) have been added.

2. By the *Amending Act* of 1978, Executive Magistrates have been brought back within a limited compass, by inserting sub-sec. (2A). As to the other changes made by the Act of 1978, see next caption.

2. Amendment and effects thereof.—

Extensive changes have been introduced to the section by Amendment Act, 1978, [79] as indicated be square brackets, above, as follows:

1. *Proviso (a) to sub-sec. (2):* Instead of a total period of 60 days as the maximum of remand in all cases, it has been extended to *90 days* where the investigation relates to an offence punishable with death, imprisonment for life or for a term not less than 10 years. In short, this recognizes the difficulties of the investigating authorities to complete the investigation in 60 days in the case of serious offence, and provides that the statutory release on bail of the accused shall, in such cases, take place on the expiry of *90 days.* In *other cases,* the limit of 60 days shall remain.

   Another change in this Proviso (a) by the Act of 1978 is to substitute the words "in custody under this section" by the words" in custody under this *paragraph* ". The result of this change is that the words occurring in Proviso (a) shall have to be construed within the framework of the Proviso itself, without any reference to s. 167(2). So construed it would mean that the Proviso forbids the extension of remands beyond a total period of 90 days under Cl. (i) and beyond a total period of 60 days under Cl. (ii) it follows that the period of 90 or 60 days will commence running only from the date of remand and not from any anterior date in spite of the fact that the accused may have been taken into custody earlier by a Police officer and so deprived of this liberty. [80]

2. *Explanation I to the Proviso to s. 1167(2):* The statutory release under the Proviso to s. 267(2) conditional upon the accused furnishing bail. There was no explicit provision as to what would happen if the accused does *not* furnish bail. Expl. I, *now* inserted, makes it clear that the detention should

continue so long as bail is not furnished, even though the statutory period specified in the Proviso has expired.

3. *Sub-sec. (2A):* Sub-section (1) provides that the Police officer has to forward the accused with the records to the nearest *Judicial* Magistrate, for obtaining a remand order.

But it may sometimes happen that a Judicial Magistrate is *not* available within easy reach, so that the Police officer's duty to produce the accused before a Judicial Magistrate within 24 hours cannot be complied with. Hence as in interim arrangement, it has been provided in sub-sec. (2A) that, in such a case, the Police-officer shall produce the accused with his records to the nearest *Executive* Magistrate who has been vested with the powers of a Judicial or Metropolitan Magistrate: (i)The maximum period of remand which such Executive Magistrate shall be competent to order shall be *7 days;* (ii) if the Police does not, before the expiry of that 7 days, obtain a further order of remand from a competent Judicial Magistrate, the accused shall be entitled to be released; (iii) if such Judicial Magistrate does make a further remand, the period of remand made by the Executive Magistrate shall be taken into consideration in computing the statutory maximum laid down in the Proviso (2)(a) to s. 167. [81]

1. The provisions of s. 167 are applicable whenever a person has been arrested under s. 41 or 151[82] and detained for purposes of investigation.

2. There has been a difference of judicial opinion as to whether, in this section, the word 'arrested' should include cases where the accused voluntarily *surrenders* to the custody of the Police. The view taken by a Division Bench of the Kerala High Court seems to be preferable, for reasons given under sub-sec. (5), *post.* [83]

3. *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) makes the following amendments to sub-section (2) by substituting a new Clause (b) in place of original Clause (b). In Clause (b) the words "any custody" has been substituted by the words "custody of police" and after the words "is produced before him", the words "in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage."

Secondly, for the existing Explanation-II a new Explanation-II the words "or by the order certified by the Magistrate as to production of the accused person or through the medium of electronic video linkage, as the case may be" are new.

Thirdly, after existing proviso, a new proviso has been inserted. The following notes on Clause 14 of the Amendment Bill of 2008 states the purposes of these new amendments as follows :

" Section 167 relates to the procedure when the investigation cannot be completed in twenty four hours. No Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before in person for the first time and subsequently every time till the accused remands in custody of the police. Clause (b) of s. 167 has been amended in order to make detention in the judicial custody of the accused also through the medium of electronic video linkage except for the first time when the production of the accused in person is required. New proviso to said sub-section (2) provides that in the case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home. These

amendments have come into force with effect from 31-12-2009.

3. Art. 22(2) of the Constitution and s. 167(1).—

1. Article 22(2) is a constitutional mandate, namely, that if an arrested person is to be detained for more then 24 hours from the time of arrest, he must be produced before the nearest Magistrate. [84]

2, Section 167(1) prescribes the mode of exercise of that power to detain beyond 24 hours and provides that the Magistrate before whom the arrested person is to be produced must be a Judicial Magistrate and sub-sec. (2) empowers such Magistrate to order detention of the accused for a term not exceeding 15 days in the whole. [85]

3. While s. 167(2) deals with detention during investigation, s s. 209(b) and 309(2) deal with detention in custody, pending inquiry or trial. If there is no valid order of detention under any of the foregoing provisions, his detention would be in contravention of Arts. 21 and 22(2) of the *Constitution* and the accused would be entitled to be released forthwith in a proceeding of *habeas corpus.* [86]

4. Non-production before Judicial Magistrate within 24 hours.—

1. The provision in sub-sec. (1) is complementary to s. 57. If the arrested person is not produced before a Judicial Magistrate, his detention by the Police on the expiry of 24 hours becomes illegal and he is entitled to be released forthwith. [87]

2. A Signal Judge of the Orissa High Court [88] has opined that the illegality of non-production before Magistrate within 24 hours would be cured if the arrested person is actually produced before a Magistrate on the expiry of 24 hours and he remands the accused for further investigation. This view, however, is not acceptable because the non-production before the expiry of 24 hours also violates the constitutional mandate in Art. 22(2), which invalidates the detention beyond 24 hours without producing the person before a Magistrate and the Single Judge's view [89] is contrary to the decision of the Supreme Court. [90] Constitutional invalidity cannot be cured by any subsequent act .

5. Object.—

Object of sub-section (1) of *s. 167 Cr.P.C.* is that the person arrested must be produced before the Magistrate within 24 hours of his arrest when the investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated by sub-section (2) of *s. 167 Cr.P.C.* [1]

6. Special Judge.—

When a Special Judge is empowered with the power of the Magistrate, he can authorize the detention of the accused in custody under *s. 167 Cr.P.C.* [2]

7. No inherent power of remand.—

Apart form s. 167 and *s. 309 Cr.P.C.* The Court has no inherent power of remand.[3]

The Magistrate should not mechanically sign order of remand. [4]

8. Power of remand, a)udicial power.—

Power of remand exercised under *s. 167 Cr.P.C.* is a judicial function.[5]

The Magistrate may differ with the police on the question as to which the provision of the *Indian Penal Code* is attracted and may pass an appropriate order of remand.[6]

Remand of victim girl who is *sui juris* is illegal. She cannot be detained by the Magistrate and must be released to go wherever she likes. [7]

9. Remand application to be filed by the police.—

Remand applications are to be filed by the investigating agency to satisfy the Court that there are justifiable grounds to detain the accused arrested either in police or in judicial custody. But by such application, the investigating agency is required to bring to the notice of the Court the materials collected against the accused person arrested to persuade the Court to remand the accused in custody for the purpose of further investigation under sub-section (2) of *s. 167 Cr.P.C.* [8]

10. Remand in a proceedings to s. 110 Cr.P.C.—

The Magistrate in a proceedings under *s. 110 Cr.P.C.* , cannot remand the opposite party in custody as he is not an accused person.[9]

11. Sub-sec. (2) : Power of remand under the new Code: S s. 167(2), 209(b) 309(2).—

1. It is now settled by the Supreme Court [10] that there are three provisions in the *new* Code authorising remand of an accused who has not be released on bail:

   (a) S.167(2) is applicable during investigation of an offence.

(b) S. 209(b) is applicable during pendency of a Session trial. [11]

(c) S. 309(2) can be invoked during inquiry or trial *other than* Sessions trial.

2. Under the *old* Code, there was no provision in s. 167(2) authorising remand of the accused in custody beyond 15 days; but it was held that even during investigation, the provision in *old* s. 344 [*new* s. 309] could be used to remand the accused 'for any reasonable cause'. [12]

   The *new* Code has engrafted the Proviso to s. 167(2) to provide for the case where a remand beyond 15 days becomes necessary *before* the case is taken cognizance of. But, then, while the remand under s. 167(2) can be made by a Magistrate whether he has or has not jurisdiction to try the case, the power of remand under the Proviso can be taken only if the Magistrate has jurisdiction to try the case. [13]

3. The *new* Code retains the provision for remand after cognizance, in *new* s. 309. [14] But the power under s. 309 cannot be exercised before the Police has submitted its report under s. 173(2). [15] , [16] It is also to be noted that if, after submission of the Police report under s. 173(2), the prosecution finds that further investigation into the offence is necessary, it may resort to the *new* provision in s. 173(8), and obtain remand under s. 309(2). [17] In short, Proviso (a) to s. 167(2) and s. 309 operate independently of each other. [18]

4. Conversely, after the Magistrate takes cognizance, his power to remand the accused to custody under s. 167(2) comes to an end and any power in that behalf has thereafter to be sought from s. 309. [19] , [20]

   Hence, where a formal order of taking cognizance was not passed within 90 days from the arrest, but the Police report was submitted within that period, the accused would not be entitled to be released on bail under Proviso (a) to s. 167(2), but could be remanded to custody under s. 309(2), under the terms thereof. [21]

5. The Supreme Court has held [22] that even though the committal procedure has been omitted by the *new* Code as regards Sessions cases, there is an 'inquiry', as contemplated by s. 2(g) before the Magistrate before whom the accused appears or is produced with the Police report under s. 170, so that the Magistrate who proceeds to inquiry whether s. 207 has been complied with, would be competent to remand the accused till that inquiry is completed, under s. 209(b), read with s. 309. [23]

6. Since the power of remand is expressly conferred by the provisions specified above, the Court shall have no inherent power of remand of an accused otherwise than in accordance with the said provisions. [24]

7. But no application or request by the Police is necessary for the Magistrate to make a valid order of remand. [25] As soon as the accused is produced before a Magistrate he is in *custodia legis* and it becomes the Court's responsibility and power to order whether he is to be remanded to further custody or granted bail or released altogether. This power of the Court cannot be passed on to the mere discretion of the investigating agency. [26]

8. A Full Bench of the Patna High Court has held [27] that an order of remand would not be illegal even where the accused could not be produced before the Magistrate, for circumstances beyond the control of the prosecution or the Police, [28] e.g., illness of the accused, curfew having been imposed in the locality, attendance of the accused in another Court. [29]

   It is to be noted that subsequent to the Supreme Court decisions, [30] the New Code has engrafted Proviso (b) to s. 167(2), which unequivocally says that "no Magistrate shall authorise detention...

unless the accused is produced before him", and, further, by the *Explanation* thereto (now *Expl, II*) provided the mode of proof in a subsequent proceeding as to the fact of such production. *Prima facie,* it would seem that an order of remand made by the Magistrate inspite of non-production of the accused would be illegal. The Patna Full Bench [31] has, nevertheless, held that the new provisions in the Code of 1973 could not possibly ask the Police or the Court to perform an impossibility. There is logic behind this proposition, but, then, the Legislature should make the position clear by adding words at the end of Proviso (b) to s. 167(2) to except from its absolute mandate cases where there are circumstances beyond the control of the Police which render the production of the accused before the Magistrate impossible.

9. The power of remand and of granting bail can be exercised only by a Judicial Magistrate, and not by any Executive Magistrate, except under sub-sec.(2A), below. But a second class Judicial Magistrate cannot be remand the accused to *Police*- custody, unless he is specially empowered by the High Court [Proviso (c) to s. 167(2)].

12. The Magistrate cannot add a new section while remanding the accused to custody.—

At the stage of remand under s. 167(2) *Cr.P.C.* , the Magistrate has no authority to add a new section. When the police in the remand paper did not add s. 308 I.P.C. against the accused, the Magistrate at that stage cannot prejudge the issue of making out an offence under s. 308 I.P.C. So, the High Court set aside the order of remand.[32]

13. Custody of adolescent.—

All adolescent offenders who are to be detained at pre-conviction stage is to be kept in custody of Borstal School and not in regular prison. [33]

14. Arrest under FERA or Customs Act .—

The provision of s. 167(2) *Cr.P.C.* are attracted in case of an arrest under *FERA* and *customs Act* offences.[34]

15. Arrest under Narcotic Drugs and Psychotropic Substance Act, 1985.—

The arrest of a person alleged to have committed an offence under *s. 15 of the NDPS Act* have to be produced before a Magistrate within 24 hours of arrest and his further remand shall be guided by sub-section (2) of *s. 167 Cr.P.C.* , when the accused alleged to have committed an offence under s. 15 of the Act was arrested in Rajasthan on 22.06.1968 and recorded arrest in Madhya Pradesh but was never produced before the Magistrate at any time and kept under detention for long, such detention is illegal.[35]

16. Detained for six years in custody.—

When the accused was detained in custody for six years and the Magistrate mechanically authorized his detention being conscious of sub-section (2) of *s. 167 Cr.P.C.* his detention was illegal and he was ordered to be released forthwith.[36]

17. Extension of custody when illegal.—

When the accused was never produced before the Magistrate after first and records were not produced after the accused was remanded to custody for the first time, such extension of custody by the Magistrate mechanically is illegal. [37]

18. Periods of remand under s. 167(2). —

A summary of the various parts of this sub-section would lead to the following results :

(a) 15 days in all (including one or more remands) [38] in Police or other custody,—by a Magistrate with or without jurisdiction to try the case [sub-sec.(2)].

Where the Magistrate remands to *Police* custody, he must record his reasons for so doing [sub-sec.(3)].

(b) A further period of 75 days from the beginning of remand by Magistrate *having* jurisdiction to try the case,—where the case relates to an offence punishable with death, an in other cases—45 days [Proviso to sub-sec.(2)].

(c) On the expiry of the total period (of 60 or 90 days) as aforesaid, the accused would be entitled to bail. [39]

If, however, the accused refuses or is unable to furnish bail, the detention will continue, [40] under a fresh remand order.

19. "Or if he has no jurisdiction..." —

These words highlight the principle that offences are to be inquired into and tried in a Court having geographical jurisdiction over the local of the crime. [41]

20. Proviso (a) : Object of.—

This Proviso has been substituted by Act 45 of 1978 in order to remove the difficulty which was experienced under the original Proviso in cases of investigation into offences of a serious nature which, as pointed out by the Supreme Court, [42] might not be completed within the originally limited time of 60 days and, if in such cases,

the accused were to be released on bail after that period, such law might be a 'paradise for the criminals'.

Hence, by the substituted Proviso, the Magistrate is now empowered to authorise detention of the accused in custody pending investigation for an *Aggregate* period of (a) *90 days* where the investigation relates to an offence punishable with death, imprisonment for life or for a term of not less than 10 years or more, and (b) up to *60 days in other cases.* [43]

While under the original Proviso (a), the period of extension was limited up to 60 days only, the substituted Proviso (a) classifies cases deserving extension into two categories and for offences punishable with death or imprisonment for life or for 10 years or more, raises the limit of extension up to 90 days. [44]

21. 'The Magistrate'.—

1. While even a Magistrate having no jurisdiction to try the case is competent to order remand up to 15 days under sub-sec.(2), under Proviso (a), for remanding for any further period, 'Magistrate' means the Magistrate having jurisdiction to try the case. [45]

2. A Special Judge appointed under the *Criminal Law Amendment Act* would not be a 'Magistrate' in the present context, even though he may have to follow the procedure to be adopted by a Magistrate for the trial of warrant cases, [46] and though the power of remand under s. 309 may be available to him. [47]

22. 'Otherwise than in custody of the police': Police custody and judicial custody. —

1. Sub-section (2) does not specify the nature of the detention. Hence, the initial custody up to 15 days may be either Police custody to judicial custody. [48]

2. For the same reason, during this initial period of 15 days, the Magistrate has jurisdiction to convert judicial custody into Police custody and *vice-versa.* [49]

3. But Police custody is not renewable once the 15 days' period has elapsed, because the Proviso which relates to further custody beyond 15 days says that such custody must be *judicial custody.* [50] , [51] The principle underlying this condition is that once the inquiry or trial begins it is not proper to let the accused remain under Police influence. [52] Police custody is allowed at the stage of investigation only for the facility of investigation and collection of evidence. [53] But once the inquiry or trail has begun, s. 309(2) would come into play, and the custody ordered by the Court may only be judicial or jail custody. [54] The accused cannot again be remanded to Police custody even for purposes of investigation. [55]

4. But this rule does not apply when the complicity of the accused in some other transaction was disclosed while the accused was in judicial custody and for the purpose of those separate offences for some other transaction he can be taken into Police custody to facilitate the investigation of that case. [56]

23. Police custody not on mere asking by police.—

The order of remand to the police custody can not be made merely on the request of the police. s. 167(3) *Cr.P.C.* makes it clear that the Magistrate has to give reasons for granting police custody. The police has to make out a case that the custody of the accused with the police is necessary for further investigation. When such a prayer is made, the Magistrate has to exercise its discretion as to whether he would remand the accused to the police custody of judicial custody, it he does not wish to release him on bail.[57]

When cases against the accused were registered under Sections 420, 406 etc. and the police custody was prayed for, the Magistrate verified all the details, applied his mind and then on being satisfied that the police custody was necessary for further investigation under the case ordered detention in police custody, the High Court did not wish to interfere. [58]

24. Police custody of the accused after cognizance of the offence taken .—

After cognizance of the offence has been taken and during further investigation ordered by the Magistrate, the accused was arrested and for his proper interrogation, the police prayed for police custody. Such prayer of the police custody was approved on the ground their police custody cannot be considered after cognizance of the offence has been taken and he has to be remanded to the judicial custody if the Magistrate does not release him on bail. The decision of the Bombay High Court in *M.M.Y Ansari v. State,* [59] was placed in support. The Supreme Court has, however, set aside the decision of the Bombay High Court and has held that when further investigation is pending provisions of *s. 167 Cr.P.C.* are attracted and if the police custody of the accused prayed for during such further investigation under s. 173(8) *Cr.P.C.* and his custody by the police is necessary, the fact that the cognizance of the case has been taken would be no bar to the grant of such police custody for the purpose of further investigation.[60]

However, no application for the police custody shall be made after investigation is over and charge sheet submitted. [61]

25. Surrender of the accused and prayer for police custody.—

Even the accused surrenders before the Magistrate and the police prays for police custody so that he could show the hide-out of other absconding accused and for recovery of weapons, the Magistrate was justified in granting police custody for two days. It is held by the High Court that even if the accused surrenders and the Magistrate takes him into custody, he can in appropriate case direct the police custody and the police custody for two days for the purpose of further investigation has been approved by the High court. [62]

26. 'If he is satisfied that adequate grounds exist '.—

1. These words indicate that remand to custody pending investigation, by the Judicial Magistrate is not a mechanical act and cannot be granted merely because the Investigating Officer or the Police Officer in charge desires that the accused be remanded. [63]

2. The Police should satisfy the Magistrate from the case diary and a day-to-day report of the investigation that there is *prima facie* material against the accused and that it requires further investigation. [64]

3. In order to enable the Magistrate to discharge this function, not only the accused but also copies of the Police dairy should be before him. [65]

The following consideration, by itself, is not a sufficient ground for refusing bail and ordering remand : that the presence of the accused is necessary for identification by witnesses [2nd Prove. to s. 437 (1),*post*].

27. 'On the expiry ....shall be released on bail'. —

1. The novel provision introduced by this Proviso is that if it is not possible to complete the investigation within a period of 60 days (or 90 days in the case of offences punishable with death or imprisonment for not less than 10 years) then even in serious case of ghastly types of crimes, the accused shall be entitled to be released on bail, on the expiry of the period from the date of arrest.

2. The Parliament has introduced the amendment to s. 167(2) *Cr.P.C.* prescribing the outer limit within which the investigation is to be completed. If the same is not completed, the accused would acquire a right to right to be released on bail and such release on bail shall be deemed to be under Chapter XXIII of the Code.[66] The right to statutory bail under s. 167(2) [as amended by *Unlawful Activities (Prevention) Act, 1967*] gets extinguished on filing of charge-sheet. But the charge-sheet must be filed before application for statutory bail is made. A three-Judge Bench of the Supreme Court held that filing of charge-sheet during the pendency of the application for statutory bail does not affect the right of the accused to bail. [67]

3. When such release on bail is made, the order is not defeated by lapse of time by the filing of the charge sheet subsequently or for remand to custody under s. 309(2) *Cr.P.C.* [68]

4. But if the accused fails to apply for bail when such right is accrued to him and he does not furnish the bail, he cannot exercise such right after charge sheet is filed and cognizance taken. In such a case, he has to apply for bail under s. 309(2) *Cr.P.C.* [69]

5. Similarly, when the accused was ordered to be released on bail under s. 167(2) as charge sheet had been filed within the specified period, but he did not furnish the bail bond immediately and did so after the submission of the charge sheet. So, the right of the accused to be released on bail under s. 167(2) *Cr.P.C.* has been extinguished.[70]

6. But when the accused has availed of the right by filing an application for bail under s. 167(2) as charge sheet has not been filed within sixty days, subsequent filing of the charge sheet cannot frustrate the indefeasible right and the order rejecting such bail on the ground that the charge sheet had been subsequently filed is not proper. [71]

7. But where in the offence of murder charge sheet has been filed within ninety days, the accused is not entitled to bail on the mere ground that the cognizance had been taken by the Magistrate after the expiry of the period of ninety days. [72]

8. Such right is enforceable only prior to the filing of the charge sheet. But the accused did not avail himself of the right and charge sheet has in the meantime been filed, his right to obtain statutory bail under s. 167(2), proviso (a) or (b) has been extinguished. [73]

9. But when the accused has filed the application for bail after the expiry of the statutory period for filing the charge sheet, the Magistrate cannot keep such petition for bail pending to reject it on the ground that the charge sheet has been filed in the meantime. [74]

10. When the accused filed an application for bail on the ground that the charge sheet had not been filed within the specified period, the Magistrate was not justified in rejecting the application for bail. The accused moved the higher forum but in the meantime, the charge sheet had been submitted. It is held that the right of the accused had not been extinguished and he was entitled to statutory bail. [75]

28. Prevention of Terrorism Act.—

The special Judge hearing an offence under the *prevention of Terrorism Act* has the power to extend the period of remand for ninety days more under s. 49(2)(b) of the Act within the period of ninety days of remand. When he has extended such period, the accused cannot claim statutory right of bail only because charge sheet has not been filed within ninety days because the police has 180 days to file charge sheet. [76]

29. The FIR at two places.—

When same FIR was filed at Karnal in Punjab and at Delhi, the accused was granted statutory bail on the expiry of ninety days of remand at Karnal. The Court without releasing him, send him to Delhi, where charge sheet had been filed. So, he cannot be released on statutory bail and has to obtain regular bail under *s. 437 Cr.P.C.* [77]

30. Duty of the Magistrate under Proviso (a). —

1. Because of the mandatory terms of the Proviso, it has been held by the Supreme Court [78] that when an undertrial prisoner is produced before a Magistrate and the prisoner has already been in detention for 90 days or 60 days (as the case may be),—

   (a) The Magistrate must, before making an order for further remand to judicial custody, *point out* to the accused that he is entitled to be released on bail. [79]

   (b) In view of Art. 39A, read with Art. 21, the State Government must also provide at its own cost a lawyer [80] to the undertrial prisoner with a view to enable him to apply for bail in exercise of his right under this Proviso. [81]

   (c) The Magistrate must take care to see that the right of the undertrial prisoner to the assistance of a lawyer at State cost is secured to him, [82] even without his asking for it. [83]

2. In view of the forgoing duty of the Magistrate, no formal or written application for bail need be filed on behalf of the prisoner, and an oral application would suffice. [84]

31. Nature of the bail that may be required. —

1. The Proviso does not say whether, the bail shall be with or without sureties. The Supreme Court, on applying the principles evolved by it under *Art. 21 of the Constitution* , laid down that [85] —

(a) If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in community and is *not likely to abscond* , it can safely release the accused on his *personal bond* . [86]

(b) In order to determine whether the accused has his roots in the community, the Magistrate should take into consideration various factors, such as the length of his residence in the community, his reputation, character, monetary condition. [87]

(c) Even when releasing the accused on a personal bond, the Court must further take care that the *amount* of the bond which it fixes should not be based merely on the nature of the charge but also on his financial circumstances and the probability of his absconding, so that it may not amount to a denial of bail and deprivation of liberty, [88] by fixing an unduly harsh condition.

32. Computation of the statutory period. —

1. There was a difference of opinion amongst the High Courts [89] as to whether the period of 90 or 60 days should be counted from the date of arrest or surrender of the accused [90] or from the date of the first order of remand made by the Magistrate. [91]
2. This controversy has now been settled by the Supreme Court [92] in favour of the letter view, as follows:

(i) The words in the Proviso are—'no Magistrate shall *authorise* detention... exceeding...' Detention can be authorised by the Magistrate only from the time the order of remand is made by him. Hence, the earlier period when the accused is in the custody of the Police under s. 57 cannot be said to be detention *authorised* by the Magistrate; such period is, therefore, to be excluded for computing the period of 60 or 90 days under Proviso (a) to s. 167(2). [1]

(ii) As a result of the changes made by the *Amending Act* of 1978, Proviso (a) to sub-sec.(2) should be regarded as an independent paragraph and has to be construed with reference to its own terms, without invoking the provisions of the *General Clauses Act* or the *limitation Act* (para. 30).[2]

So construed, the period of 90 or 60 days under the Proviso will commence running only from the date of remand made under the Proviso and not from the date of arrest or any other anterior date (para. 22). [3]

3. The Supreme Court having decided [4] that the computation of the period of 60 or 90 days (as the case may be) has to be started from the date of the first remand by the Magistrate, the question whether in the computation of the period the date of arrest has to be excluded or not, [5] does no longer arise.

4. Fraction of a day shall be counted as a full day. [6]

5. Public holiday shall not be excluded even if the 90th of 60th date falls on a Sunday or holiday. [7]

6. But temporary bail granted to the accused during the period of 90 days or 60 days, as the case may be, shall be excluded. [8]

33. Date of arrest to be excluded.—

Ordinarily the computation of ninety days or sixty days commence from the date of first remand as laid down by the Supreme Court in *Chaganti Satyanarayan v. State of Andhra Pradesh.* [9]

But when on the date of arrest of the accused the accused was produced before the Magistrate who on that very day passed the order of remand, then the date of arrest and date of remand, being the same, the period ninety days or sixty days, as the case may be, must commence from that date. So, when so computed, the prayer for statutory bail having been made before the Magistrate on 91st day of the date of first remand, the Magistrate was not justified in rejecting the said application even subsequently on that date at 4.00 p.m. charge sheet had been filed. So, the High Court allowed the application of the accused for statutory bail under s. 167(2) *Cr.P.C.* as the prayer for bail was made when no charge sheet was filed within ninety days of the date of first remand.[10]

34. Deemed custody.—

Since the condition under *s. 167 Cr.P.C.* is that the accused must be in the custody of police, notional surrender/ so called deemed surrender before a Judicial Magistrate while in custody in another case could not be taken as starting point of the computation of fifteen days of police remand or ninety days or sixty days period of detention as prescribed by s. 167(2) *Cr.P.C.* custody of police as contemplated in *s. 167 Cr.P.C.* The police custody in a particular case and not judicial custody/ detention in another case. Hence statutory period of detention in the present case was required to be computed from the date when the accused came in the custody of the police subsequently. Accused is already in the custody in relation to certain cases at City M in one State and wanted in two more cases required at City C in another case. The accused voluntarily surrendered before the Magistrate at M in a case relating to FIR at C. It is held that such notional surrender could not be treated as police custody so as to count ninety days from that notional surrender as regards case pending at C. Ninety days are to be counted from the date he was remanded to the police custody at C.[11]

35. Two FIRS were filed against the accused and computation of ninety days.—

An FIR was lodged against the accused for corruption charge. But on the basis of the said first FIR he was not arrested. On the next day, the second FIR was filed and he was arrested. As ninety days passed after the filing of the first FIR, the accused prayed for bail under s. 167(2) *Cr.P.C.* It is held that the period of ninety days cannot be counted from the date the first FIR was filed and he cannot be treated to be as deemed arrest on the date of first FIR as he was not arrested in connection with the first FIR. As ninety days did not expire on the date when he moved the

application for statutory bail, his prayer for statutory bail under s. 167(2) *Cr.P.C.* cannot be considered from the date of the first FIR.[12]

36. 'Shall be deemed to be so released ... Chapter XXXIII'. —

1. There have been some controversy as to the effects of this deeming provision, *viz.* , whether the application of Chap. XXXIII to bail granted under the Proviso (a) to s. 167(2) is for procedural purposes or extends to substantive purpose as well. But the words 'for the purpose of the Chapter' at the end of Proviso are quite general and would *prime facie* include all purpose,—making the application to the fullest extent. [13]

   In this view, it has been held [14] that if a person is released on bail during the pendency of investigation, the order of release on bail operates even after the charge-sheet is filed, though the filing of the charge-sheet terminates the investigation itself. [15] But in view of the deeming provision, it would be open to the prosecution to file an application for cancellation of bail under s. 437(5), in Court. [16]

2. As a result of the 'deeming clause'—

   (i) The release of a person under the Proviso to s. 167(2) shall be deemed to be a release under s. 437(1) or (2),*post.* [17]

   (ii) *Ipso facto,* the provision for cancellation of bail, in s. 437(5), would be attracted to a case of release under the Proviso to s. 167(2). [18] In the result, when an accused in released on bail on the expiry of the period specified in the Proviso to s. 167(2), the power of the Court to cancel that bail under s. 437 (5) is reserved. [19]

   (iii) Since the provisions in s. 437(1)- (2) are attracted to a release under the Proviso to s. 167(2), the applicability of s. 437(5) [to cancel that bail] would not be influenced by the fact that subsequent to the release—

   (a) A challan or charge-sheet was filed by the Police; [20] or

   (b) The bail petition of the accused was dismissed on merits by a superior Court. [21]

   (c) An order of remand to custody made by the Court under s. 309(2). [22]

In cancelling the bail, the Court should be confined to considerations relevant to s. 437(5),[23] *e.g.* —

(a) that the accused had committed a non-bailable [24] offence and that it was necessary that he should be arrested and committed to custody; [25] or.

(b) that he was tampering [26] with the evidence or that his being at large was not in the interest of justice, [27] *e.g.,* where he was attempting to flee from justice; [28], [29]

(c) that further material has been discovered against the accused while the order under Proviso (a) had been made without any consideration of merits. [30]

(iv) Where a person is so arrested under s. 437(5), restriction imposed by s. 167(2) that an arrested person shall not be detained beyond 60 days shall not apply to his case. [31], [32]

(v) Because of the application of Chap. XXXIII, a bail once granted, even thought it has been granted before expiry of 60 days without completion of investigation under the Proviso to s. 167(2), shall continue remain valid until it is duly cancelled on grounds known to law. [33] Hence, if a Magistrate, while granting bail under the Proviso to s. 167(2) adds a condition that the bail shall be vacated as soon as the charge-sheet is filed, such condition, being repugnant to the Proviso, shall be void. [34]

(vi) If the case triable by a Court of Session, the Magistrate, while committing him under s. 209(b), cancel the bail already granted under Prov. (a) to s. 167(2), and remand the accused to custody till the completion of the trial by the Court of Session. [35] But in such a case, it would be open to the accused to move the Court of Session or the High Court for granting fresh bail on merits [s. 439]. [36]

A bail once granted, under any provision, including the Proviso to s. 167(2), can be cancelled only under s. 437(5) or 439(2) and under certain well-recognised circumstances, *e.g.,* chances of the accused jumping bail, threatening or influencing the witnesses, interfering with the investigation, obstructing the judicial process or otherwise misusing or abusing the bail. [37], [38]

(vii) The provisions contained in Chap. XXXIII are ss. 436-450. These provisions will be attracted to a person released under Proviso (a) to s. 167(2), unless excluded by some other provision. [39], [40]

3. There is no other provision in the code for granting of bail other than s. 167(2) and the Provisions of Chap. XXXIII. No court can grant bail in circumstances outside these provisions. [41]

4. Once the accused is released on bail under s. 167(2)(a), his bail cannot be cancelled nor can he be taken into custody as soon as a charge-sheet is submitted after the expiry of the period of 90 days. [42]

37. Section 167(2) proviso (a), not controlled by either s. 437 or s. 439 Cr.P.C.—

Section 167(2), proviso (a) *Cr.P.C.* is not controlled by either s. 437 or *s. 439 Cr.P.C.* Merits of the case are immaterial. Whatever may be serious nature of the crime and gravity of offence, no discretion is given to the Magistrate. When the accused files a petition for bail under s. 167(2) *Cr.P.C.* it is not on the merits of the case but is primarily a statutory and technical right accruing in the event of delay in completion of investigation by the police within the period prescribed therein. So, when the accused files a bail petition for default of the investigating agency to submit charge sheet within the prescribed period, the petitioner would be entitled to bail as a matter of right in view of

the fact that he has applied for bail.[43]

38. Section 36A of N.D.P.S. Act overrides s. 167 (2)Cr.P.C.—

The proviso to sub-section (4) of *s. 36A of the N.D.P.S. Act* makes it clear that if it is not possible to complete investigation within a period of 180 days, the Special Court may extend the said period upto a period of one year on the report of the Public Prosecutor indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 180 days. This provision of sub-section (4) of *s. 36A of the N.D.P.S. Act* is an exception to the general rule contained in s. 167(2) *Cr.P.C.* and being a special statute shall naturally override the provision of s. 167(2) *Cr.P.C.* [44]

39. Ninety days or sixty days.—

The charge sheet is required to be filed by the Police within the ninety days of the date of first remand in respect of the offences punishable with death, imprisonment for life or imprisonment for a term not less than ten years in view of Clause (a)(i) of the proviso to s. 167(2) *Cr.P.C.* , Clause (a)(ii) of the proviso to s. 167(2) *Cr.P.C.* is attracted when the investigation relates to any other offence. In such a case, the charge sheet is required to be filed within sixty days of the date of first remand. In default the accused acquires an indefeasible right to get bail which is a statutory right.

The question arises as to whether in order to attract Clause (a)(ii) of the proviso sentence of imprisonment for ten years would mean the maximum sentence of ten years or the minimum sentence. Different High Courts have expressed contrary view. One set of decisions indicate that the sentence of ten years of imprisonment has to be minimum sentence, the other view is that the ten years imprisonment has to be maximum.

In *Rajeev Choudhury v. State,* [45] the Supreme Court expressed the view that when the offence under s. 386 I.P.C. was punishable with imprisonment for less than ten years but the maximum sentence was ten years imprisonment, then Clause (a)(ii) was attracted and charge sheet was required to be filed within the sixty days, failing which the accused would acquire the indefeasible right to obtain bail under s. 167(2) *Cr.P.C.*

But the Supreme Court in a later decision has overruled Rajeev Chaudhury's case. In that case, the question arises before the Supreme Court as to whether Clause (a)(ii) or Clause (a)(i) of s. 167(2) would be attracted when the maximum punishment for the offence under s. 304-B I.P.C. is imprisonment for life but the minimum sentence is seven years imprisonment. The Supreme Court has held that when the minimum sentence is seven years R.I. and the maximum sentence is for life, it is for the Court to decide what would be the adequate sentence and it may be for imprisonment for life and merely because the minimum sentence is provided, it does not mean that only that the minimum sentence is impossible. So, the police would get ninety days to complete the investigation. [46]

40. Completion of the investigation.—

As defined in s. 2(h) [see *ante*], investigation is any proceeding for collection of evidence by any person other than a Magistrate (and such proceeding must not be an 'inquiry' or 'trial').

Investigation by the Police is completed either when the officer-in-charge of the Police Station acts under s. 169 to release the suspect; or when he submits his report to the Magistrate under s. 173(2) to proceed further.

Where the report under s. 173(2) is complete and has been submitted within the period of 60 or 90 days, no question of release on bail on the ground of the expiry of the period specified in Prov. (a) to s. 167(2) can arise. [47]

The investigation would come to an end the moment the charge-sheet is submitted [s. 173(2)], as required under s. 170 unless the Magistrate directs further investigation. [48] The filing of the charge-sheet is thus an integral part of the investigation proceedings. [49]

Filing of a charge-sheet is not complete unless accompanied by papers contemplated by s. 173(5) and is taken on record for its examination for taking cognizance. [50] But when a complete charge-sheet was filed within 90 days, the delay in furnishing the copies thereof to the accused would not attract s. 167(a). [51]

When the challan was filed before the Magistrate with all relevant documents and only negative of certain photographs were not filed, the Supreme Court has overruled the plea of the accused that the charge sheet filed though within ninety days of the first remand, it was not a complete charge sheet and the accused is entitled to be released on statutory bail under s. 167(2) *Cr.P.C.* as the complete charge sheet has not been filed within the specified period. The Supreme Court has not accepted the plea. However, in that case, it is observed that it would be appropriate to file the original photographs along with the report under s. 173(2) *Cr.P.C.* which can be taken back as and when required or alternatively Xerox copies can be filed along with a certificate that they can be compared with the originals, as and when so directed by the Court.[52]

When the charge sheet has been submitted within ninety days, delay by the Magistrate in taking cognizance would not mean that a new right has accrued to the accused for bail under *s. 167 / 21* (b) *Cr.P.C.* [53]

41. Proviso (b). —

1. Under the *old* Code, there was no provision requiring the accused to be produced before the Court at the time of the remand order. The Supreme Court, however, pointed out the desirability of such production. [54]

2. Proviso (b) has, therefore, been engrafted by the *new* Code making it mandatory for the Magistrate to have the prisoner produced before him when he commits him to custody. [55] In the absence of any

subsequent orders curing the defect, a remand order made in the absence of the prisoner would be illegal and the prisoner should be entitled to be released on bail. [56]

3. In a case under the *old* Code, [57] it was held that where the accused *refused* to appear before the Magistrate, the remand order could be made in his absence, because after having himself refused to appear at the hearing of the remand application, he could not legitimately make a grievance that the order was passed in his absence. The question whether this decision stands as good law after the mandatory provision in the *new* Proviso (b), buttressed with the *Explanation* to sub-sec. (2), is somewhat intriguing. But since the Code does not authorise the application of force for the purpose of production in Court, if the authorities succeed in proving such refusal (which, again, would be a difficult business), the remand order has to be made in the absence of the prisoner.

4. In this context, the question of proof of the presence of the accused at the time of hearing of the remand matter arises. In the case under the *old* Code, [58] the Magistrate had made a wrong entry in his record that the accused was present, whereas it was proved from the report of the Jail authorities that he could not be produced. In the circumstances, the Supreme Court held that the remand order was not illegal merely because the entry made by the Magistrate was wrong. [59] The *new Explanation* (now *Expl.* II) enables the State to prove the presence of the accused by obtaining his signature under the remand order. But here, again, the accused may refuse to oblige by giving his signature. Hence, it must be held that in such circumstances the presence of the accused may be proved by other means.

5. The mandate for production of the accused is not an empty formality. The accused would be entitled to be heard in person or through his counsel, as also the prosecution, and the Magistrate would then have to determine whether the accused should be detained further and, if so, the nature of such custody. [60]

6. A Division bench of the Punjab High Court has held that the accused must also be produced before the Revisional Court when the Magistrate's order s. 167 is brought up for revision. [61] But Proviso (b) to s. 167(2) is confined to 'authorisation of detention *by the Magistrate'* .

Expl. I. By amendment Act 45 of 1978, the original *Expl.* of the 1973-Code has been renumbered as *Expl.* II (below) and *Expl. I* has been inserted in order to make it clear that when the accused person does *not* furnish bail, he would continue to be in detention notwithstanding expiry of the period specified in Proviso (a). [62]

By the *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) which has come into force, original Clause (b) has been substituted and substituted Clause (b) which came into force with effect from 31-12-2009 makes the provisions of Clause (b) more elaborate. It states—

(a) No Magistrate shall authorize detention of the accused in the custody of the police under this section unless the accused is produced before him in person for the first time;

(b) and subsequently every time till the accused remains in the custody of the police;

(c) but the Magistrate may extend further detention in the judicial custody on production of the accused either in person or through the medium of electronic video linkage.

Explanation-II has also been substituted by a new Explanation-II by the same amendment Act of 2008 (5 of 2009). Prior to this substitution, if any question arose whether an accused was produced before the Magistrate under Clause (b), production could only be proved by the signature of the accused on the order authorizing

detention. The question could arise as to how the production of the accused could be established if the accused refused to sign the remand order, because the Magistrate could not force or compel the accused to put his signature or thumb impression on the remand order. So, under this new Explanation if the signature or thumb impression of the accused could not be procured on the remand order, the production of the accused may be proved by the order certified by the Magistrate as to production of the accused through the medium of electronic video linkage.

As regards the custody of woman under eighteen yeas of age, a further Clause has been inserted below Explanation-II which mandates the Magistrate not to order either police custody or judicial custody of the female accused aged less than eighteen years. Her detention shall be authorized to be in the custody of a remand house or recognized social institution.

However, it is to be noted in view of Juvenile Justice (Care and Protection) Act, 2000, any Juvenile (who is aged less than eighteen years) in conflict with law *i.e.* committing any offence has to be dealt under the above Act. To such juvenile male or female provisions contained in *s. 167 Cr.P.C.* would not be attracted.

42. Clause (b) as amended by several States.—

The State of Andhra Pradesh by the Andhra Pradesh (Amendment) Act, 2001, the State of Gujarat by the Gujarat (Amendment) Act, 2003, the State of Maharashtra by the Amendment Act 8 of 2005, State of Rajasthan by the Rajasthan Amendment Act 16 of 2005 and State of West Bengal by the West Bengal (Amendment) Act of 2004 have amended Clause (b) to provide not only for personal appearance of the accused for the purpose of remand but also for appearance through the medium of electronic video linkage. These amendments came into force prior to the date on which the Clause (b) as substituted by the *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) came into force on 31-12-2009.

43. Sub-sec. (2A).—

1. This sub-section, added by Act 45 of 1978, [63] empowers an *Executive* Magistrate on whom powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, to make an order for remand of an accused for a period not exceeding 7 days in cases where the Judicial Magistrate is not available.

2. In order that the production of an accused, arrested under s. 57, before a Magistrate is not delayed on account of non-availability of a *judicial* Magistrate, the Legislature has, by inserting this sub-section, conferred powers of remand, for a term not exceeding 7 days in the aggregate, upon such of the *Executive* Magistrates as have been empowered to exercise powers of a Judicial Magistrate. [64]

It is further provided that the period of remand ordered by a Executive Magistrate under this sub-section should also be taken into account for computing the period of 60 or 90 days (as the case may be) as specified in para. (a) of the Proviso to sub-sec. (2). [65]

44. Sub-secs. (3), (4) : Reasons for remand.—

Authorising the detention of a person is a 'judicial' order and the Magistrate cannot do it mechanically, [66] and sub-sec. (3) expressly requires the Magistrate to record his reasons where he remands the accused to Police custody. Violation of this mandatory requirement will thus render the order illegal. [67]

Where such order is made by a Magistrate other than the Chief Judicial Magistrate, sub-sec. (4) requires him to forward a copy of his order of remand together with his reasons, to the Chief Judicial Magistrate.

45. Sub-sec. (5) : Order stopping further investigation.—

1. While the statutory operation of Proviso (a) to sub-sec. (2) releases the prisoner on bail, it would not *ipso facto* stop the investigation. [68] But the *new* Code aims at eradicating the malady of keeping the arrested person in detention indefinitely under protracted investigation, by putting a deadline, in a summons-case, *i.e.* , for an offence not punishable with death, imprisonment for life or imprisonment exceeding 2 years.
2. The deadline is *6 months* from the date when the accused was *arrested.* [69]

—

(a) At the end of that 6 months, the Magistrate having jurisdiction to try such case shall make an order stopping the investigation,—unless the Investigating Officer satisfies him that continuation of the investigation beyond 6 months is necessary in the interests of justice and for special reasons [sub-sec. (5)].

(b) The order of the Magistrate, stopping the investigation, under sub-sec. (5), however, not final, but may be vacated by the Sessions Judge on application by the State. If the Sessions Judge is satisfied as to the need for further investigation, he may give suitable directions in that behalf [sub-sec. (6)]. [70]

3. If, however, the State does not proceed under sub-sec. (6) to set aside the order of the Magistrate stopping further investigation and discharging the accused, the order becomes 'final' and the Magistrate shall have no jurisdiction to review it, [71] unless it comes under s. 362 on the ground of some clerical or arithmetical error.
4. Sub-section (5) puts a time-limit for continuation of the investigation into a summons case after 6 months from the date on which the accused was arrested unless the investigating officer satisfies the Magistrate regarding its continuation beyond such period for special reasons or in the interest of justice. [72]
5. Under this sub-section, a mandatory duty is cast upon the Magistrate to stop the investigation in a summons case after 6 months, except where he is satisfied that there are special reasons for its continuation.

A. From this, the Bombay, [73] Madras, [74] Andhra Pradesh, [75] Delhi, [76] Karnataka [77] High Courts opined that if the Magistrate does not exercise his power after the period of 6 months, the investigating officer may assume that continuation of the investigation is permitted, so that if the charge-sheet is tendered after 6 months, it is competent for the Magistrate to take cognizance on the basis of such delayed charge-sheet provided the period of limitation under s. 468 has not expired. [78]

According to this view, if the investigation has *not been* stopped by the Magistrate and the Police submit their report beyond the period of 6 months, cognizance taken by the Magistrate upon the basis of such delayed report cannot be quashed; but the Court must confine itself to the results of *that part* of the investigation which took place within the period of 6 months. [79] A Division Bench of the Kerala High Court [80] has held that the Magistrate does not lose his jurisdiction to take cognizance of a case on the basis of materials collected at the investigation even *after* the expiry of 6 months in cases where he is satisfied that there was good reasons why the investigation could not be completed within the period of 6 months.

B. On the other hand, the view taken by the Calcutta [81] and Rajasthan [82] High Courts was that a charge-sheet submitted in breach of s. 167(5) is a nullity and a trial held upon such a charge-sheet is without jurisdiction. [83] This view derived support from the observations made by the Supreme Court in *Hussainara's case* [84] that it is obligatory upon the Magistrate to make an order stooping the investigation on the expiry of the 6 month period—

"unless the *officer making the investigation* satisfied the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of 6 months is necessary." [85]

In this view, it is for the Police officer to obtain a specific order from the Magistrate permitting continuation of the investigation beyond 6 months, and not to presume that such permission has been granted, in the absence of a specific order stopping the investigation. The contrary view taken by the A.P., Bombay and Madras High Court, on this point, is not correct.

The question, however, remains as to what would be the effect of s. 460(e), if the Magistrate proceeds to trial on the basis of such delayed report. Section 460(e) says—

"If any Magistrate not empowered by law ...

(e) to take cognizance of an offence under Cl. (a) or (b) of sub-section (1) of s. 190: erroneously and in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered."

This, again, begs the question whether non-completion of the investigation within 6 months or non-submission of the report under s. 173(2) within that period was an illegality or a mere irregularity.

In the *Calcutta case,* [86] relying on the observations of the Supreme Court in *Hussainara's case,* [87] the High Court held that a charge-sheet filed after the expiry of the statutory period specified by s. 167(2), Proviso (a), was a nullity. But in a subsequent

decision, [88] a Bench of the Supreme Court has held that the quoted observations in *Hussainara's case* [89] was only *obiter* on the other hand, another passage in the same case [90] said—

"When an undertrial prisoner produced before a Magistrate and he has been in detention for 90 days or 60 days, as the case may be, the Magistrate must, before making an order of further remand to judicial custody point out to the undertrial prisoner that he is entitled to be released on bail."

The very fact that sub-sec. (5) of s. 167 itself empowers the Magistrate to permit continuation of the investigation beyond 6 months 'for special reasons and in the interests of justice' shows that investigation after 6 months is not a nullity but an 'irregularity'. [91] At any rate, a cognizance on the basis of evidence collected during such irregular investigation shall not vitiate the trial in the absence of prejudice to the accused or miscarriage of justice. [92]

Moreover, the fact that order of release on the expiry of the statutory period is dependent upon the accused offering a bail bond goes against the theory of nullity. *Explanation I,* added to the Proviso by the Amendment of 1978, places this beyond doubt—"the accused shall be detained in custody so long as he does not furnish bail" (see *ante*).

In the case of *Lakshmi Barman,* [93] the Court stated this agreed proposition—

"On the expiry of 60 days from the date of the arrest...., the further detention *does not become ipso facto illegal or void;* but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in s. 437(1), the accused would be *entitled* to an order for being released on bail *if he is* prepared to and does furnish bail".

More pronounced is the judgment in the still later case of *Rabhubir v. State of Bihar.* [94] In this case, S.S. Mann was released under the Proviso to s. 167(2) on 28-10-1985; the Police filed charge-sheet, thereafter on 14-12-1985 and the Magistrate took cognizance of the case upon that charge-sheet, on 18-12-1985. The observations of the Supreme Court leave no doubt that the filing of the charge-sheet and taking cognizance thereon subsequent to the release of the accused on bail under the Proviso to s. 167(2) would not be a nullity or without jurisdiction :

"Where bail has been granted under the Proviso to s. 167(2) for the default of the prosecution is not completing the investigation in 60 days, *after that defect is cured* by the filing of a charge-Sheet, the prosecution may seek to have the bail cancelled....."

6. 'Arrested' includes voluntary 'surrender' to the Police. [95] The contrary view, expressed by the Allahabad and Calcutta [96] High Courts does not appear to be sound because it is inconsistent with the principle behind s. 167(2) and (5), and the meaning of the words 'detained in custody' as explained by the Supreme Court. [1]

Of course, the view of the Allahabad and the Calcutta [2] High Court is based on the textual interpretation of the word 'arrested' which is used in the section.

Here is a fit case for legislative amendment.

46. Sub-section (5) as amended in the State of West Bengal.—

Sub-section (5) of *s. 167 Cr.P.C.* has been amend in the State of West Bengal by *Cr.P.C.* (West Bengal Amendment) Act, 1988 which has come into force with effect from 2nd May 1989. This amendment not only provides for stopping of investigation in a summons case but also in Sessions triable cases and warrant cases.

In cases triable by Sessions Judge and by the Magistrate for offence under Chapter XVII of the *Indian Penal Code* , the Magistrate shall stop investigation if the investigation is not completed within three years of the date of arrest and in other cases if the investigation is not completed within a period of two years of the date of arrest. Unless the Officer-in-charge of the police station applies for extension and that too before the expiry of three years or two years, as the case may be, no question of extension by the Magistrate would arise. But if the charge sheet is submitted after the expiry of the period, cognizance can be taken and the Magistrate can entertain such report restricted to three years or two years, as the case may be, and take cognizance. The trial of the case cannot be vitiated on such cognizance based on the investigation for the period permissible under the law. This is what is what observed by the Supreme Court in the State of *West Bengal v. Phalguni Datta* . [3]

In another decision, the Supreme Court has pointed out that the language of sub-section (5) of *s. 167 Cr.P.C.* as amended in the State of West Bengal is quite clear in indicating that the said amendment is applicable only in a case when the investigation was still pending and not in a case when the investigation had been completed prior to the date when the Amendment Act of 1988 has come into force. It is observed that sub-section (5) of *s. 167 Cr.P.C.* as amended by the West Bengal Act of 1988 intended to ensure speedy completion of the investigation within the time frame specified therein otherwise to face the order of discharge when the investigation is kept pending without any just cause to the satisfaction of the Magistrate.[4]

However, it is pointed out that for the purpose of sub-section (5) of *s. 167 Cr.P.C.* as amended in the State of West Bengal by the Act of 1988, the appearance by the accused shall be physical appearance and when the accused never personally appeared before the Magistrate and appeared through the Advocate, the provisions of the said sub-section (5) of s. 167, as amended in West Bengal would not be attracted. This is because sub-section (5) of the West Bengal Amendment imposes a time schedule for the completion of the investigation and such time commences from the date of arrest of the accused or when he appeared in the Court personally on surrender.[5]

Even after the expiry of the period of two years as specified in sub-section (5) of s. 167 as amended in West Bengal has expired, the Magistrate can in appropriate case extend the period of investigation before any order of discharge has been passed. In that case, even the order passed by the Single Judge of the High Court granting extension of the period of investigation, when the I.O. pleaded sickness for the delay in completing the

investigation has been upheld by the Supreme Court even if it was passed after the expiry of the period of two years of the investigation period. [6]

47. Sub-sec. (6): Revision.—

As has been stated earlier, an order of the Magistrate stopping further investigation under sub-sec. (5), is subject to revision by the Sessions Judge as follows :

(a) the Sessions Judge may vacate the Magistrate's order and direct further investigation;

(b) provided he is satisfied, on an application made to him or *suo motu,* that the case is such that further investigation ought to be made.

48. Power of Special Court.—

Special Court constituted under *Sections 12-A of the Essential Commodities Act, 1955* can stop further investigation into the offence if the investigation is not concluded within a period of six months from the day of arrest of the accused person, unless for special reasons and in the interest of justice the continuation of investigation beyond that period is necessary. However, if the investigation has been stopped on the expiry or six months or the extended period, if any, the investigation comes to an end and, therefore, on the completion of investigation, the officer-in-charge of the Police station is to forward a report in the prescribed form. There is nothing in sub-section (5) of section 167 to suggest that if the investigation has not been completed within the period allowed by that sub-section, the officer-in-charge of the Police station will be absolved from the responsibility of filing the Police report under section 173(2) of the Code on the stoppage of investigation. So the Special Court was also competent to entertain the Police report restricted to six months' investigation and take cognizance on the basis thereof. [7]

49. Bail under s s. 167(2) and 437.—

1. Section 167(2) operates during the investigation and this power may be exercised by a Judicial Magistrate before he has taken cognizance of the case. The power under s. 437 can be exercised only by the Court (having power to take cognizance of the case) and in non-bailable cases. [8]

2. The power under s. 167(2) cannot be exercised by the Magistrate when the investigation is over, *i.e.* , after he has taken cognizance of the case [s s. 170, 173]. Thereafter he can grant bail only under s. 437, where applicable. [9]

3. Under s. 437, the Court cannot release a person on bail if there appears reasonable ground for believing that he is guilty of an offence punishable with death or imprisonment. Under s. 167(2), the Magistrate had no such matter to consider. In refusing bail (prior to the expiry of 60 days), his only consideration is whether there exist adequate grounds for authorising further detention pending investigation. [10]

4. The mandatory provision in Proviso (a) to s. 167(2) as to release on bail after 60 days is not controlled by anything in s. 437(1); on the other hand, the provision in s. 437(1) is applicable only in the case of an accused whose period of detention has not completed 60 days. [11]

5. Because of the 'deeming' clause at the end of Cl. (ii) of Proviso (a) to s. 167(2) [see *ante*], the bail of a person released under the Proviso (a) to s. 167(2) can subsequently be cancelled only on grounds which are relevant under s. 437(5), and not on any other ground whatsoever. [12]

50. S s. 167(2) and 438.—

The grant of anticipatory bail under s. 438 interferes with the statutory right of the Police to investigate, which has not been abrogated by s. 438. Hence, anticipatory bail should not be granted where [13] —

(a) a legitimate case for remand to Police custody for interrogation may be made out; [14] or

(b) reasonable claim to secure incriminating material from information likely to be received from the offender under *s. 27 of the Evidence Act* can be made out. [15]

51. S s. 167(2), 439 and 482.—

The Proviso (a) to s. 167(2) only puts a limitation on the powers of a Magistrate to detain or remand after the expiry of 60 days. It cannot affect the powers of the High Court or Court of session to grant or cancel the bail, under s. 439, even after the accused has obtained bail under the Proviso to s. 167(2); or the inherent power of the High Court to cancel bail under s. 482 to protect the interests of justice, *e.g.* , where the accused is tampering with evidence. [16]

2. The power under s. 439 or s. 482 can be exercised even where the offence is bailable. [17]

52. Remedy of person under illegal custody.—

Where a person in custody shows that his custody was illegal, he can obtain release on an application for *habeas corpus.* [18]

This includes cases of illegal orders of remand. [19] The Supreme Court [20] released, on a Petition under Art. 32, accused who were detained in jail for over three years from the date of the FIR, where the investigation has not been completed, with the following order :

... the accused should be released forthwith subject to re-investigation of the case *on fresh facts;* and the accused shall not be arrested again without permission of the Magistrate (on execution of personal bond). [21]

53. Revision.—

If the order granting bail is not warranted by any law, the state is entitled to get it quashed on revision under s. 439. [22]

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72 Subs. by Act No. 45 of 1978, S. 13(a) (w.e.f. 18-12-1978).

73 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 14 (w.e.f. 31-12-2009) for the following : "(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;".

74 New Expln. I, inserted by Act 45 of 1978, S. 13(b) (w.e.f. 18-12-1978).

75 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 14 (w.e.f. 31-12-2009) for the following : "*Explanation II* .—If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention."

76 Proviso inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 14 (w.e.f. 31-12-2009).

77 Sub-s. (2A), inserted by Act No. 45 of 1978, S. 13(c) (w.e.f. 18-12-1978).

78 For application of amended provisions of S. 167 to pending investigations, see S. 14 of Act 45 of 1978, which runs as follows :— "14. Amendment of Section 167 to apply to pending investigations.—The provisions of Section 167 of the principle Act, as amended by this Act, shall apply to every investigation pending immediately before the commencement of this Act, if the period of detention of the accused person, otherwise than in the custody of the police, had not, at such commencement, exceeded sixty days. "

79 These changes have been fully explained in *Satyanarayana v. State of A.P.*, AIR 1986 SC 2130 [*LNIND 1986 SC 181*](paras 7, 19, 22) : (1986) 3 SCC 141 [*LNIND 1986 SC 181*] : (1986) 2 Crimes 678 [*LNIND 1986 SC 181*].

80 These changes have been fully explained in *Satyanarayana v. State of A.P.*, AIR 1986 SC 2130 [*LNIND 1986 SC 181*](paras 7, 19, 22) : (1986) 3 SCC 141 [*LNIND 1986 SC 181*] : (1986) 2 Crimes 678 [*LNIND 1986 SC 181*].

81 These changes have been fully explained in *Satyanarayana v. State of A.P.*, AIR 1986 SC 2130 [LNIND 1986 SC 181](paras 7, 19, 22) : (1986) 3 SCC 141 : (1986) 2 Crimes 678 [LNIND 1986 SC 181].

82 *Gopalan v. State of Kerala*, AIR 1962 Ker 215 [LNIND 1961 KER 369].

83 *Bhaskaran v. State of Kerala*, (1987) Crlj 170 (para 3) (Ker-DB).

84 *State of Kerala v. Sadanandan*, (1984) Crlj 1823 (para 8-9).

85 *State of Kerala v. Sadanandan*, (1984) Crlj 1823 (para 8-9).

86 *Rabindra v. State of Bihar*, (1984) Crlj 1412 (para 3) FB.

87 *Rabindra v. State of Bihar*, (1984) Crlj 1412 (para 3) FB.

88 *Rajani v. State of Orissa*, (1975) Crlj 83 (paras 6-7) Or.

89 *Rajani v. State of Orissa*, (1975) Crlj 83 (paras 6-7) Or.

90 *State of U.P. v. Abdul Samad*, AIR 1962 SC 1506 [LNIND 1962 SC 120]: 1962 Supp(3) SCR 915; *Bashir v. State of Haryana*, AIR 1978 SC 55 [LNIND 1977 SC 279]: (1977) 4 SCC 410 [LNIND 1977 SC 279] : 1978 Crlj 173.

1 *Directorate of Enforcement v. Deepak Mahajan*, AIR 1994 SC 1775 : (1994) 3 SCC 440 : 1994 SCC (Cri) 785 : 1994 Crlj 2269.

2 *State of Tamil Nadu v. Krishnaswamy*, AIR 1979 SC 1255 [LNIND 1979 SC 266]: (1979) 4 SCC 5 [LNIND 1979 SC 266] : 1979 Crlj 1069.

3 *Natabar Parida* v *State of Orissa,* [1975 SCC (Cri) 484 *LNIND 1975 SC 159*].

4 *Khetri v. State,* [(1981) 1 SCC 627 *LNIND 1980 SC 473*] : 1981 Crlj 470 : 1981 SCC (Cr) 228.

5 *Kashmiri Singh v. State of Punjab,* 1984 Crlj 51 (P&H).

6 *Harihar v. State of U.P.,* 1990 Crlj 2082 All.

7 *Mariappa v. State of Tamil Nadu,* 1990 Crlj NOC 77Mad ; *Feroz Ahmed v. State,* 1982 Crlj NOC 125Del ; *Pradeepan v. State,* 1981 Crlj 1356 Ker.

8 *State of Maharasthra* v *Ramesh,* [AIR 1998 SC 696 *LNIND 1997 SC 1517*]: [1998 SCC (Cri) 261 *LNIND 1997 SC 1517*] : 1998 Crlj 841.

9 *Damodar Majhi v. State of Orissa,* 1981 Crlj 1450.

10 *State of U.P. v. Lakshmi,* [AIR 1983 SC 439 *LNIND 1983 SC 82*](paras 13-14, 16) : [(1983) 2 SCC 372 *LNIND 1983 SC 82*] : 1983 Crlj 939.

11 *State of U.P. v. Lakshmi,* [AIR 1983 SC 439 *LNIND 1983 SC 82*](paras 13-14, 16) : [(1983) 2 SCC 372 *LNIND 1983 SC 82*] : 1983 Crlj 939.

12 *Natabar v. State of Orissa,* [AIR 1975 SC 1465 *LNIND 1975 SC 159*](para 8) : 1975 Crlj 1212 : [(1975) 2 SCC 220 *LNIND 1975 SC 159*].

13 *Natabar v. State of Orissa,* [AIR 1975 SC 1465

LNIND 1975 SC 159](para 8) :
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159]; *Singeswar v. State of Bihar,*
(1976) Crlj 1511 (para 11) Pat.

14 *Natabar v. State of Orissa,*
AIR 1975 SC 1465 [
LNIND 1975 SC 159](para 8) :
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159]; *Singeswar v. State of Bihar,*
(1976) Crlj 1511 (para 11) Pat.

15 *Natabar v. State of Orissa,*
AIR 1975 SC 1465 [
LNIND 1975 SC 159](para 8) :
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159].

16 *Ram v. State of U.P.,*
(1977) Crlj 1783 (All) .

17 *Ved Kumar v. State of Assam,*
(1975) Crlj 647 (para 35) Gau; [*Gauri Shankar v. State of Bihar,*
AIR 1972 SC 711 [
LNIND 1972 SC 39]:
(1972) 1 SCC 564 [
LNIND 1972 SC 39] :
1972 Crlj 505 not good law under *new* Code]; *State of Karnataka v. Nair,*
(1978) Crlj 96 (NOC) (Knt) .

18 *State of Karnataka v. Nair,*
(1978) Crlj 96 (NOC) (Knt) .

19 *Natabar v. State of Orissa,*
AIR 1975 SC 1465 [
LNIND 1975 SC 159](para 8) :
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159].

20 *Gyanu v. State of Karnataka,*
(1977) Crlj 632 (para 9) Knt; *Shambhu v. State of Bihar,*
(1987) Crlj 310 (para 8) (pat DB); *Arjun v. State of Rajasthan,*
(1987) Crlj 1236 (para 8.2) (Raj. DB).

21 *Gyanu v. State of Karnataka,*
(1977) Crlj 632 (para 9) Knt.

22 *State of U.P. v. Lakshmi,*
AIR 1983 SC 439 [
LNIND 1983 SC 82](paras 13-14, 16) :

(1983) 2 SCC 372 [
LNIND 1983 SC 82] : 1983 Crlj.

23 *State of U.P. v. Lakshmi,*
AIR 1983 SC 439 [
LNIND 1983 SC 82](paras 13-14, 16) :
(1983) 2 SCC 372 [
LNIND 1983 SC 82] : 1983 Crlj.

24 *Natabar v. State of Orissa,*
AIR 1975 SC 1465 1467 [
LNIND 1975 SC 159]:
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159].

25 *Ramesh v. State of Bihar,*
(1987) Crlj 1489) (para 6, 9, 19) Pat (FB).

26 *Ramesh v. State of Bihar,*
(1987) Crlj 1489) (para 6, 9, 19) Pat (FB).

27 *Ramesh v. State of Bihar,*
(1987) Crlj 1489) (para 6, 9, 19) Pat (FB).

28 *Ramesh v. State of Bihar,*
(1987) Crlj 1489) (para 6, 9, 19) Pat (FB).

29 *Raj Narain v. Supdt.,*
AIR 1971 SC 178 [
LNIND 1970 SC 366]:
(1970) 2 SCC 750 [
LNIND 1970 SC 366] :
1971 Crlj 244 ; *Sandip v. Officer-in-Charge,*
AIR 1974 SC 871 : 1974 Crlj 740 :
(1974) 4 SCC 273 .

30 *Raj Narain v. Supdt.,*
AIR 1971 SC 178 [
LNIND 1970 SC 366]:
(1970) 2 SCC 750 [
LNIND 1970 SC 366] :
1971 Crlj 244 ; *Sandip v. Officer-in-Charge,*
AIR 1974 SC 871 : 1974 Crlj 740 :
(1974) 4 SCC 273 .

31 *Ramesh v. State of Bihar,*
(1987) Crlj 1489) (para 6, 9, 19) Pat (FB).

32 *Ataullah v. State of U.P.,* 2007 Crlj NOC 61All :
2006 (6) ALJ 18 .

33 *Sanmuganathan* v *Secretary to the Government,* 2007 Crlj NOC 278Mad (DB).

34 *Directorate of Enforcement* v *Deepak Mahajan,*
AIR 1994 SC 1775 : (1994) 3 SCC 440 :
1994 SCC (Cri) 785 :
1994 Crlj 2269 .

35 *Manoj v. State of M.P.,*
AIR 1999 SC 1403 [
LNIND 1999 SC 342]:
(1999) 3 SCC 715 [
LNIND 1999 SC 342] :
1999 SCC (Cri) 478 [
LNIND 1999 SC 342] :
1999 Crlj 2095 .

36 *Mantu Majumdar* v *State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91]:
1980 Crlj 546 :
(1980) 2 SCC 406 [
LNIND 1980 SC 91].

37 *K. Paliniappa v. State of A.P.,*
1999 Crlj 3616 AP .

38 *Krishnaji,* (1897) 23 Bom 32.

39 *Natabar v. State of Orissa,*
AIR 1975 SC 1465 1467 [
LNIND 1975 SC 159]:
1975 Crlj 1212 :
(1975) 2 SCC 220 [
LNIND 1975 SC 159].

40 *State of U.P. v. Lakshmi,*
AIR 1983 SC 439 [
LNIND 1983 SC 82](para 5) :
(1983) 2 SCC 372 [
LNIND 1983 SC 82] :
1983 Crlj 839 ; [See under Prov. (a), *post*].

41 *Zafrul v. State,*
AIR 1986 Pat 194 (para 10) FB.

42 Cf. *Natabar v. State of Orissa,*
AIR 1975 SC 1465 [
LNIND 1975 SC 159]:
(1975) 2 SCC 220 [
LNIND 1975 SC 159] :
1975 Crlj 1212 .

43 *P.P.* *v.* *Satyanarayana,* (1986) Crlj 1134 (para 12) AP, affirmed by *Satyanarayana v. State of A.P.,* AIR 1986 SC 2130 [*LNIND 1986 SC 181*](para 7) : (1986) 3 SCC 141 [*LNIND 1986 SC 181*] : (1986) 2 Crlj.

44 *P.P. v. Satyanarayana,* (1986) : Crlj 1134 (para 12) AP, affirmed by *Satyanarayana v. State of A.P.,* AIR 1986 SC 2130 [*LNIND 1986 SC 181*](para 7) : (1986) 3 SCC 141 [*LNIND 1986 SC 181*] (1986) 2 Crlj.

45 Cf. *Natabar* *v.* *State of Orissa,* AIR 1975 SC 1465 [*LNIND 1975 SC 159*]: (1975) 2 SCC 220 [*LNIND 1975 SC 159*] : 1975 Crlj 1212 .

46 *Krishnaswami* *v.* *State of T.N.,* (1977) Crlj 1013 (para 5) Mad.

47 *Krishnaswami* *v.* *State of T.N.,* (1977) Crlj 1013 (para 5) Mad.

48 *Kosanapu Ramreddy* *v.* *State of A.P.,* (1994) Crlj 2121 : AIR 1994 SC 1447 .

49 *Kosanapu Ramreddy* *v.* *State of A.P.,* (1994) Crlj 2121 : AIR 1994 SC 1447 .

50 *Kosanapu Ramreddy* v. *State of A.P.,* (1994) Crlj 2121 : AIR 1994 SC 1447 .

51 *C.B.I.* v. *Anupam J. Kulkarni,* AIR 1992 SC 1768 [*LNIND 1992 SC 397*]: (1992) 3 SCC 141 [*LNIND 1992 SC 397*] : 1992 Crlj 2768 .

52 *Gauri Shankar* v. *State of Bihar,* AIR 1972 SC 711 [*LNIND 1972 SC 39*]: (1972) 1 SCC 564 [*LNIND 1972 SC 39*] : 1972 Crlj 505 .

53 *Natabar* v. *State of Orissa,* [AIR 1975 SC 1465 *LNIND 1975 SC 159*]: [(1975) 2 SCC 220 *LNIND 1975 SC 159*] : 1975 Crlj 1212 .

54 *Gauri Shankar* v. *State of Bihar,* [AIR 1972 SC 711 *LNIND 1972 SC 39*]: [(1972) 1 SCC 564 *LNIND 1972 SC 39*] : 1972 Crlj 505 .

55 *Kosanapu Ramreddy* v. *State of A.P.,* : (1994) Crlj 2121 AIR 1994 SC 1447 .

56 *C.B.I. v. Anupam J. Kulkarni,* [AIR 1992 SC 1768 *LNIND 1992 SC 397*]: [(1992) 3 SCC 141 *LNIND 1992 SC 397*] : 1992 Crlj 2768 .

57 *State of Gujrat v. Swamy Amar Jyoti,* 1989 Crlj 501 Guj .

58 *Bharat v. State of Punjab,* 2007 Crlj 4490 (P&H) DB .

59 1994 Crlj 1854 (Bom) (overruled).

60 *State v. Dawood Ibrahim Kaskar,* [(2000) 10 SCC 438 *LNIND 1997 SC 815*] : [AIR 1997 SC 2494 *LNIND 1997 SC 815*]: 1997 SCC (Cr) 636.

61 *State v. Sundara Moorthy,* 2008 Crlj 898 Mad .

62 *Y. Mahesh Babu v. State of A.P.,* 1994 Crlj 77 AP .

63 *Rajani v. State of Orissa,* (1975) Crlj 83 (para 9) Or.

64 *Rajani v. State of Orissa,* (1975) Crlj 83 (para 9) Or.

65 *Hariharanand v. Jailor,* AIR 1954 All 601 [*LNIND 1954 ALL 78*].

66 *Hitendra Vishnu Thakur v. State of Maharashtra,* AIR 1994 SC 2623 [*LNIND 1994 SC 572*]: (1994) 4 SCC 602 [*LNIND 1994 SC 572*] : 1995 Crlj 517 : (1994) 2 Crimes 916.

67 *Syed Mohd. Ahmad Kazmi v. State, GNCTD,* AIR 2013 SC 152 [*LNINDORD 2012 SC 386*].

68 *Raghuvir Singh v. State of Bihar,* AIR 1987 SC 149 [*LNIND 1986 SC 336*]: 1987 Crlj 157.

69 *Bipin Shantilal Panchal v. State of Gujrat,* AIR 1996 SC 2897 [*LNIND 1996 SC 43*]: 1997 Crlj 1652 : (1996) 1 SCC 718 [*LNIND 1996 SC 43*]; *Mohammed Iqbal Madar Seikh v. State of Maharashtra,* (1996) 1 SCC 722 : (1996) 1 Crlj 4; *Sanjay Dutt v. State,* (1994) 5 SCC 410 : 1994 SCC (Cri) 1433.

70 *Gyan Chandra Agarwal v. C.B.I.,* 2007 Crlj 2851 CHH.

71 *Vishnu v. State,* 2007 Cr. LJ NOC 537CHH.

72 *Ajay Sharma v. State of Rajasthan,* 2007 Crlj NOC 314Raj ; *Mohammed Arif v. State,* 1999 Crlj 2645 Bom.

73 *State v. Mohammed Asraft Bhat,* (1996) 1 SCC 432 [*LNIND 1995 SC 1269*] : 1996 SCC (Cri) 117 [*LNIND 1995 SC 1269*] : (1995) 4 Crimes 787.

74 *Mohammed Iqbal Madar Sheikh v. State of Maharashtra,* (1996) 1 SCC 722 : 1996 SCC (Cri) 202 : (1996) 1 Crimes 4.

75 *Uday Mohanlal Acharya v. State of Maharashtra,* [AIR 2001 SC 1910 : *LNIND 2001 SC 852*] : [(2001) 5 SCC 453 : *LNIND 2001 SC 852*] : [2001 SCC (Cri) 760 : *LNIND 2001 SC 852*] : 2001 Crlj 1832 .

76 *Ateef Nasir Mulla v. State of Maharashtra,* [AIR 2005 SC 3293 : *LNIND 2005 SC 642*] : [(2005) 7 SCC 29 : *LNIND 2005 SC 642*] : [2005 SCC (Cri) 1587 : *LNIND 2005 SC 642*] : 2005 Crlj 3748 .

77 *Sukhjinder Singh v. State NCT of Delhi,* [(2001) 8 SCC 630 : *LNIND 2001 SC 2384*]. : [AIR 2001 SC 2941 : *LNIND 2001 SC 2384*] : 2001 Crlj 4764 .

78 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) . (para 3) :

79 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) . (para 3) :

80 *Hussainara v. State of Bihar,* [AIR 1979 SC 1369 : *LNIND 1979 SC 188*] : [(1980) 1 SCC 98 : *LNIND 1979 SC 188*] : 1979 Crlj 1045 (para 7) ; *Hoskat v. State of Maharashtra,* [AIR 1978 SC 1548 : *LNIND 1978 SC 199*] : [(1978) 3 SCC 544 : *LNIND 1978 SC 199*] : 1978 Crlj 1678 ; *Suk Das v. Arunachal Pradesh,* [AIR 1986 SC 991 : *LNIND 1986 SC 60*] : [(1986) 2 SCC 401 : *LNIND 1986 SC 60*]; *Khatri v. State of Bihar,* [AIR 1981 SC 928 : *LNIND 1980 SC 473*] : [(1981) 1 SCC 635 : *LNIND 1982 SC 16*] : 1981 SCC (Cr) 235. (paras 5-7) :

81 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) . (para 3) :

82 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 (para 3) : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) .

83 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 (para 3) : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) .

84 *Hussainara v. State of Bihar,* AIR 1979 SC 1377 (para 3) : (1979) 3 SCR 760 : (1980) 1 SCC 50 (Cr) .

85 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 (para 4) : (1981) 1 SCC 635 [LNIND 1982 SC 16] : 1981 SCC (Cr) 235.

86 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 (para 4) : (1981) 1 SCC 635 [LNIND 1982 SC 16] : 1981 SCC (Cr) 235.

87 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 (para 4) : (1981) 1 SCC 635 [LNIND 1982 SC 16] : 1981 SCC (Cr) 235.

88 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 (para 4) : (1981) 1 SCC 635 [LNIND 1982 SC 16] : 1981 SCC (Cr) 235.

89 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 (para 4) : (1981) 1 SCC 635 [LNIND 1982 SC 16] : 1981 SCC (Cr) 235; *Fakira v. State of Orissa,* (1983) Crlj 1336 (para 6) Or; *Trilochan v. State,* (1981) Crlj 1773 (para 10) Del; *Prem v. State of Rajasthan,* (1976) Crlj 455 (Raj) .

90 *Fakira v. State of Orissa,* (1983) Crlj 1336 (para 6) Or; *Trilochan v. State,* (1981) Crlj 1773 (para 10) Del; *Prem v. State of Rajasthan,* (1976) Crlj 455 (Raj) .

91 *Tarsem v. State,* (1975) Crlj 1303 (Del) ; *Feroz v. State,* (1986) Crlj 409 (para 11) Pat; *Jagdish v. State of M.P.,* (1984) Crlj 79 (MP) ; *Batna v. State of H.P.,* (1980) Crlj 748 (HP) .

92 *Satyanarayana v. State of A.P.,* AIR 1986 SC 2130 [

LNIND 1986 SC 181]: (1986) 3 SCC 141 : (1986) 2 Crimes 678 [LNIND 1986 SC 181]; affirming (1986) Crlj 1134 (para 33) AP.

1 *Satyanarayana v. State of A.P.,* AIR 1986 SC 2130 [LNIND 1986 SC 181]: (1986) 3 SCC 141 : (1986) 2 Crimes 678 [LNIND 1986 SC 181], affirming (1986) Crlj 1134 (para 33) AP.

2 The Supreme Court thus overrules the contrary view taken in *Jagdish v. State of M.P.,* (1984) Crlj 79 (MP) ; *Sureya v. State of Orissa,* (1985) Crlj 939 (Or) .

3 The Supreme Court thus overrules the contrary view taken in *Jagdish v. State of M.P.,* (1984) Crlj 79 (MP) ; *Sureya v. State of Orissa,* (1985) Crlj 939 (Or) .

4 *Tarsem v. State,* (1975) Crlj 1303 (Del) ; *Feroz v. State,* (1986) Crlj 409 (para 11) Pat; *Jagdish v. State of M.P.,* (1984) Crlj 79 (MP) ; *Batna v. State of H.P.,* (1980) Crlj 748 (HP) .

5 Cf. *Arjun v. State of Rajasthan,* (1987) Crlj 1236 (paras 2(1), (3)) (Raj DB).

6 Cf. *Arjun v. State of Rajasthan,* (1987) Crlj 1236 (paras 2(1), (3)) (Raj DB).

7 *Meghji v. State,* (1988) Crlj 68 (NOC) (Guj) .

8 *Devendu v. State,* (1992) Crlj 1730 (MP) .

9 AIR1986 SC 2130 : 1986 (2) Crimes 678 [LNIND 1986 SC 181] (SC).

10 *Sunil Singh v. State,* 2007 Crlj 516 CHH .

11 *State of West Bengal v. Dinesh Dalmia,* AIR 2007 SC 1801 [LNIND 2007 SC 530]: (2007) 5 SCC 773 [LNIND 2007 SC 530] : (2007) 3 SCC 19 (Cri) : 2007 Crlj 2757 .

12 *State of Rajasthan v. Ravishanker,* 2005 Crlj 4216 Raj .

13 *Umedsinh v. State of Gujarat,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*].

14 *Umedsinh v. State of Gujarat,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*]; *Raghubir v. State of Bihar,* AIR 1987 SC 149 [*LNIND 1986 SC 336*](para 22) : (1986) 4 SCC 481 [*LNIND 1986 SC 336*] : 1987 Crlj 157 .

15 *Umedsinh v. State of Gujarat,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*].

16 *Umedsinh v. State of Gujarat,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*].

17 *Bashir v. State of Haryana,* AIR 1978 SC 55 [*LNIND 1977 SC 279*](para 6) : (1977) SC 410 : 1978 Crlj 173 .

18 *Bashir v. State of Haryana,* AIR 1978 SC 55 [*LNIND 1977 SC 279*](para 6) : (1977) SC 410 : 1978 Crlj 173 .

19 *Bashir v. State of Haryana,* AIR 1978 SC 55 [*LNIND 1977 SC 279*](para 6) : (1977) SC 410 : 1978 Crlj 173 .

20 *Raghubir v. State of Bihar,* AIR 1987 SC 149 [*LNIND 1986 SC 336*](para 22) : (1986) 4 SCC 481 [*LNIND 1986 SC 336*] : 1987 Crlj 157 ; *Bashir v. State of Haryana,* AIR 1978 SC 55 [*LNIND 1977 SC 279*](para 6) : (1977) SC 410 : 1978 Crlj 173 .

21 *Bashir* *v.* *State* *of* *Haryana,*
AIR 1978 SC 55
LNIND 1977 SC 279
(1977) SC 410
1978 Crlj 173
[ ](para 6) : :
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22 *Raghubir* *v.* *State* *of* *Bihar,*
AIR 1987 SC 149
LNIND 1986 SC 336
(1986) 4 SCC 481
LNIND 1986 SC 336
1987 Crlj 157
[ ](para 22) : [ ] :
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23 *Bashir* *v.* *State* *of* *Haryana,*
AIR 1978 SC 55
LNIND 1977 SC 279
(1977) SC 410
1978 Crlj 173
[ ](para 6) : :
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24 Cf. *State* *v.* *Jagjit,*
AIR 1962 SC 253
LNIND 1961 SC 301
(1962) 3 SCR 622
LNIND 1961 SC 301
(1962) 1 Crimes 215
[ ]: [ ] :
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25 *Bashir* *v.* *State* *of* *Haryana,*
AIR 1978 SC 55
LNIND 1977 SC 279
(1977) SC 410
1978 Crlj 173
[ ](para 6) : :
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26 Cf. *Gurcharan* *v.* *State,*
AIR 1978 SC 179
LNIND 1977 SC 337
(1978) 1 SCC 118
LNIND 1977 SC 337
1978 Crlj 129
[ ]: [ ] :
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27 *Bashir* *v.* *State* *of* *Haryana,*
AIR 1978 SC 55
LNIND 1977 SC 279
(1977) SC 410
1978 Crlj 173
[ ](para 6) : :
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28 *Bashir* *v.* *State* *of* *Haryana,*
AIR 1978 SC 55
LNIND 1977 SC 279
(1977) SC 410
1978 Crlj 173
[ ](para 6) : :
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29 *State* *of* *Maharashtra* *v.* *Nainmal,*
(1969) 3 SCC 904
1969 CAR 69
1970 SCC (Cri) 170
: :
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30 *Dhena* *v.* *State,*
(1977) Crlj 781 (para 6) Pat.

31 *State of U.P* . v. *Lakshmi,*
AIR 1983 SC 439
[*LNIND 1983 SC 82*
](para 5); *Gyanu v. State of Karnataka,*
(1977) Crlj 632 (para 8) Knt.

32 *Prem* *v.* *State of* *U.P.,*
(1976) Crlj 1451 (paras 2-3) All.

33 *Raghubir* *v.* *State of* *Bihar,*
AIR 1987 SC 149
[*LNIND 1986 SC 336*
](para 22) :
(1986) 4 SCC 481
[*LNIND 1986 SC 336*
] :
1987 Crlj 157 .

34 *Raghubir* *v.* *State of* *Bihar,*
AIR 1987 SC 149
[*LNIND 1986 SC 336*
](para 22) :
(1986) 4 SCC 481
[*LNIND 1986 SC 336*
] :
1987 Crlj 157 .

35 *Prem* *v.* *State of* *U.P.,*
(1976) Crlj 1451 (paras 2-3) All.

36 *Prem* *v.* *State of* *U.P.,*
(1976) Crlj 1451 (paras 2-3) All.

37 *Raghubir* *v.* *State of* *Bihar,*
AIR 1987 SC 149
[*LNIND 1986 SC 336*
](para 22) :
(1986) 4 SCC 481
[*LNIND 1986 SC 336*
] :
1987 Crlj 157 .

38 *Ram* *v.* *State,*
(1976) Crlj 211 (para 2) All

39 Cf. *Gurcharan* *v.* *State,*
AIR 1978 SC 179
[*LNIND 1977 SC 337*
]:
(1978) 1 SCC 118
[*LNIND 1977 SC 337*
] :
1978 Crlj 129 .

40 *Surinder* *v.* *State of* *Punjab,*
(1977) Crlj 1266 (para 10) P&H (FB); *State of Maharashtra v. Tukaram,*
(1977) Crlj 394 (para 27) Bom [re. s. 439].

41 *State of U.P. v. Lakshmi,* AIR 1983 SC 439 [*LNIND 1983 SC 82*]: (1983) 2 SCC 372 [*LNIND 1983 SC 82*] : 1983 Crlj 839 ; *Durei v. Suratha,* (1987) Crlj 1462 (para 5) (Or, DB).

42 *Aslam v. State,* (1992) 4 SCC 272 [*LNIND 1992 SC 609*] : AIR 1993 SC 1 1992 CrLJ 3712.

43 *Singamala v. State of Andhra Pradesh,* 2007 Crlj 884 AP .

44 *Rasheed v. State of Karnataka,* 2007 Crlj 2316 Kant .

45 *Rajeev Chaudhury v. State of NCT of Delhi,* (2001) 5 SCC 34 [*LNIND 2001 SC 1182*] : 2001 SCC (Cri) 819 [*LNIND 2001 SC 1182*] : AIR 2001 SC 2369 [*LNIND 2001 SC 1182*].

46 *Bhupinder Singh v. Jarnail Singh,* AIR 2006 SC 2622 [*LNIND 2006 SC 508*]: (2006) 6 SCC 277 [*LNIND 2006 SC 508*] : (2006) 3 SCC 101 (Cri) : 2006 Crlj 3621 . (Apart from overruling Rajeev Chaudhury's case the Supreme Court overruled *Sunil Kumar v. State,* 2002 Crlj 2507 Jhar and approved *Keshav Dev v. State of Rajasthan,* 2005 Crlj 3306 Raj ; *State of H.P. v. Lal Singh,* 2003 Crlj 1668 HP and *Kuldip Singh v. State of Punjab,* (2005) 3 RCR 599 (P&H)].

47 *Taj Singh v. State,* (1988) Crlj 1634 (para 13) (Del-DB).

48 *State of U.P. v. Lakshmi,* AIR 1983 SC 439 [*LNIND 1983 SC 82*](para 9) : (1983) 2 SCC 372 [*LNIND 1983 SC 82*] : 1983 Crlj 839 .

49 *P.P. v. Anjaiah,* (1988) Crlj 236 (para 3) (AP, DB).

50 *Venkatareddy* *v.* *State,*
(1994) Crlj 257
1980 SC 506
(1980) 3 SCC 152
1980 Crlj 227
(*262*) AP; See also *Satyanarayana v. State of Bihar,*
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51 *State of Karnataka v. Babu,*
(1994) Crlj 651
(1993) Crlj 282
(Kant) ; *Bhole v. State of M.P.,*
(MP) .

52 *Bhupinder Singh v. Jarnail Singh,*
AIR 2006 SC 2622
LNIND 2006 SC 508
(2006) 3 SCC 101
2006 Crlj 3621
[
]: (2006) 6 SCC 277 :
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.

53 *Jeewan Kumar Raut v. C.B.I.,*
(2009) 7 SCC 526
LNIND 2009 SC 1418
(2009) 3 SCC 473
LNIND 2009 SC 166
[
] :
[
](Cri) .

54 *Sandip* *v.* *Officer-in-charge,*
AIR 1974 SC 871
1974 Crlj 740
AIR 1971 SC 178
LNIND 1970 SC 366
(1970) 2 SCC 750
LNIND 1970 SC 366
1971 Crlj 244
: (1974) 4 SCC 273 :
; *Raj Narain v. Supdt.,*
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] :
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55 *Izhar* *v.* *State,*
(1978) Crlj 58
(All) .

56 *Izhar* *v.* *State,*
(1978) Crlj 58
(All) .

57 *Gauri Shankar v. State of Bihar,*
(1972) 1 SCC 564
LNIND 1972 SC 39
AIR 1972 SC 1515
LNIND 1972 SC 53
1973 Crlj 505
[
] (para 7) :
[
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58 *Gauri Shankar v. State of Bihar,*
(1972) 1 SCC 564
LNIND 1972 SC 39
AIR 1972 SC 1515
LNIND 1972 SC 53
1973 Crlj 505
[
] (para 7) :
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59 *Gauri Shankar v. State of Bihar,*
(1972) 1 SCC 564
LNIND 1972 SC 39
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[
] (para 7) :
[

LNIND 1972 SC 53]:
1973 Crlj 505 .

60 *Kashmir Singh v. State of Punjab,*
(1984) Crlj 51 (para 13) P&H.

61 *Kashmir Singh v. State of Punjab,*
(1984) Crlj 51 (para 13) P&H.

62 *P.P. v. Satyanarayana,*
(1986) Crlj 1134 (para 12) AP affirmed by
AIR 1986 SC 2130 [
LNIND 1986 SC 181](para 7) :
(1986) 3 SCC 141 [
LNIND 1986 SC 181] :
(1986) 2 Crimes 678 [
LNIND 1986 SC 181].

63 *Satyanarayana v. State of A.P.,*
AIR 1986 SC 2130 [
LNIND 1986 SC 181](para 19) :
(1986) 3 SCC 141 [
LNIND 1986 SC 181] :
(1986) 2 Crimes 678 [
LNIND 1986 SC 181].

64 *Satyanarayana v. State of A.P.,*
AIR 1986 SC 2130 [
LNIND 1986 SC 181](para 19) :
(1986) 3 SCC 141 [
LNIND 1986 SC 181] :
(1986) 2 Crimes 678 [
LNIND 1986 SC 181].

65 *Satyanarayana v. State of A.P.,*
AIR 1986 SC 2130 [
LNIND 1986 SC 181](para 19) :
(1986) 3 SCC 141 [
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(1986) 2 Crimes 678 [
LNIND 1986 SC 181].

66 *Mantoo v. State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91](para 8) :
(1980) 2 SCC 406 [
LNIND 1980 SC 91] :
1980 Crlj 546 ; *Daulatram v. R.,*
AIR 1933 Oudh 315 .

67 *Mantoo v. State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91](para 8) :
(1980) 2 SCC 406 [
LNIND 1980 SC 91] :

1980 Crlj 546 ; *Daulatram v. R.,* AIR 1933 Oudh 315 .

68 *Bhaskaran v. State of Kerala,* (1987) Crlj 170 (paras 3, 9, 10).

69 *Bhaskaran v. State of Kerala,* (1987) Crlj 170 (paras 3, 9, 10).

70 Sub-section (5) and (6) were inserted on the recommendation of the Joint Committee.

71 *Babulal v. State,* (1987) Crlj 1287 .

72 *P.P. v. Satyanarayana,* (1985) Crlj 932 (Del) .

73 *State of Maharashtra v. Tatyaji,* (1986) Crlj 332 (para 20) Bom.

74 *Jagannathan v. State,* (1983) Crlj 1748 (Mad) .

75 *P.P. v. A.P. High Court,* (1988) Crlj 236 (AP) ; *P.P. v. Anjaneyulu,* (1986) Crlj 1456 (AP) DB .

76 *State v. Jai Bhagwan,* (1985) Crlj 932 (Del) .

77 *Kumar v. State of Karnataka,* (1985) Crlj 1347 .

78 *State of Maharashtra v. Tatyaji,* (1986) Crlj 332 (para 20) Bom.

79 *P.P. v. A.P. High Court,* (1988) Crlj 236 (AP) ; *P.P. v. Anjaneyulu,* (1986) Crlj 1456 (AP) DB .

80 *Bhaskaran v. State of Kerala,* (1987) Crlj 170 (paras 12-14) (Ker, DB).

81 *Jay Sankar v. State,* (1982) Crlj 744 (Cal) DB .

82 *Babulal v. State of Rajasthan,* (1982) Crlj 1001 (Raj) .

83 *Jay Sankar v. State,* (1982) Crlj 744 (Cal) DB ; *Babulal v. State of Rajasthan,* (1982) Crlj 1001 (Raj) .

84 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1979 Crlj 1036 .

85 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1979 Crlj 1036 .

86 *Jay Sankar v. State,* (1982) Crlj 744 (Cal) DB .

87 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1979 Crlj 1036 .

88 *Satyanarayana v. State of A.P.,* AIR 1986 SC 2130 [*LNIND 1986 SC 181*](paras 26, 31) : (1986) 3 SCC 141 [*LNIND 1986 SC 181*] : (1986) 2 Crimes 678 [*LNIND 1986 SC 181*].

89 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1979 Crlj 1036 .

90 *Hussainara v. State of Bihar,* AIR 1979 SC 1360 : (1980) 1 SCC 81 : 1979 Crlj 1036 .

91 This view of the Author, expressed in Latest Edition, is now affirmed by *State of W.B. v. Falguni,* (1993) 3 SCC 288 [*LNIND 1993 SC 435*] (para 8-9) : (1983) 2 Crimes 321 .

92 *Sharma v. Delhi Admn.,* AIR 1973 SC 913 [*LNIND 1973 SC 30*]: (1973) 1 SCC 726 [*LNIND 1973 SC 30*] : 1973 Crlj 902 .

93 *State of U.P. v. Lakshmi,* AIR 1983 SC 439 [

LNIND 1983 SC 82](para 5) :
(1983) 2 SCC 372 [
LNIND 1983 SC 82] :
1983 Crlj 839 .

94 *Raghubir v. State of Bihar,*
AIR 1987 SC 149 [
LNIND 1986 SC 336](para 22) :
(1986) 4 SCC 481 [
LNIND 1986 SC 336] :
1987 Crlj 157 .

95 *Jagannathan v. State,*
(1983) Crlj 1748 (Mad) .

96 *Jay Sankar v. State,*
(1982) Crlj 744 (Cal) DB .

1 *Niranjan v. Prabhakar,*
AIR 1980 SC 785 [
LNIND 1980 SC 112]:
(1980) 2 SCC 559 [
LNIND 1980 SC 112] :
1980 Crlj 426 .

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(1982) Crlj 744 (Cal) DB .

3
(1993) 3 SCC 288 [
LNIND 1993 SC 435] : 1983 (Cri) 815 :
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LNIND 1993 SC 435].

4 *Durgesh Chandra Saha v. Bimal Chandra Saha,*
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LNIND 1995 SC 1173]:
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1996 Crlj 1137 ; *see also State of West Bengal v. Pranab Ranjan Roy,*
(1998) 3 SCC 209 [
LNIND 1998 SC 308] :
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AIR 1998 SC 1887 [
LNIND 1998 SC 308]:
(1998) 1 Crimes 46 .

5 *State of West Bengal v. Pranab Ranjan Roy,*
(1998) 3 SCC 209 [
LNIND 1998 SC 308] : 1998 SCC (Cri) 730 :
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LNIND 1998 SC 308]:
(1998) 1 Crimes 46 .

6 *Nirmal Kanti Roy v. State of West Bengal,* (1998) 4 SCC 590 [*LNIND 1998 SC 477*] : 1998 SCC (Cri) 1100 [*LNIND 1998 SC 477*] : 1998 Crlj 3282 : (1998) 2 Crimes 267 .

7 *State of West Bengal v. Falguni,* : (1993) 2 SCC 288 : (1993) 2 Crimes 321) [*LNIND 1993 SC 435*].

8 *Umedsinh v. State,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*][see also *Shardulbhai v. State,* (1990) Crlj 1303 (Guj) (FB)].

9 *Umedsinh v. State,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*][see also *Shardulbhai v. State,* (1990) Crlj 1303 (Guj) (FB)].

10 *Umedsinh v. State,* AIR 1977 Guj 11 [*LNIND 1975 GUJ 61*][see also *Shardulbhai v. State,* (1990) Crlj 1303 (Guj) (FB)] .

11 *Ved Kumar v. State of Assam,* (1977) Crlj 647 (para 20) Gau.

12 *Bashir v. State of Haryana,* AIR 1978 SC 55 [*LNIND 1977 SC 279*](para 6) : (1977) 4 SCC 410 [*LNIND 1977 SC 279*] : 1978 Crlj 173 .

13 *Gurbaksh v. State,* AIR 1978 P&H 20 (paras 43, 50) FB.

14 *Gurbaksh v. State,* AIR 1978 P&H 20 (paras 43, 50) FB; Cf. *Balchand v. State of M.P.,* AIR 1977 SC 366 [*LNIND 1976 SC 425*]: (1976) 4 SCC 572 [*LNIND 1976 SC 425*] : 1977 Crlj 225 .

15 *Gurbaksh v. State,* AIR 1978 P&H 20 (paras 43, 50) FB.

16 *Talab v. Madhukar,* AIR 1958 SC 376 [*LNIND 1958 SC 5*](*380*) :

1958 Crlj 701 ; *Ratilal v. Collector,*
(1967) Crlj 1576 (SC) .

17 *Talab* *v.* *Madhukar,*
AIR 1958 SC 376 [
LNIND 1958 SC 5](380) :
1958 Crlj 701 ; *Ratilal v. Collector,*
(1967) Crlj 1576 (SC) .

18 *Natabar* *v.* *State of Orissa,*
AIR 1975 SC 1465 1468 : (1975) 2 SCC 220 :
1975 Crlj 1212 ; *Ramdeo v. State of Bihar,*
(1978) Crlj 1674 (para 15) Pat.

19 *Rabindra* *v.* *State of Bihar,*
(1984) Crlj 1412 (para 3) FB (Pat); *Mathew v. State of Bihar,*
AIR 1984 SC 1854 [
LNIND 1984 SC 253]:
(1985) 2 SCC 102 :
1985 Crlj 357 ; *Mantoo v. State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91](paras 6, 8) :
(1980) 2 SCC 406 [
LNIND 1980 SC 91] :
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20 *Mathew* *v.* *State of Bihar,*
AIR 1984 SC 1854 [
LNIND 1984 SC 253]:
(1985) 2 SCC 102 :
1985 Crlj 357 ; *Mantoo v. State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91](paras 6, 8) :
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21 *Mathew* *v.* *State of Bihar,*
AIR 1984 SC 1854 [
LNIND 1984 SC 253]:
(1985) 2 SCC 102 :
1985 Crlj 357 ; *Mantoo v. State of Bihar,*
AIR 1980 SC 847 [
LNIND 1980 SC 91](paras 6, 8) :
(1980) 2 SCC 406 [
LNIND 1980 SC 91] :
1980 Crlj 546 .

22 Cf. *State of U.P.* *v.* *Lakshmi,*
AIR 1983 SC 439 [
LNIND 1983 SC 82](paras 1, 14, 16) :
(1983) 2 SCC 372 [
LNIND 1983 SC 82] :
1983 Crlj 839 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 168
Report of investigation by subordinate police officer.

When any subordinate police officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer-in-charge of the police station.

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1. Scope of s. 168. —

This section corresponds to *old* s. 168 without any change.

2. Effect of contravention of s. 168. —

Where the subordinate Police officer is duly empowered to make the investigation, if, instead of reporting the result of his investigation to the officer-in-charge of the Police Station, he sends a charge-sheet direct to the Magistrate, the Magistrate is not debarred from taking cognizance thereupon, because under s. 190(1)(b), the Magistrate is entitled to take cognizance upon receipt of any 'Police report'. [23]

3. Responsibility of the Officer-in-charge of Police station in the matter of investigation. —

The scheme of the Code shows that while it is permissible for an officer-in-charge of a Police station to depute some subordinate officer to conduct some of the steps in the process of investigation, the responsibility for every one of these steps is that of the person in charge of the Police station, the subordinate officer being bound to report to the latter [s. 168]. It is also clear that the final step in the investigation, *i.e.* , the formation of the opinion whether or not there is a case to place the accused on trial is that of the officer in charge of the Police station [s. 170]. There is no provision permitting a delegation of these duties to a subordinate officer, though s. 36 [*old* s. 551] entitles superior officer to supervise or

participate. [24]

4. Reports made by a Police officer, relating to investigation. —

Chapter XII of the Code provides for three kinds of reports by a Police officer at different stages of the investigation :

(a) An officer in charge of a Police station may himself investigate into a cognizable case [s. 156] without the order of a Magistrate, in which case after the completion of the investigation, he should make a report to a Magistrate empowered to take cognizance of the offence under s. 173 [s. 157(1)];

(b) If, instead of himself investigating into a cognizable offence, the officer in charge of a Police station having reason to assume the commission of such an offence, wants to bring it to the notice of a Magistrate empowered to take cognizance of such an offence, he shall make a preliminary report to-such Magistrate under s. 157, who may make an order for investigation into the offence either personally or make an order for investigation by a subordinate officer [s. 159];

(c) In any case, where a subordinate Police officer makes an investigation, he must report the result of his investigation to the officer-in-charge of the Police-station [s. 168]; and as already stated, s. 173 provides for the final report by the officer-in-charge of a Police station after the completion of the investigation to a Magistrate empowered to take cognizance of the offence whether the investigation has been made by the officer-in-charge himself or by any officer subordinate to him.

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23 *Shreeyest v. State of Bihar,* (1977) Crlj 1597 (para 6) Pat.

24 *Rishbud v. State of Delhi,* AIR 1955 SC 196 [ ]: *LNIND 1954 SC 177* [ ] : (1955) 1 SCR 1150 *LNIND 1954 SC 177* 1955 Crlj 526 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 169
Release of accused when evidence deficient.

If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.

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1. Scope of s. 169. —

This section reproduces *old* s. 169 without any change.

2. Final report by the Police .—

1. A report by the Police under s. 169 is called the 'final report', because it is to the effect that the Officer in charge of the Police station, upon investigation, finds no sufficient evidence or reasonable ground to send the accused for trial before the competent Magistrate. This is to be distinguished from a 'charge-sheet' which the Officer submits under s. 170 when he finds that there is sufficient evidence to put the accused on trial.

2. The opinion of the Police as to whether a final report or a charge-sheet is to be submitted, is to be formed on the material collected by investigation; it is a function of the Police and *not* the Magistrate. If the Magistrate disagrees with the opinion so formed by the Police, he may take suitable action (as will appear from *below*), but he cannot impinge upon the jurisdiction of the Police, by compelling them to change their opinion. [25]

3. Expression 'final report' not defined in the Code.—

Neither the expression 'final report' or 'charge sheet' are defined in the Code but it is understood in the Police Manuals of several States containing the Rules and Regulations to describe a report under *s. 169 Cr.P.C.* to be a final report and one under *s. 170 Cr.P.C.* to be the charge sheet. When there is no sufficiency of evidence justifying forwarding of a case to the Magistrate, it is termed invariably as final report or summary.[26]

4. Courses open to the Magistrate on receipt of a final report. —

1. On receipt of a final report from the Police that there is no case for trial, the Magistrate may or may not judicially agree with the opinion of the Police Officer; he may take one of the following courses: [27]

   (a) He may accept the final report and close the proceeding,—striking off the case.

   (b) If he disagrees, that is, if it appears to the Magistrate that the opinion formed by the Police officer is not based on a full and complete investigation, he may give directions to the Police, under s. 156(3), to make a *further investigation* . The Police after such further investigation, may submit a charge-sheet or again submit a final report, depending upon the further investigation made by them. [28]

If ultimately, the Magistrate forms the opinion that the facts set out in the final report (submitted initially or after re-investigation), constitute an offence, he can take cognizance of the offence under s. 190(1)(b), notwithstanding the contrary opinion of the Police expressed in the final report. [29] In this case, he need not depend upon any protest petition against the final report of the Police; [30] nor need he resort to s s. 200, 202 for taking cognizance. [31]

2. But in no case can the Magistrate call upon the Police to submit a *charge-sheet,* when they have sent a final report, under s. 169, that there is no case made out for sending an accused for trial. [32]

3. If, however, the complainant files a protest petition against a final report, there is nothing to bar the Magistrate from treating that protest petition as a petition of complaint and then proceed on its basis under Chaps. XVI-XVII, [33] provided the protest petition contains all the ingredients of a complaint, *e.g.,* disclosing the offence committed, names of the persons who had committed it. [34]

5. Release of accused.—

Release of accused on the ground of insufficiency of evidence is proper. Before such an order, no notice to the complainant is necessary before passing the order of release of the accused under *s. 169 Cr.P.C.* Such notice would be necessary only when the Magistrate though report was sent to him under

s. 173 Cr.P.C. does not deem it proper to take cognizance against the accused.[35]

6. High Court cannot direct I.O. to take back final report.—

When the Investigating Officer has submitted a final report before the Magistrate under *s. 169 Cr.P.C.* , the High Court in a writ petition filed by the *de facto* complainant cannot direct the I.O. to take back the final report and on consultation with the Public Prosecutor to submit charge sheet in the Court. Such an order being illegal and being interference with the exclusive jurisdiction of the I.O. either to file final report or charge sheet before the Magistrate cannot in any way be interfered with the High Court issuing such direction. So, the Supreme Court has set aside the order of the High Court. [36]

7. Protest Petition.—

1. Whenever a Final Report is submitted or whenever the informant has reasonable ground to believe that a Final Report will be submitted by the Police and he wishes to challenge that Report, the usual practice [37] is for him to file a protest petition (known as ' *Naraji* ' petition in some States) before the Magistrate. Such protest petition may be either anticipatory or it may be filed after the submission of the Final Report. [38]

2. A protest petition is regarded as a 'complaint' (see *ante*). In the result, on receipt of the protest petition, the Magistrate should examine the complainant and either issue process under s. 204, placing the accused on trial, or for adequate reasons, order a judicial inquiry under s. 202; or if sufficient ground is not made out, the protest petition may be dismissed under s. 203. [39]

8. 'On his executing a bond ... to appear before a Magistrate'.—

Since the Investigating Officer has formed the opinion that there is no reasonable ground or sufficient evidence to send the accused for trial, he is bound to release him. But, at the same time, as a condition of such release, he must take a bond from the accused to appear before the Magistrate empowered to take cognizance because, as has just been shown, such Magistrate to whom the report under s. 169, read with s. 173, is sent, has the power to disagree with the view taken by the Police under s. 169 and proceed against the accused. [40]

9. S s. 169 and 319(1).—

Under s. 319(1), the Court can proceed even against persons who have been dropped by the Police during investigation under s. 169. [41]

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25 *Abhinandan* *v.* *Dinesh,*
AIR 1968 SC 117
LNIND 1967 SC 144
1968 Crlj 97
[
](paras 18-20) :
:

(1967) 3 SCR 668 [LNIND 1967 SC 144].

26 *Minu Kumari v. State of Bihar,* AIR 2006 SC 1937 [LNIND 2006 SC 267]: (2006) 4 SCC 359 [LNIND 2006 SC 267] : (2006) 2 SCC 310 (Cri) : 2006 Crlj 2468 .

27 *Lakshman v. Sudhakar,* AIR 1969 Or 149 (para 3).

28 *Lakshman v. Sudhakar,* AIR 1969 Or 149 (para 3).

29 *Lakshman v. Sudhakar,* AIR 1969 Or 149 (para 3).

30 *Satyapal v. State of U.P.,* (1988) Crlj NOC 17(All) ; *Param Hans v. State,* (1988) Crlj 16 (NOC) (All) .

31 *Satyapal v. State of U.P.,* (1988) Crlj NOC 17(All) ; *Param Hans v. State,* (1988) Crlj 16 (NOC) (All) .

32 *Abhinandan v. Dinesh,* AIR 1968 SC 117 [LNIND 1967 SC 144](paras 18-20) : 1968 Crlj 97 : (1967) 3 SCR 668 [LNIND 1967 SC 144].

33 *Lakshman v. Sudhakar,* AIR 1969 Or 149 (para 3).

34 *Satyapal v. State of U.P.,* (1988) Crlj NOC 17(All) ; *Param Hans v. State,* (1988) Crlj 16 (NOC) (All) .

35 *Abdul Razak v. State of Maharashtra,* 2008 Crlj 133 Bom .

36 *R. Sarala v. T.S. Velu,* AIR 2000 SC 1731 [LNIND 2000 SC 657]: (2000) 4 SCC 459 : 2000 SCC (Cri) 823 [LNIND 2000 SC 657] : 2000 Crlj 2453 .

37 There is no express provision authorising the filing of such petition but it is entertained as a matter of practice, when the Police report under s. 173 or the report of inquiring under s. 202 is adverse to the complainant [

Akshoy *v.* *Jogesh,*
AIR 1959 Cal 76 78].

38 *Mahabir* *v.* *State,*
AIR 1958 Or 11 13 .

39 *Mahabir* *v.* *State,*
AIR 1958 Or 11 13 .

40 *Lakshman* *v.* *Sudhakar,*
AIR 1969 Or 149 (para 3).

41 *Joginder* *v.* *State* *of* *Punjab,*
AIR 1979 SC 400 [
LNIND 1978 SC 335](para 9) :
(1979) 3 SCC 90 [
LNIND 1978 SC 335] :
1979 Crlj 329 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 170
Cases to be sent to Magistrate when evidence is sufficient.

(1) If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer-in-charge of a police station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any), and so many of the persons who appear to such officer to be acquainted with the facts and circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the Chief Judicial Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

1. Scope of s. 170.—

This section corresponds to *old* s. 170, with changes indicated by italics.

2. S s. 170 and 173.—

These two sections impose two different duties upon the officer-in-charge of a Police station, to be carried out at end of an investigation held under Chap. XII. They are to be read together and contemplate a simultaneous act ion. [42]

2. *Firstly,* if the Police officer finds, on the materials collected by investigation, that there is sufficient ground or reasonable grounds for trying the accused of an offence, he shall send the accused to the Magistrate who has jurisdiction to take cognizance of such offence, together with any weapon or other articles connected with such offence. This act is called the ' *challan* ' of the accused to the Magistrate for trial [s. 170].

Secondly, after having challaned the accused as above, the Police-Officer is to submit to that Magistrate (who is empowered to take cognizance), a report called the 'charge-sheet', containing the particulars and accompanied by the documents specified in s. 173(2), (5). It is on the basis of this report that a Magistrate is entitled to take cognizance under s. 190(1)(b). but, under the new sub-sec. (8) to s. 173, the functions of the investigating officer in this behalf may not be over; if he subsequently receives any further evidence, he may send a supplementary report to the Magistrate [See, further, under s. 173,*post*].

3. Exclusive jurisdiction of the officer-in-charge of police station to decide whether to submit charge sheet.—

The question whether the accused or the case is to be sent to the Magistrate for trial is in the sole discretion of the officer-in-charge of the police station. The opinion as to whether or not, there is a case to place the accused on trial has to be of the said officer and the function cannot be delegated and cannot be performed by some other authority. *Section 36 Cr.P.C.* only entitles the superior officers to supervise or participate in investigation. Even a competent Magistrate cannot compel the officer-in-charge of the Police Station concerned to from a particular opinion. Lastly there is no stage during which the officer-in-charge of police station is legally obliged to take Public Prosecutors or any other authority's opinion other than that of a superior officer under *s. 36 Cr.P.C.* The Public Prosecutor is not involved in the investigation. It is not the scheme of the Code for supporting any combined operation between the I.O. and the Public Prosecutor.[43]

4. Police not barred by the contrary opinion of the police of the foreign country in filing charge sheet.—

The illegally exported consignment of narcotic drugs and psychotropic substances from India had been seized abroad. The investigating officer in India had sufficient material to submit charge sheet under the *NDPS Act* against the accused appellant. However, the information from the police of the foreign country was to the effect that till then no material has been collected to implicate the appellant with the said consignment. This opinion of the foreign police is not binding on the I.O. and he can submit charge sheet against him under

s. 170 Cr.P.C. [44]

Special Law

5. Customs Act .—

In an investigation under the *Customs Act*, by a Customs Officer, the provisions of s. 169-170 of the *CrPC* have no application.[45]

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[42] *Ajit Singh v. State,* AIR 1970 Del 154 [LNIND 1970 DEL 19](para 14) FB.

[43] *M.C. Mehra (Taj Corridor Scam v. Union of India,* AIR 2007 SC 1087 [LNIND 2006 SC 1046]: (2007) 1 SCC 110 [LNIND 2006 SC 1046] : (2007) 1 SCC 264 (Cri) : (2007) 1 Crimes 375 [LNIND 2006 SC 1046].

[44] *Umar Abdul Sakoor Sorathia v. Intelligence Officer,* AIR 1999 SC 2562 [LNIND 1999 SC 657]: (2000) 1 SCC 138 [LNIND 1999 SC 657] : 1999 Crlj 3972 .

[45] *Choraria v. State of Maharashtra,* AIR 1968 SC 938 [LNIND 1967 SC 372](para 5) : (1968) 2 SCR 624 [LNIND 1967 SC 372] : 1968 Crlj 1134 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 171
Complainant and witnesses not to be required to accompany police officer and not to be subjected to restraint.

No complainant or witness on his way to any Court shall be required to accompany a police officer, or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Provided **that, if any complainant or witness refuses to attend or to execute a bond as directed in Section 170, the officer-in-charge of the police station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.**

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1. Scope of s. 171.—

This section reproduces s. 171 of the Code of 1898, with verbal change.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 172
Diary of proceedings in investigation.

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

46

[(1A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.

(1B) The diary referred to in sub-section (1) shall be a volume and duly paginated.]

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Sections 161 or Sections 145, as the case may be, of the *Indian Evidence Act, 1872* (1 of 1872), shall apply.

1. Legislative changes.—

Sub-sections (1A) and (113) have been incorporated in s. 172 by the

Cr.P.C. (Amendment) Act, 2008 (5 of 2009) which have come into force with effect from 31-12-2009.

Sub-section (1A) makes it mandatory for the investigating officer to insert all the statements of the witnesses recorded during the investigation in the case diary.

Sub-section (113), on the other hand states that the case diary shall be a bound volume and shall be duly paginated.

These amendments have been incorporated to put a sanctity to the case diary maintained by the Investigating Officer during investigation of a cognizable case and to prevent interpolation in a case diary subsequently.

2. Scope of s. 172.—

This section reproduces *old* s. 172 with this change that *old* sub-sec. (2) has been divided into sub-secs. (2) and (3).

3. Analysis of s. 172.—

1. It embodies a complete and integrated scheme relating to the matter of maintaining a diary. [47]
2. Clause (1) imposes the obligation to do so and provides for the contents thereof.
3. The Court is empowered to call for such diaries to aid it in inquiry or trial subject to the rider that it cannot be used as evidence thereat.
4. Merely because the Court calls for the diary, the accused (or his agent) cannot claim the right to peruse it.
5. The accused can peruse that particular part of the diary in the context of *Sections 161 of the Indian Evidence Act* or s. 145 thereof in case—

   (a) if it is used by the Police-officer concerned to refresh his memory; or

   (b) if the Court uses it for contradicting the Police official concerned. [48]

4. Sub-sec. (1) : Duty of investigating officer to maintain Diary.—

1. This sub-section provides that every Police Officer making an investigation shall have the *duty* to maintain a day-to-day Diary (commonly known as the 'case diary') with the particulars specified in the sub-section.

2. The entries in this case diary should be made with promptness, in sufficient detail, mentioning all sufficient facts, in careful chronological order and with complete objectivity. [49] A haphazard maintenance would defeat the very purpose for which it is required to be maintained. [50]

3. That purpose behind s. 172 enjoining the investigating officer to maintain a case diary [sub-sec. (1)] and empowering a Criminal Court to call for that diary [sub-sec. (2)], is that it is both for the vindication of the law as well as for the protection of those charged with an offence, it is necessary for the Magistrate before whom the case is for inquiry or trial should have the means of ascertaining what was the information which was obtained from day-to-day by the Police Officer who was investigating the case and what were the lines upon which such Police Officer act ed. [51]

4. Sub-sections (1A) and (1B) have been inserted by the *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2008. Sub-section (1A) casts a duty of the investigating officer to record all the statements of the witnesses in the case diary. Sub-section (1B) makes obligatory for the investigating officer to keep the case diary in a bound volume and duly paginated.

These amendments are salutary to check interpolation in the case diary. In a murder case, the attention of the Supreme Court was drawn to the fact that the statements of PW-6 and other witnesses were available on record when the application for bail was considered by the Trial Court. But subsequently the statements of those witnesses vanished from the case diary. It showed malpractices of the police during the investigation. [52]

In view of the above amendments, such malpractices of the police during investigation, mainly with the purpose of helping the accused would be diminished.

5. General and Special Diary.—

1. Both *Sections 44 of the Police Act, 1861* , and Sections 172 of the Code enjoin a Police Officer to maintain a Diary. While the diary under the *Police Act* is called a 'general diary because of its contents, the Diary required to be maintained under the present section of the Code is known as a 'special diary', or 'case diary' for the same reason.

2. While the *Police Act* imposes the duty upon an officer in charge of a Police station, under the present section the duty is imposed on *every* officer making an investigation under Chap. XIII of the Code . [53]

3. In the General Diary maintained under the *Police Act* , the officer-in-charge of a Police station is required to record—

(i) all complaints and charges preferred; (ii) the names of the complainants; (iii) the names of all persons arrested; (iv) the offences charged against them; (v) the weapons or properties taken from their possession or otherwise; (vi) the names of the witnesses who shall have been examined.

4. In the special diary under s. 172, on the other hand the investigating officer has to record [sub-sec. (1)]—

(i) his proceedings in the investigation day by day;

(ii) the time at which the information reached him;

(iii) a statement of the circumstances ascertained through his investigation.

(iv) the time at which he began and closed his investigation;

5. The general Diary is admissible in evidence under *s. 35 of the Evidence Act* . [54] But if there is any entry or, matter recorded in it outside the requirements of Sections 44 of the Police Act such entry cannot be held to be made in the discharge of official duty, *s. 35 of the Evidence Act* cannot be availed of and it will not be admissible. [55]

6. Diary under s. 172 and memorandum under s. 161(1).—

1. Under s. 161(3), the investigating officer may reduce into writing any statement made to him by witnesses examined by him in course of the investigation.

2. Section 172 does not require the investigating officer to record in the Diary the statement of any witness examined by him. Hence, if he does record any such statement in his Case Diary, nothing in s. 172 will be applicable to such memorandum, but s. 162 (*ante*) would be attracted to such memorandum of statements of witnesses, so that it may be used, under the Proviso to s. 162(1), for contradicting a witness who may be called at the trial to prove such statement. [56]

7. Diary under s. 172 and s. 162.—

1. It has already been stated that s. 172 is not attracted to the statement of any witness if recorded by the investigating officer in his Diary, because s. 172 does not require him to record it in his Diary. If it is, in fact, recorded in the Case Diary, such statement cannot be admissible in evidence except for the purpose of contradiction in terms of the Proviso to s. 162(1). [57]

2. The statement recorded under s. 161(3) and the diary mentioned in s. 172(1) are both covered by s. 162. The prohibition imposed by s. 162 cannot be circumvented by resort to s. 172(2) in order to use the statements in the Diary as evidence. [58]

3. But if the statement so recorded relates to an offence other than the offence relating to the trial before the Court where the statement is sought to be used, the bar under s. 162(1) will not operate, so that it

may be admitted in the same manner and for the same purpose as any statement made to any other person. [59]

8. S s. 172 and 167.—

Since s. 167(1) (*ante*) requires that 'a copy of the entries in the diary...' is to be submitted to the Magistrate to enable him to decide whether the accused should be kept in further detention for purposes of investigation, it is essential that the Case Diary should give as complete information as possible. [60]

9. Effect of contravention of s. 172(1).—

1. A contravention of s. 172 occasioned by the failure of the Police officer to keep a diary as required by that section lays the evidence of the Police officer to adverse criticism and may diminish its value; [61] but it does not have the effect of making that evidence inadmissible. [62]

2. If the diary is not written day-to-day, it might expose the investigation to the suspicion as to its *bona fides* and the evidence collected during such investigation. [63] The proper maintenance of the diary under s 172 is intended to safeguard not only the accused, but the investigating agency itself from unjustified attacks. [64]

10. Court not obliged to scrutinize case diary.—

The Trial Court at the stage of evidence was having independent witnesses corroborated by medical evidence. He, at the instance of the accused is not obliged to scrutinize the case diary for any tell-tale signs in favour of the defence. [65]

11. Failure to maintain case diary.—

Failure on the part of the I.O. not to observe *s. 172 Cr.P.C.* read with Rule 164 of Bihar Police manual is serious lapse and resulting in diminishing the value and credibility of investigation. But whether the trial would be vitiated or not would depend upon the question whether the accused was prejudiced or not. Even when the case diary was not properly maintained nor was the earth seized from the place of occurrence sent for chemical examination it would not be sufficient to throw away prosecution case proved by independent and trustworthy witnesses. So, when the Trial Court held the accused guilty only such lapses on the part of the Investigating Officer in not maintaining the case diary properly would not be sufficient to interfere with the conviction against the accused.[66]

So, even assuming that there was failure on the part of the Investigating Officer to maintain the case diary in accordance with the provisions of s. 172, the same cannot have the effect of making evidence led by the investigating officer inadmissible and what inference shall be drawn against the Investigating Officer would depend upon the facts and circumstances of the case. [67]

But the Investigating Officer cannot make late entries in the diary and the registers by way of interpolation. The entries should be made at its appropriate place under the correct date on which it was act ually made. But any

delay may be explainable but not the interpolations made in case diary or register. [68]

Interpolation in the case diary will be checked considerably when under sub-section (1A) of s. 172 and sub-section (1B) incorporated in the section by the *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009. In view of sub-section (1A) it is held that mandatory duty of the I.O. that all the statements of the witness to be recorded in the case diary and sub-section (1B) also mandates that case diary shall be a bound volume and paginated.

12. Sub-sec. (2) : Evidentiary use of the Police Diary under this section.—

1. The only proper use a Court can make of these diaries is the one allowed by the section *i.e.* , during the trial he can get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused, [69] , [70] or to contradict the Police-officer, under s. 161 or *s. 145 of the Evidence Act* . [71]

2. But the Diary cannot be taken as substantive evidence of any date, fact or statement contained therein. [72]

3. The Diary may be given to the investigating Police-officer for refreshing his memory but not to any other witness. [73]

4. But the Court cannot make use of the Police Diary at all in his judgment. [74] It is an improper use of the Diary for a judge to seek confirmation of his opinion on the question of appreciation of evidence from statements contained in the Diary. [75]

5. The High Court cannot use the case diary to overcome some contradiction pointed out by the defence. So, the acceptance of the evidence of the witness by the High Court by verifying their statements of the witness recorded under s. 116(3) from the case diary is illegal. [76]

13. Case diary not admissible in evidence.—

But the case diary is not admissible in evidence. The Investigating Officer can us it where he has been examined as a witness to refresh his memory therefrom. But when the Investigating Officer has not been examined as a witness, the whole case diary cannot be exhibited at the trial. [77]

So, the entries in the case diary are neither substantive nor corroborative evidence and they cannot be used by or against any other witnesses than the Police Officer who maintained the diary and can only be used to that limited extent to confront the Investigating Officer with the case diary. [78]

Entries in case diary cannot be used as evidence against the accused. They cannot also be used to explain any contradiction in the evidence of a prosecution witness which the defence has not brought for using any portion of the statement of the prosecution witness recorded under *s. 161 Cr.P.C.* [79]

Reliance on a document neither formed part of the case diary nor proved nor the attention of the I.O. was drawn thereto is impermissible. [80]

14. Summoning a case diary not connected with the investigation of the case.—

s. 172 Cr.P.C. cannot be used for the purpose of summoning the case diary which does not pertain to the investigation of the case which is being tried. So, the Court, by the strength of *s. 172 Cr.P.C.* cannot call for the case diary of a different case for the purpose of assisting the accused to have a look at the previous statement of a witness given in another case for using it for the benefit of the defence.[81]

15. 'To aid it in such inquiry or trial'.—

1. The meaning of this expression was explained by the Allahabad High Court in *Mannu's case,* [82] which has been approved by the Privy Council [83] as well as the Supreme Court [84] as noted under the preceding caption.
2. Briefly speaking—

   A. The Court may look into the Diary to ascertain the time at which the investigation was begun and closed on each day, the places visited by the Officer, and the circumstances ascertained through investigation, [85] or how a particular matter was investigated. After ascertaining such things the Court must await the evidence of the particular Officer or may even summon his in evidence and clear the point in doubt by putting necessary questions to him. [86]

   B. On the other hand—

      1. The Court cannot take the entries to be evidence of any date, fact or statement therein, contained; [87] or for the purpose of making a comparison with the testimonies of witnesses or judicial dying declarations or judicial confessions. [88]

      2. The Court cannot refer to any statement or finding in the Police Diary to support his judgment as if it were substantive or corroborative evidence. [89] If the Court discovers any material in the Diary which may be important for a just decision of the case, it is open for the Court to call for necessary material evidence or document and to have the same legally proved. [90]

      3. A Criminal Court can, however, send for police diaries of a case under trial in such Court but to aid it in such enquiry or trial. But case diary cannot be utilized as evidence to corroborate the statement of the prosecution witness. However, in the instant case, the I.O. had migrated to Pakistan and had died there. Hence, he could not be examined by the Trial Court. In such circumstances the Trial Court looked into the case diary as an additional factor to test the veracity of the witnesses since the witnesses were confronted with their previous statements the act of the Trial Court was not prejudicial to the interest of the accused in the facts of the case. [91]

16. Use of the Case Diary in a proceeding under Art. 226 of the Constitution or civil proceedings.—

The prohibition in *s. 172(2), Crpc* against use of the Case Diary as evidence applies only to an inquiry or trial for an offence before a Criminal Court. There is no such bar to use the Diary as evidence in a civil proceeding or a writ proceeding under *Art. 32* or *226* of the *Constitution* .[92]

17. Sub-sec. (3) : Rights of accused in regard to the Diary.—

1. The accused is not as a rule entitled to call for or inspect the Case Diary maintained by the Police, even if the Court refers to it as an 'aid' at the inquiry or trial.

   The reason behind this embargo upon the use of the Case Diary by the accused is that the Case Diary contains not only the statements of witnesses recorder under s. 161 and the site plan or other documents prepared by the Investigating Officer but also reports observations of such Officer or his superiors, which are of a confidential nature. Further, their opinion is inadmissible in evidence. [93] The accused has no right to insist upon the Police witness referring to his Diary in order to elicit information which is privileged. [94]

2. But the above rule is subject to two exception cases as provided in sub-sec. (3), *viz.* —

   (a) Where the Court allows the maker of the Diary to refresh his memory; or (b) where the Court uses the Diary for contradicting the maker of the Diary, when examined as a witness.

Sub-section (3) says that in either case, the provisions of *s. 145* or *161* of the *Evidence Act* (as may be applicable) shall be attracted. The net result is :

(a) If the Police witness is allowed to refresh his memory with reference to the Diary made by him, the Diary must be produced and show to the accused so that he may, if he pleases, cross-examine the witness thereupon (*s. 161, Evidence Act*).

   It has been held, what the accused would in such a case be entitled to see is not the entire Diary but only that particular entry or portion which is used by the Police-officer for refreshing his memory

and any other portion as is, in the opinion of the Court, necessary for a full understanding of the particular entry which is used by the Investigating Officer. [95]

(b) If the Court uses the Diary for contradicting the Police witness, who made the Diary, the Court must call his attention to such parts of the Diary as are to be used for the purpose of contradicting him [s. 145].

Even then no entry in the Diary can be use as evidence to show that what is stated in the entry was true or correctly represents what was said or done. [96]

Nor can the Diary be used for contradicting any witness *other than* the Police-officer who made the Diary. [97]

3. The embargo imposed on the accused by the opening words of this sub-section is only partial because [98] —

(a) If a part of the Diary has been used by the Police-Officer to refresh his memory or the Court uses it for the purpose of contradicting such Police-Officer, the provisions of s *s. 161* and *145* of the *Evidence Act* will be applicable.

(b) So for as the *other* parts are concerned, the accused need not necessarily have a right of access to them because in a criminal trial or inquiry, whatever is sought to be proved against the accused, will have to be proved by evidence other than the Diary itself.

4. The constitutionality of sub-sec. (3) has been upheld by the Supreme Court on the following reasoning: [1]

(a) The embargo imposed by the accused cannot be said to be arbitrary or unreasonable because it is only partial.

(b) Under sub-sec. (2), the Court itself has unfettered power to examine the entries in the Diary. This is in important safeguard for the accused; for, no Court will deny itself the power to make use of the entries in the Diary to the advantage of the accused by contradicting the Police Officer with reference to the contents of the Diary. The Accused can also utilise this power of the Court : if the accused or his counsel has any doubt about the veracity of the statements made by the Investigating Officer, he may always request the Court to look into the Diary and verify the facts. [2]

18. Limited use by the accused of the case diary.—

The accused gets the right to cross examine the Investigating Officer with reference to the case diary when the

same is used by the Police Officer to refresh his memory with reference to the case diary or when the Court uses it for the purpose of contradicting the Investigating Officer. Such right of the accused is subject to the limitation of s *s. 145* and *161* of the *Evidence Act* . But the Police Officer cannot be compelled to look into the case diary for refreshing his memory. So, in case the Court does not use the same for the purpose of contradicting the police officer or if the police officer does not use it for refreshing his memory, the question of the accused getting any right to use it even to that limited extent does not arise. The entries in the case diary are neither substantive nor corroborative evidence and they cannot be used against any other witness than the Investigating Officer and it is only when the I.O. refreshes the memory from the case diary. So, the case diary only be used by the accused to the above limited extent. [3]

Under s. 172(3) neither the accused, nor his agents are entitled to call for or use the case diary. If the entries case diary is made available to the accused, it may cause serious prejudice to others and even of the safety and security of those who have given statement to the police. But in appropriate cases, the Court can call for the case diary but not to use it as evidence but only to use it as an aid to find out anything that happened during the investigation of the case. [4]

The accused is entitled to have all the documents which accompanied the police report under s. 173(3) *Cr.P.C.* , but the case diary can only be used by the Court subject to the restriction mentioned in s. 172(2) and (3) *Cr.P.C.* but the accused can have not claim on it.[5]

SPECIAL LAW

19. Indian Police Act, 1861.—

The Supreme Court has assumed that the report of the D.I.G. (C.I.D.) under *Sections 3 of the Police Act, 1861* is a ‘case diary’ within the meaning of *s. 172, Crpc* .[6]

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46 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 15 (w.e.f. 31-12-2009).

47 *Mukund v. Union of India,* (1989) Supp. (1) SCC 622 (paras 2, 4) : AIR 1989 SC 144 [*LNIND 1988 SC 517*] : 1989 Crlj 872 .

48 *Mukund v. Union of India,* (1989) Supp. (1) SCC 622 (paras 2, 4) : AIR 1989 SC 144 [

LNIND 1988 SC 517]:
1989 Crlj 872 .

49 *Bhagwant* *v.* *Commr.,*
AIR 1983 SC 826 [
LNIND 1983 SC 146](para 17) :
(1983) 3 SCC 344 [
LNIND 1983 SC 146] :
1983 Crlj 1081 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 173
Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

7

[(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station.]

(2)

(i) As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under Section 170.

8 [(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under Sections 376, 376A, 376B, 376C,[9] [376D or *section 376E of the Indian Penal Code (45 of 1860)*.]]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer-in-charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

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1. Legislative changes.—

The *Criminal Procedure Code* (Amendment) Act, 2008 (5 of 2009) has made the following amendments to s. 173. After sub-section (1), a new sub-section (1A) has been inserted by specifically providing that investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the Officer-in-Charge of Police Station.

After Clause (g) in sub-section (2), Clause (h) has been inserted by the same Amendment Act of 2008 that the form prescribed in which charge sheet shall be submitted shall contain whether the report of the medical examination of the woman has been attached, when the investigation relates to an offence under Sections 376, 376A, 376B, 376C or 376D of the *Indian Penal Code* .

These amendments have come into force with effect from 31-12-2009. The *Criminal Law (Amendment) Act, 2013* has further amended this section to enlarge the scope of the sexual acts enumerated in sub-clause (h) of clause (i) of sub- section 2 of s. 173.

2. Scope of s. 173.—

This section corresponds to *old* s. 173, with the following important changes, which will be explained in their proper places:

(a) Sub-sec. (1) has been divided into sub-secs. (2)-(3), with changes.

(b) Sub-sec. (2)-(3) have become sub-secs. (3)-(4).

(c) Sub-sec. (4) has been substituted as sub-sec. (4), with substantive changes.

(d) Sub-sec. (7)-(8) have been added.

3. Sub-sec. (1).—

1. This sub-section gives a general mandate to the Police to complete the investigation of each case without unnecessary delay.

2. In this context, reference should be made to the *new* sub-sec. (5)-(6) of s. 167 (*ante,* which provide that if the investigation of a summons-case is not completed within 6 months, the Magistrate may (subject to revision by the Sessions Judge) stop the investigation.

3. Even in other cases, inordinate delay in submitting the charge-sheet under s. 173 may lead to a charge that the investigation was carried on with an ulterior motive, [10] though, by itself, it may not suffice to quash the proceedings in Court instituted on such Police report. [11]

4. Scope of sub-sec. (2)(i) : Police Report, nature of.—

1. As soon as the Police investigation under Chap. XII of the Code is complete, the Police officer in charge of the Police station should forward to the Magistrate a report (popularly called a 'challan') in the prescribed form setting forth—(a) the names of the parties; (b) the nature of the information; (c) the names of the person who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed, if so, by whom; (e) whether the accused has been arrested; (f) whether the accused, has after arrest, been released on bail; and (g) whether he has been forwarded to the Magistrate under s. 170.

2. Any report submitted by the officer in charge may be treated by the Magistrate as a Police report for taking cognizance of the office under s. 190(1)(b), if it gives all the foregoing particulars,—which can be furnished only if the investigation has been completed. [12]

3. Once these particulars had been given in a Police report, the Magistrate can lawfully take cognizance on the basis of such report (even though the report described itself as an 'incomplete challan' and the names of the some formal witnesses were submitted thereafter); [13] or the report of the Forensic Since Laboratory is submitted later. [14]

4. If the Police report is filed in time with certain omissions, which are of trivial in nature or minor particulars or inadvertent omissions, it cannot be side that the Police report is not filed in accordance with s. 173(2). What has to be looked into at this stage by the Magistrate is only to see whether any offence was disclosed in the Police report and whether the names of the accused, witnesses *etc.* , are furnished. If the names of the accused and the nature of the offence is not disclosed, or cannot be culled out on a reading of the Police report, then perhaps it may be a case of non-compliance of the provisions of s. 173(2) of the Code. But where it is fairly made clear about the names of the accused, the offence involved in the case together with similar other necessary details, even if there are some omissions in some minor particulars like the age of the accused, father's name *etc.* , it cannot be said that there is failure of compliance with s. 173(2). [15]

5. As soon as the investigation is completed the officer-in-charge of police station shall forward to the Magistrate a report in prescribed form stating the particulars as specified in *s. 173(2) (i) Cr.P.C.* He shall have to forward all the documents or relevant extracts thereof on which the prosecution wanted to rely other than those already sent to the Magistrate during investigation as well as the statement of witnesses recorded under *s. 161 Cr.P.C.* on which the prosecution wants to rely during trial.[16]

6. A charge as a final report within the meaning of s. 173(2) *Cr.P.C.* filed in order to enable the Court concerned to apply its mind as to whether cognizance of the offence thereon should be taken or not. It is ordinarily filed in prescribed form. One of the requirements for submission of police report is whether any offence appears to have been committed, if so, by whom.[17]

7. In some cases, the accused not having been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving a decision that the absconding accused is also a person by whom the offence appears to have been committed. But if the investigating officer finds sufficient evidence even against an absconding accused, the law does not require that filing of the charge sheet must await the arrest of the accused. [18]

8. While investigating into bailable offence, the Investigating Officer has the right to submit charge sheet under s. 307 I.P.C., non-bailable offence. The accused cannot challenge such inclusion of a non-bailable offence to quash the investigation. It is for the Magistrate to accept the final report submitted by the Investigating Officer or not but include a non-bailable offence by I.O. during investigation and to submit charge sheet thereon cannot be challenged. [19]

9. It is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the view expressed by the I.O. in the report and decide whether an offence has been committed or not. [20]

5. Completion of the investigation : S s. 167(5) 173(2).—

1. Sub-section (1) of s. 173 enjoins that the investigation must be completed without 'unreasonable delay' while no definite time limit is imposed by this section for completion of the investigation, that is indirectly furnished by Cl.(5) of s. 167 (see *ante*), that in a summons-case the investigation, must be completed within a period of 6 months unless the Magistrate extends that time for 'special reasons'.

2. It is, accordingly, necessary to ascertain when the investigation of a case may be said to have been completed. That test is offered by sub-sec. (2) of s. 173, namely, that the process of investigation is completed by the submission of 'Police report' containing the particulars required by s. 173(2). If this report has been submitted by the Police, the investigation must be taken to have been completed, [21] because the particulars required by the various clauses of sub-sec. (2) cannot be furnished until the investigation has been complete. [22]

3. A Police report is complete if it contains the particulars specified in s. 173(2). If, inadvertently, it is not accompanied by the statements recorded under s. 161 or the reports of experts, it cannot be said to be incomplete so as to unable the accused from being released under s. 167(2), Proviso, on the expiry of 60 days. [23]

4. Similarly, merely because the Police-Officer submits a revised report to correct some *errors* in the original report [which had otherwise given the full particulars as required by Cl. (2) of s. 173], or submits a supplementary report as authorised by sub-sec. (8), it cannot be said that the original report under s. 173(2) was incomplete. [24]

5. A Full Bench of the Patna High Court [25] has held that where there are several accused persons, it is possible that the investigation is totally complete against one of the accused while it is not yet complete against an absconding or unnamed or untraced person. In such a situation it is permissible for the Police to submit a Police report as regards the first accused, keeping the investigation against the other accused. In such a case, the Court has held [26] , the report against the first accused would be treated as the final report under s. 173(2) as well as the Proviso to s. 167 (2), so far as the first accused is concerned.

   The foregoing view [27] is open to criticism as follows :

   (a) Under s. 190 (1), a Magistrate takes cognizance of an 'offence', and under s. 173(2), the Police Officer has to send the investigation report to a Magistrate 'empowered to take cognizance of the offence' on the basis of such Police report, after investigation into the offence is completed. When several persons are accused of the same offence, it cannot be said that the completion of investigation into the offence can be split up only because the accused persons are more than one.

   (b) The Supreme Court decision [28] upon which the Panta Full Bench [29] relies for the proposition that there may be more than one reports under sub-sec. (1) of s. 173 overlooks the fact that the Supreme Court made it clear that the power to make further investigation and send a further report could be exercised only when 'fresh facts'; fresh information' came to light; in other words, when sub-sec. (8) would be applicable. The Supreme Court did not say that more than one reports could be submitted under sub-sec. (1) in regard to the same information or the same facts regarding to the same offence.

   (c) Similarly, when several offences are involved in a 'case' for investigation, the investigation would be complete only when investigation into all the offences committed during the course of the same

transaction is over; and the Police cannot submit separate reports under s. 173(2) in respect of each of the offence. [30]

(d) Any report submitted before investigation of the entire case is completed, is not a 'police report' within the meaning of s. 173 (2). [31]

6. Investigation if complete or not.—

1. The charge sheet in order to be complete must contain the names of all accused, if known, and their addresses, if known, and when the I.O. could not effect the arrest, the fact in spite of best efforts, he could not arrest that accused. [32]

2. Where it is fairly made clear in the charge sheet about the name of the accused, the offence involved in the case together with similar other details, even if there are some omissions in minor particulars, such as, age of the accused, the father's name etc., it cannot be said that the charge sheet is not complete. [33]

3. A charge sheet is a final report of the police officer under s. 173(2) *Cr.P.C.* It is complete when all the documents have accompanied the charge sheet and the statement of the witnesses recorded under *s. 161 Cr.P.C.* [34]

4. However, the word 'shall' in s. 173(5) *Cr.P.C.* requiring the police officer to forward all the documents is not mandatory but directory, for additional evidence gathered during further investigation can be produced by the police officer even after the submission of the charge sheet.[35]

5. But filing of the charge sheet is not complete unless it accompanied all papers contemplated by s. 173(5) *Cr.P.C.* is taken on record for the Magistrate to take cognizance of the case.[36]

6. Though ordinarily all documents shall accompany the charge sheet but even if all the documents have not been filed as they were not in possession of C.B.I. at the time of filing of the charge sheet, the charge sheet cannot be held to be incomplete. The accused has also not pleaded that he has been prejudiced by such non-filing of the documents. So, the validity of the charge sheet cannot be questioned. [37]

7. 'Officer in charge of police station'. —

1. The Code vests the primary responsibility of every investigation in the officer in charge of the Police-station, and he is required by the present provision to submit the report to the Magistrate upon which the latter can take cognizance under s. 190(1)(b). Even when a subordinate Police-officer holds the investigation, s. 168 requires him to submit his report to the officer in charge of his Police station, and not to the Magistrate direct. On receipt of the report of the subordinate Police officer, it is the officer in charge who would take all the steps required by sub-secs. (2), (5)-(8) of s. 173. [38]

2. The question arises as to what would happen if such subordinate investigating officer submits the report under s. 173 (2) direct to the Magistrate, instead of the officer in charge. the view has been taken that this is an 'irregularity' to be cured by s. 465 [*old* s. 537]. Such irregularity relating to investigation would not affect the legality of the materials collected,

and the Magistrate is entitled to take cognizance under s. 190(1)(b) upon such Police report, and would not accordingly vitiate the conviction. [39]

3. But the expression 'officer-in-charge' of the Police station, in the present context, would include a superior officer who has jurisdiction over a larger local area, including that Police station. [40]

8. Cls. (1)(g).—

The particulars required by these clauses make it clear that the report under s. 173(2) shall comprise cases both under s. 169 and s. 170,*i.e.* , where the Investigating Officer as a result of the investigation, comes to the conclusion that—(a) there is no sufficient evidence for forwarding the accused foe trial; or (b) that there is sufficient evidence or reasonable ground for trial of the accused.

9. Courses open to the Magistrate when he receives a 'final report' under s. 169/173 (2). —

1. This topic has already been discussed under s. 169,*ante* . In short, the Magistrate [41] can—

   (i) agree with the report and ask the prosecution to drop the proceedings; and make an order for discharge of the bond, under s. 174(4); [42]

   (ii) ignore the report and, after evaluating the evidence collected by the investigating agency, take cognizance of the case on suspicion that an offence has been committed under s. 190(1)(c), [43] without following the procedure laid down in s s. 200, 202; [44]

   (iii) disagree with the report, and either direct the Police to make further investigation under s. 156(3), or hold an inquiry himself, or get an inquiry made by a subordinate Magistrate, under s. 159;

   (iv) even after refusing to take cognizance on the Police Report, it is open the Magistrate to take cognizance on the complaint; [45]

   (v) treat the protest petition, if any, field by the aggrieved party as a complaint, and proceed under s. 202. [46]

2. The Magistrate is not bound by the conclusions drawn by the Police. [47] He may decide to issue process even if the Police recommend that there is no sufficient ground to proceed. Conversely, even where the Police has submitted a charge-sheet for proceeding against the accused, the Magistrate may, after considering the facts disclosed in the Police report along with the statements of the complainant and his witnesses (on record), decide that there is no sufficient ground for proceeding further, and may drop the proceeding.

3. The purpose of the submission of the Police report with the details as mentioned above, is to enable the Magistrate to satisfy himself, whether on the basis of the report and the material filed along with the Police report, a case for taking cognizance has been made out or not. After applying his mind to the Police report and the material submitted therewith, if the Magistrate is satisfied that cognizance of the offence is required to be taken, he shall proceed further in accordance with the provisions of the *Code of Criminal Procedure* . Section 190(1) (b), *CrPC* provides that a Magistrate has the power to take cognizance upon a police report of such facts as are provided therein on being satisfied that the case is a fit one for taking cognizance of the offence. Therefore, if the Police report and the material filed therewith is sufficient to satisfy the Magistrate that he should take cognizance, his power is not fettered by the *label* which the investigating agency chooses to give to the report submitted by it under *s. 173(3),Cr.P.C.* Merely, because the prosecution had filed

an application, after submission of the charge-sheet,*seeking permission* to file 'supplementary charge-sheet', it could not affect the jurisdiction of the Magistrate to take cognizance, if he was otherwise satisfied from the material placed before him along with the charge-sheet that cognizance of the offence was required to be taken. It is the jurisdiction of the Magistrate and Magistrate alone to decide whether the material placed by the prosecution with the report (charge-sheet) was sufficient to take cognizance or not. The power of the Magistrate to take cognizance cannot be controlled by the investigating agency, whose duty is only to investigate and place the facts and the evidence before the Magistrate. [48]

4. Even where the Magistrate has accepted the final report that the complaint was false, the Magistrate can accept a further report from the Police made after further investigation and, if fresh materials have come to light, he may take cognizance on the basis of such further report which is permitted by s. 173(8). Such order of cognizance does not involve a *review* of the Magistrate's earlier order or entertaining a 'second complaint'. [49]
5. But the Magistrate cannot,—

Order re-investigation or re-examination of the seized material, without first disagreeing with the Police report under s. 169/173(2). [50]

10. Final Report submitted and order of the Magistrate.—

If the final report together with statement of the witnesses discloses an offence, the Magistrate can take cognizance and issue process on the original complaint and that can be done without following the procedure laid down in s. 200 or *s. 202 Cr.P.C.* [51]

When the investigation culminates in final report, the duty of the Magistrate or the Court is to scrupulously scrutinize the report and the accompanying documents by applying judicial mind either to accept or reject the final report. However, when the case is exclusively cognizable by the Special Judge, it is the duty of the Magistrate to place such final report before the Special Judge and it is for him to accept it or reject it. [52]

In appropriate cases, the Magistrate on receiving the final report without accepting it may direct further enquiry or make cognizance of the offence on the materials produced with the final report. [53]

Even if the Magistrate accepts the final report, it does not debar him from taking cognizance if fresh materials come to light. [54]

In spite of the police submitting final report if the Magistrate feels the materials collected justified prosecution of the accused, he may not accept the report and take cognizance of the offence and that does not amount to interference with investigation because the Magistrate is doing so in exercise of the power under *s. 190 Cr.P.C.* [55]

11. Magistrate not applying his mind to final report.—

When the police filed a report against the accused, the Magistrate has to apply his judicial mind whether to accept it or to take any other decision. But when the Magistrate did not apply his mind to the final report filed against the accused along with the attached documents, but simply directed the report and the documents to be attached the record of the case and thereafter ordered separate registration of the case and issued process against the accused against whom the police filed final report, the Magistrate cannot adopt such a procedure on receiving the final report and said procedure being illegal, the order issuing process against the accused has been quashed by the High Court. [56]

12. Discharge of the accused by the Magistrate on the final report submitted by the C.B.I. and direction to investigation by State Police.—

The State Government entrusted the investigation of the case to the C.B.I. and the C.B.I. on holding investigation filed a final report stating that no *prima facie* case was made out against the accused. The Magistrate accepted such report and discharged the accused. The act ion of the State Government to entrust the further investigation into the case by the State Police was quashed by the Supreme Court as it was found to have been ordered in colourable exercise of power. [57]

13. Supreme Court directed investigation by C.B.I. on final report submitted by the State Police.—

In case of death of a young man in police custody, the State Police on holding investigation submitted a biased and incomplete report. The Supreme Court first got the matter enquired into by the Sessions Judge and on receiving the report from the Additional Sessions Judge about the perfunctory nature of investigation by the State Police directed the investigation to be conducted by the C.B.I. [58]

14. Court cannot direct Investigating Officer to take back final report and seek opinion of public prosecution.—

The Supreme Court has deprecated the action of the Magistrate on directing the Investigating Officer to take back the final report submitted by him and seek opinion of the Public Prosecutor and submit a fresh report. [59]

15. Appointment of Special Officer for inquiry.—

1. When the Court is satisfied that there has not been a proper or adequate investigation by the Police, the Court may appoint a Special Officer to inquire into the commission of the offence. [60]

2. Such power may, however, be exercised by the Court only in extreme cases, because investigation into allegations of commission of an offence is, under the Code a function of the Police. The appointment of a Special Officer for the purpose can, therefore, be made by the Court only after giving the State Government an opportunity to be heard and to produce papers relating to the investigation. [61]

3. No Special Officer can be appointed while investigation by the Police is still pending (paras. 18, 25). [62]

16. Courses open to the Magistrate on receipt of charge-sheet under s. 170/173.—

1. As s. 190(1) uses the word 'may', it is obvious that the Magistrate is *not bound* to take cognizance merely because the Police has submitted its report under s. 173(2) with a charge-sheet. He has to judicially consider that report and then to take a decision, whether or not to take cognizance. [63] He may, therefore, take either of the following courses :

   (a) If he finds no reason to disagree with the report that there is sufficient evidence for trial, he would take cognizance under s. 190(1)(b).

   (b) If, however, he takes the view that the facts disclosed in the report do not make out an offence or there is no sufficient evidence to justify an accused being put on trial, he may decline to take cognizance; [64] and direct further investigation under s. 156(3) where considered necessary. [65]

2. The report submitted by the Police under s. 173(2), though popularly called a 'charge-sheet' is not, however, a complete or accurate thesis of the prosecution case. [66] s. 173(2) enjoins the Police officer to state the facts and circumstances relating to the offence, emerging out of the investigation. In framing the charge, the Court is not bound by the conclusions of the Police report as to the offence involved; the Court is at liberty to frame a charge according to law upon the facts and circumstances disclosed before it and also to amend the charge in the light thereof, at any time before the judgment is pronounced, provided the accused is given opportunity to meet [67] the charge so farmed or amended. But merely because the charge so farmed by the Court differs from the 'charge-sheet' under s. 173 (2), no doubt may be cast upon the credibility of the prosecution case. [68]

3. Again, after taking cognizance of an offence upon a Police report received under s. 173(2), the Magistrate is not debarred from proceeding against any person on the basis of the facts disclosed, even though he had not been sent up as an accused by the Police report. [69] He may also summon additional accused against whom he considers that there is good evidence, after perusing the statements recorded under s. 161 and the other documents forwarded with the report under s. 173. [70]

4. So, when the police submitted charge sheet, the Magistrate is not bound to accept it but he may direct further enquiry or, take cognizance on the basis of the materials placed before it. [71]

5. The Magistrate is not precluded from taking cognizance though earlier to declined to take cognizance on police report. [72]

6. But once he takes cognizance on police report, he cannot direct further investigation under s. 156(3) *Cr.P.C.* [73]

17. Cl. (ii) : Right of the informant.—

1. This clause requires the officer -in-charge of the Police Station to communicate to the informant (*i.e.* , the person who lodged the F.I.R.) the action taken by him, because the informant is interested in seeing that the Magistrate takes cognizance of the offence and issues process as a culmination of his F.I.R. [74]

2. From this it may be presumed that if, on a consideration of the Police report, the Magistrate is not inclined to take cognizance of the offence, he must give the informant an opportunity to be heard at the time when the report is considered by the Magistrate, so that the informant may make his submissions. [75]

So, it is the duty of the Magistrate to give notice and opportunity of hearing to the informant before accepting the final report and closing the case. So, when in the instant case, no notice was issued by the Magistrate to the informant before accepting the final report and closing the case and decided not to take cognizance and drop the proceeding, the omission vitiates the order of the Magistrate accepting the final report. So, the order was set aside and the Magistrate was directed to act according to law after giving notice to the informant. [76]

So, when a final report is filed the informant on being served with notice may file a *naraji* or protest petition disclosing all facts necessary for taking cognizance and the Magistrate may take cognizance after examining the complainant and his witnesses. [77]

Even without examining the complainant and his witnesses, the Magistrate on the basis of the protest petition on considering the materials produced along with final report may take cognizance. [78]

When no notice was issued to the complainant by the Magistrate and the complainant could not file the *naraji* or protest petition before the Magistrate, but on receiving notice from the Investigating Officer that the final report was accepted, he filed a protest petition and the Magistrate took cognizance of the case on the basis thereof. The accused cannot challenge such taking of cognizance. [79]

When a police report is submitted recommending discharge of the accused person and the complainant files a protest petition, if the Magistrate dismisses the naraji petition, he has to give reasons and in the absence of any reasons, the order is liable to be set aside. [80]

When the Enquiry Commission and the Special Judge accepted the final report filed by the Respondent without issuing notice to the writ petitioner, the *de facto* complainant, the same has been challenged and the prayer has been made for enquiry by C.B.I. against the accused under the *Prevention of Corruption Act* . The High Court on being satisfied that neither the Respondent No. 5, the Investigating Officer not the Special Judge issued any notice upon the writ petitioner, the *de facto* complainant, then the said acceptance of the final report was not legal and proper and was set aside. The High Court, therefore, directed the Enquiry Commission and the Special Judge to reconsider the final report and pass fresh orders with due notice to the petitioner in accordance with law. [81]

18. Sub-sec. (3).—

Where a superior officer has been authorised under s. 158 (*ante*), it follows that he may give directions for further investigation to the officer in charge, whose report must be sent through such superior officer.

19. Sub-sec. (4).—

This sub-section refers to the release on bond of an accused against whom the Police-officer has submitted a final report under s. 169, on the ground that the evidence is insufficient. The present sub-section provides that if the Magistrate agrees with that report, he should discharge that bond; if, however, he takes cognizance of the case, he may order continuance of that bond or make other suitable order.

In either case, it is a judicial order. [82]

20. Sub-sec. (5).—

By substituting this sub-section for *old* sub-sec.(4), the *new* Code relieves the officer in charge of his duty to furnish free copies of the relevant documents to the accused at the stage of forwarding the report under s. 173(2); instead, the present sub-section enjoins him to forward such documents, in original, to the Magistrate along with the report under s. 173(2) [See also sub-sec. (7), *below*)].

21. Cl. (b) : 'Statements'. —

These refer to the statements of the witnesses as they were recorded under s. 161 in the case to which the report under s. 173(2) relates and not to statements recorded in *connected* cases. [83]

22. 'All the persons whom the prosecution proposes to examine as its witnesses'.—

Though sub-sec. (2)(c) requires that the report of the Police-officer should specify the names of persons acquainted with the circumstances of the case and though s. 207 (iii) requires that copies of the statements record under s. 161(3) of all the witnesses whom the prosecution proposes to examine should be furnished to the accused, it has been held [84] that there is nothing in the section to prevent the prosecution from producing or the Court from examining, as a witness in the case, a person whose name has not been included in the Police report, with opportunity to the accused to cross-examine him. [85]

23. S s. 173(5) and 207.—

1. Under s. 207 (v) copies of documents forwarded by the Investigating Officer under s. 173(5) must be supplied by the Magistrate, free of cost, to the accused. It is a valuable right of the accused failure to comply with which may render a conviction liable to be set aside where prejudice may be reasonably inferred. [86] (See, further, under s s. 207-208,*post.*]

2. A combined reading of the Proviso to s s. 162(1), 173(5)(b) and 207(iii) would go to show that when a Police-officer records the statements of witnesses in his case diary, the accused must be supplied copies of such statements for the purpose of cross-examining the prosecution witnesses even though he cannot use the nothings of the Police Officer in the case-diary. [87]

24. S s. 173 (5) and 239-240.—

1. The documents forwarded to the Magistrate under s. 173(5) have to be considered by the Magistrate for determining whether the accusation is groundless and the accused should, therefore, be discharge [s. 239] or a charge should be framed against him [s. 240].

2. If a charge is framed without considering such documents which are capable of being used as evidence at the trial, the charge is liable to be quashed. [88]

3. But what the Magistrate has, at the stage under ss. 239-240, to consider is whether there is *legal* evidence to support the charge and not the weight or value of such evidence, *e.g.* , as to whether it can be relied upon with or without corroboration. [89]

4. Where entire materials collected during the investigation have been placed before the Court as part of charge sheet, the Court at the time of the framing of the charge cannot confine itself to the materials upon which the prosecution intended to rely ignoring other materials which were in favour of the accused. So whole materials have to be considered so that charges can be properly framed. But at that stage, the Court cannot consider the defence of the accused. [90]

25. Sub-sec. (6).—

This sub-section is in the nature of a rider to sub-sec. (5)(b). While sub-sec. (5)(b) enjoins the Police officer to forward to the Magistrate all the statements mentioned therein without any exception, so as to enable the Magistrate to discharge his duty under s s. 207-208 (*post*) to furnish copies of such statements to the accused, if the Police-officer considers that the disclosure of any part of such statements would not be expedient in the public interest nor essential in the interest of justice, he may append a note in his forwarding memorandum to the Magistrate to that effect, with his reasons for withholding such statement or parts thereof from the accused. Where any such reservation is made by the Police officer, the Magistrate shall, under the Proviso to s,. 207 *(post)* , consider the reasons given by the Police officer and then make his order directing that only such part of such statements as the Magistrate thinks proper, shall be furnished to the accused, in case he agrees with the objection raised by the Police officer.

26. Sub-sec. (7) : Obligation to furnish copies.—

I. *Prior* to the amendment of 1955, there was no obligation to furnish to the accused copies of statements, documents, *etc.* The accused was entitled to them, *on application,* before the commencement of the inquiry or trial.

II. *Old* sub-sec. (4), inserted in 1955, made it obligatory upon the Police officer, after completing the investigation and before commencement of the inquiry or trial, to furnish to the accused, free of cost, not only (i) a copy of the report forwarded to the Magistrate but also copies of; (ii) the first information report (under s. 154); (iii) all other documents or relevant extracts thereof, on which the prosecution relies, including; (iv) the statements and confessions recorded under s s. 161, 164(2). The *object* of this provision was to put the accused on notice of what he had to meet at the time of the inquiry or trial. [91]

The right conferred upon the accused was reinforced by the provision in s. 207A(3) and 251A(1) which imposed a duty upon the Magistrate to see, before commencement of the inquiry or trial, that copies of the statements and documents referred to in the present section have been furnished to the accused. [92]

III. The provisions in the *new* Code proceed on the view taken by the Law Commission [93] that since the administrative machinery at the disposal of the Police officer is not adequate to undertake such a heavy burden, the *duty* of furnishing copies should be shifted from the Police to the Magistrate. It has, accordingly, been provided that—

(i) The statutory duty to furnish free copies of the relevant documents is that of the Magistrate, under s. 207 or 208,—subject to the discretion of the Magistrate to allow inspection, instead of copies, in the case of voluminous documents.

(ii) In order that the Magistrate may perform this duty, it has been made obligatory upon the officer in charge of the Police station, to send the documents in original or extracts thereof to the Magistrate, along with the report under s. 173(2) [sub-sec.(5), s. 173]. This duty of the Police officer is mandatory.

(iii) At the same time, it has been made permissive for the Investigating officer[sub-sec. (7)] to furnish to the accused copies of those documents, if it is 'convenient' for him to do so, in any particular case. But this will not affect duty of the officer in charge to forward the documents to the Magistrate, as required by s. 173(5) or the duty of the Magistrate under s s. 207-208.

In the result, the trial cannot be challenged on the ground of any failure on the part of the Police-officer to supply to the accused such copies. [1]

(iv) The duty in this behalf has been laid on the Magistrate as follows:

(a) The Magistrate taking cognizance,—in cases on Police report, under Chap. XIV (*new* s. 208, *post*).

(b) The Magistrate issuing process under s. 204,—in case he finds that the offence is *triable exclusively by the Court of Session,* —whether such case was instituted on Police report or on complaint [2] (*new* s. 208, *post*).

27. Sub-secs. (2) and (8). —

1. Neither sub-sec. (2) nor sub-sec. (8) authorises a Police officer to submit an 'interim' report or a report for a limited purpose, and then to continue the investigation. [3]

2. A report under sub-sec.(2) can be submitted only after completion of the investigation. [4] But though, ordinarily, the investigation would be deemed to be completed on the submission of the report under sub-sec. (2), the *new* sub-sec. (8) enables the Police-officer to re-open the investigation even after submission of the report under s. 173(2), when it comes to the knowledge of the Investigating officer that some material evidence has been overlooked or some other persons who should have been in the category of accused or witnesses have been left out by mistake. In such a case, the Police officer may under sub-sec. (8), submit a further report based on such *fresh material,* with the further documents, copies of which the Magistrate would have to furnish to the accused, by reason of the concluding words of sub-sec. (8).

3. Sub-sections (2) and (8) and sub-sec. (8) cannot operate simultaneously, cannot be pressed in aid for collecting further evidence so long as a complete challan, enabling the Magistrate to take cognizance, is not forwarded, under s. 173(2). [5]

28. Sub-sec. (8): Further investigation.—

1. Though a report under sub-sec. (2) can be submitted only after *completion* of the investigation, new sub-sec.(8) enables the Police to carry on further investigation, as recommended by the Law

Commission, [6] on the ground that it would be unfair both to the prosecution or to the accused if the investigating officer, after submitting his report under s. 173(2), comes upon evidence bearing on the guilt or innocence of the accused and that is shut out from the Court. Under sub-sec. (8), the Investigating officer would be competent to examine such further evidence and send a supplementary report to the Magistrate, complying with the requirements of sub-secs. (2)-(6). [7]

2. This power to make further investigation is given to the Police by the Code; hence, no permission of the Magistrate is necessary for the Police to make such further investigation. [8] But when the Magistrate has already taken cognizance of the offence on the basis of an earlier Police report, and a proceeding is pending in Court, it would be *desirable* that the Police should seek formal permission of the Court to make further investigation when fresh facts come to light. [9]

3. The power under sub-sec.(8) may be exercised by an Officer superior in rank to the officer-in-charge of the Police Station; and it is immaterial whether he undertakes such further investigation on his own or on the direction of the State Government. [10]

4. The foundation of the power of the Police under s. 173(8) being the discovery of fresh facts, it permits of repeated investigations being made on the discovery of *fresh facts* on each occasion (para. 22). [11]

5. It is well-settled that s. 173(8) can be invoked (1) when new facts came to light; (2) where the superior Courts find that the investigation is tainted; or (3) when superior Courts find that it is required for ends of justice. [12]

6. Investigation of vital aspects in the counter F.I.R. even after submissions of two final reports has not been made. So further investigation by the Dy. S.P., C.B.I.., C.I.D. on taking opinion of the Public Prosecutor though irregular has not been interfered with. [13]

7. Overruling a number of High Court decisions to the country, [14] the Supreme Court has held that the power of the Police to make further investigation under s. 173(8) is not exhausted by taking the cognizance of the offence by the Magistrate (para. 20), [15] though in such a case it is desirable that the Police should seek formal permission from the Court to make further investigation upon the discovery of fresh facts. [16] Under the Code of 1898, there was no express provision enabling the Police to make further investigation after a final report under s. 173(1) had been submitted. Hence, arose a controversy whether the power of the Police to investigate into an offence after the Court had taken cognizance of the offence. The lacuna has been removed by inserting sub-sec. (8) in s. 173 of the *new* Code (para. 15). [17]

8. It is competent for the trial court, and for the superior courts to direct the trial court, to exercise the power under this sub-section, and require fresh investigation,—by an independent authority (*e.g.,* the C.B.I.)—where the Court is satisfied that there has been no proper or objective investigation by the Police. [18]

   In other words, defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it (para 18). [19]

9. In other words, the Magistrate's power to direct further investigation, even after taking cognizance, has not been taken away by empowering the Police to make further investigation under s. 173(8). [20]

10. There is no reason to suppose that s. 173(8) is applicable only to cases triable by a Magistrate and not to offences triable exclusively by the Court of Session. [21]

11. But—

   (a) The power under s. 173(8) cannot be used where the Magistrate has already passed a final order, *e.g.,* discharging the accused on the basis of an earlier Police Report, the Magistrate cannot reopen the case and take cognizance upon a supplementary report field by another Police Officer

(say, a superior officer), unless the previous judicial order of the Magistrate is set aside on revision or otherwise. [22]

(b) The power under sub-sec. (8) can be used only where *further* facts or materials come to light and was not intended to be used to fill up any *lacuna* in the prosecution case. [23] Hence, where a Magistrate accepted a Police report under s. 173(2) and proceeded to trial and already convicted some of the accused, he has no jurisdiction to direct the Police to make further investigation against the other accused. [24] Such an order would be without jurisdiction. [25]

(c) As obtaining further evidence after filing of the first-charge sheet is the condition precedent to the filing of the supplementary charge-sheet, a supplementary charge-sheet filed based on a reconsideration of evidence already before the Investigating Officer *prior* to the submission of the first charge-sheet is *not* a supplementary charge-sheet. So cognizance taken on the basis thereof is bad in law. [26]

(d) When the basis of the charge sheet submitted by the police, the Magistrate has already passed final order framing charges against the six accused discharging other ten accused, the Magistrate at the instance of defecto complainant at that stage cannot direct further investigation. Since, no application for the further investigation has been made by the investigating authority and the Magistrate has already discharged the ten accused, the next course open to the Magistrate to take recourse to *s. 319 Cr.P.C.* if evidence is disclosed during the trial against the accused persons who have been discharged.[27]

29. Further investigation even after final report on re-investigation.—

When the C.B.I. submitted a final report again on re-investigation, even if the complainant drew the attention of the C.B.I. about the short comings in investigation, the C.B.I. did not take any notice of it and again submitted final report. The Magistrate accepted the final report without issuing any notice to the complainant. When the complainant filed a protest petition, the Magistrate refused to direct further investigation on the ground that he could not review its earlier order. The Supreme Court has held that the Magistrate was not required to review its order but he could direct further investigation under s. 173(8). So, the Supreme Court set aside the order accepting the final report and directed the Magistrate to dispose of the protest petition in accordance with law. [28]

30. Further investigation, when illegal.—

When it is found that there was no reason for further investigation and only to minimize the charge against the Accused No. 3 and for the purpose of filing final report against the Accused Nos. 1 and 2 it was held and the Magistrate accepting such report look cognizance against the accused No. 3 under ss. 294 and 323 *i.e.* when originally the charge sheet was submitted against all the accused under ss. 451, 323 and 307 I.P.C. read with s. 34 I.P.C., the Orissa High Court has held that further investigation was motivated and it was misused to minimize the charge against the Accused no. 3 and for discharging the two other accused. As further investigation was vitiated, the High Court set aside the order taking cognizance against the accused No. 3 on the basis of supplementary charge sheet and directed revival of the earlier charge sheet against all the accused persons. [29]

After the conclusion of trial against the accused in a murder case resulting the acquittal of the accused, a letter was sent by the uncle of the deceased alleging involvement of the wife of the deceased in murder to the Human Rights Commission. No fresh crime was registered against her on the basis of any further facts. She was neither an accused nor any witness in the case. At this stage, the re-investigation of the murder case by the order of the Magistrate permitting to conduct brain mapping and lie-detection test on her was not at all proper.

[30]

Further investigation under s. 173(8) *Cr.P.C.* was ordered even after filing of charge sheet against some of the accused persons and to collect more evidence and to get an absconding accused, declared a proclaimed offender under the law. But after submitting charge sheet against some of the accused person under s. 376 I.P.C., the Investigating Officer cannot investigate the case further against the absconding accused, who from the statement of victim girl, under *s. 164 Cr.P.C.* was also involved with the sexual offence along with the accused who has been put to trial. Further investigation was undertaken by the Investigating Officer to practically acquit such absconding accused by taking recourses to sub-section (8) of *s. 173 Cr.P.C.* and in the name of 'investigation kept pending' did nothing to collect further evidence, to apprehend him or to declare him as proclaimed offender. Therefore, such re-investigation of the case is nothing but illegal.[31]

Fresh investigation or re-investigation is not contemplated by sub-section (8) of s. 173. What sub-section (8) provides is further investigation by the same agency. For holding fresh investigation or re-investigation, fresh permission of the Magistrate is required. Moreover, further investigation is to be undertaken from the same offence, not into further investigation in the separate offence. [32]

Direction of re-investigation being forbidden in law, no superior Court would ordinarily issue such a direction. [33]

31. Magistrate cannot direct particular officer to further investigate the case.—

It is not within the province of the Magistrate or the Special Judge while exercising the power under s. 173(8) *Cr.P.C.* to specify the particular officer to conduct such other investigation and not even to suggest the rank of the officer who should conduct further investigation. So, the direction made by the Special Judge a further investigation to be conducted by an officer of D.I.G. rank of C.B.I. has been set aside by the Supreme Court.[34]

32. Charge sheet filed, no bar to further investigation.—

Filing of the final police report or the charge sheet, does not preclude an Investigating Officer to carry on further investigation in terms of s. 173(8). Further investigation is permissible even if an order of cognizance of offence had been made by the Magistrate. [35]

When the charge sheet had been against some of the accused persons and on the prayer for the wife the further investigation was made and the Additional S.P. directed charge sheet against all the accused persons, the police at the instance of the local M.L.A. cannot direct further investigation to shield the accused persons. So, the High Court rightly quashed such further report at the instance of the local MLA and directed the police to submit charge sheet against all the accused persons on the basis of the further investigation made by the Additional S.P. [36]

33. Further investigation after submission of final report.—

Further investigation after submission of final report is permissible. [37]

34. Two F.I.R.s were filed over the same incident.—

The same investigating agencies, namely, C.B.I. carried out investigation under both the F.I.R. s . There is no illegality in holding investigation by C.B.I. in respect of two FIRS. Moreover, C.B.I. is not precluded from further investigation in spite of forwarding report under s. 173(2) *Cr.P.C.* [38]

35. Further investigation by the same agency only.—

The investigation against the police inspector under *Sections 3* and *4* of the *Official Secrets Act* has been transferred to the C.B.I. by the State Government of Kerala on the recommendation of D.I.G. of Police and the State Government accorded sanction to investigate the case of C.B.I. to up investigation but submitted a final report. The Magistrate on the basis of such report discharged the accused. Thereafter, the State Government by subsequent notification withdrew the consent to C.B.I. to hold investigation with a view to holding further investigation of the case through its own police officer. The Supreme Court has held that such action of the State Government is illegal. If further investigation has to be made, it is to be made by the CBI alone.[39]

Similarly, when the local police on investigation against the accused submitted the final report and the complainant on receiving the copy of the report did not raise any protest, it is not proper for the Director-General of Police to direct the CB, CID, to hold further investigation. If CB, CID submits charge sheet against the accused, it is held by the Kerala High Court that same is illegal and invalid. [40]

The High Court as proposed by the State Government directed the State Government to refer the matter to the C.B.I. C.B.I. during preliminary investigation detecting materials for lodging the second F.I.R.. Investigation by the State Police on the first F.I.R. was not properly done. C.B.I. detected conspiracy not detected by the State Police. C.B.I. detected investigation against large number of people. It is held that it was open to the State and/ or High Court to direct investigation into an offices which is distinct and separate from the first F.I.R. [41]

36. Direction issued by the High Court is writ jurisdiction for fresh and further investigation by a different agency.—

When the investigation by the local police is pending in a case the High Court in a writ jurisdiction filed by the complainant cannot direct fresh and further investigation by an agency other than local police. [42]

37. Procedure to be followed by Magistrate on receipt of such further report. .—

1. Such further report submitted by the investigating officer, indicating more evidence or implicating additional accused shall be treated as ‘Police report’ within the meaning of sub-sec. (2) of s. 173; [43] hence, the provisions in Cls. (2)-(6), as regards the issue of summons, supply of copies *etc.* shall apply, as far as may be.

2. What all s. 173(8) lays down is that the investigating agency can carry on further investigation in respect of the offence after a report under sub-sec. (2) has been filed. The further investigation may also disclose some fresh offences but connected with the transaction which is the subject-matter of the earlier report. At the stage of filing supplementary report itself the trial court which took cognizance cannot reject the same outright since it is only a supplementary report in support of the earlier report. The purpose of sub-sec. (8) of s. *sec. 173, Crpc* is to enable the investigation agency to gather further evidence and that cannot be frustrated.[44]

   If the materials incorporated in the supplementary charge-sheet do *not* make out any offence, the question of farming any other charge on the basis of that may not arise; but in case the court frames a charge it is open to the accused persons to seek discharge in respect of that offence also. The rejection of the report outright at that stage is not correct. [45] If the supplementary report alleges any further offence, the Magistrate should give the accused an opportunity of seeking discharge in respect of that offence also. [46]

3. When the Magistrate has already taken cognizance of the offence on the basis of the earlier report, what act ion the Magistrate should take on receipt of a supplementary report under sub-sec. (8) will depend upon the stage at which the case is before him: [47]

   (a) If he has taken cognizance but has not yet proceeded with the inquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused in a single inquiry or trial.

   (b) If the case of which he has taken cognizance has proceeded to same extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with it as a separate case. [48]

   (c) When the report of the further investigation is submitted to a Magistrate other than the Magistrate who had taken cognizance on the basis of the earlier report, the prosecuting agency, the accused or the Court (*suo motu*), may move the superior court to have the two cases tried together (para. 23). [49]

4. Where the offence is exclusively triable by a Sessions Court and there has already been a committal order on the basis of the original report, there must be another committal order on the basis of the supplementary Police report. [50]

5. In a warrant-case, when the Magistrate receives a supplementary Police report under s. 173(8), the Magistrate will have power to issue process, on the basis of the materials contained in such report and the documents sent with it, against any person other than the one who are already before him as accused. Thereupon it may become necessary for the Magistrate to open the case so for as the added person is concerned, from the stage contemplated by s. 239, and then proceed with the trial. [51]

6. Where in such supplementary report, some person other than those who are already before the Court as accused is implicated, the Court has to decide whether he should or should not issue process against such other person for having committed an offence in regard to which he has already taken cognizance. [52]

7. The Court can reopen the case on the basis of the supplementary report under s. 173(8) only where there are fresh materials in the supplementary report which could not come to the knowledge of the Investigating Officer when he conducted the earlier investigation and forwarded the original report,— and not as a routine affair. [53]

If after further investigation a supplementary charge sheet is filed, no notice to the accused against whom original charge has been filed is required to be given. [54]

On getting the supplementary charge sheet, the Magistrate has to treat it as police report and further action to be taken thereon will depend upon the stage at which the said supplementary charge sheet is filed. [55]

Even if the supplementary charge sheet is filed by the investigating officer and not by officer-in-charge of police station, it is also a police report and the Magistrate can take cognizance on such supplementary charge sheet. [56]

Similar is the case when the Investigating Officer under the direction of the officer-in-charge of the police station submitted the supplementary charge sheet. If is valid. [57]

38. Re-investigation illegal and duty of the Magistrate on receiving supplementary charge sheet.—

When the re-investigation is illegal and motivated, the Magistrate should not act upon the supplementary charge sheet filed by police. A charge under ss. 452, 307 and 323 read with s. 341 I.P.C. had been filed against three accused persons. The Magistrate took cognizance thereon. Subsequently, the police sought for re-opening the investigation but he did not permit. But he Investigating Officer under the order of the Superintendent of Police re-opened the investigation examined some witnesses and this time submitted charge sheet against the Accused No. 3 alone under ss. 293 and 323 I.P.C. and prayed for discharging the accused Nos. 1 and 2. The Magistrate ignored the earlier charge sheet took fresh cognizance against the accused No. 3 alone under Ss. 293 and 323 I.P.C. and discharged the two other accused. The High Court in revision has held that when the Investigating Officer has misapplied and misutilised the power of further investigation under s. 173(8)
Cr.P.C. and with ulterior motive to minimize the offences against an accused and to held the other two accused to be released without trial submitted a fresh charge sheet, the re-investigation not being *bona fide* and having undertaken with an ulterior motive, the Magistrate was not justified in taking cognizance on the basis of the supplementary charge sheet ignoring the earlier charge sheet. [58]

39. '... Forward to the Magistrate'. —

The word 'Magistrate' obviously refers to the Magistrate empowered to take cognizance of the offence, to whom the earlier report under s. 173(2) had been forwarded. Hence, such subsequent investigation report cannot be sent by the Police-officer to the Sessions Court. [59]

40. S s. 156(3) and 173(8).—

Under s. 156(3), the Magistrate may direct further investigation at any stage, and even after submission of the final report by the Investigating Officer. This power is an independent power, and has no conflict with the power of the Police Officer to make further investigation under s. 173(8), which power may be exercised by him only on receipt of *further* information or fresh clues. [60]

41. Revision.—

Where a charge-sheet or order of commitment is founded on a supplementary report and the revisional Court finds that there is no further evidence, oral or documentary, on the basis of which the Police submitted the supplementary report, accusing the Petitioner, the revisional Court would set aside the order framing charge or directing commitment of the Petitioner. [61]

42. Application under Art. 226 of the Constitution.—

1. An application under *Art. 226 of the Constitution* may lie to quash a direction or proceeding for further investigation under s. 173(8) in exceptional cases of want of jurisdiction or *mala fides;* but in interfering with a proceeding for investigation or further investigation, the Court should bear in mind that investigation of an offence and the collection of evidence is exclusively reserved for the Police and that it is subject to the superintendence of the State Government,—the Executive which is responsible for the prevention of crime and maintenance of the law. [62]

2. In general, the Court would not interfere with the investigation of a case where, on a consideration of the relevant materials, the Court is satisfied that an offence is disclosed, [63] *e.g.,* merely because there was delay in submitting the charge-sheet. [64]

On the other hand—

1. The Court would, under Art 226, quash the investigation proceeding where the Court is satisfied that no offence is disclosed, *e.g.,* where the F.I.R. does not disclose that the essential requirements of the relevant penal provision are *prima facie* satisfied; [65] or where the Court is satisfied that the power of investigation has been exercised by a Police-Officer *mala fide.* [66]

2. While, as a rule, the Court would not give any directions to the Police while investigation is still pending, there is a residuary jurisdiction left in the Court to the give directions to the investigating agency when it is satisfied that the requirements of the law are not being complied with and investigation is not being conducted properly or with due promptitude. [67]

SPECIAL LAW

43. I. Customs Act ; Foreign Exchange Regulation Act. —

A Customs Officer or an Enforcement Officer under these act s have power to make inquiry into infringements of these acts for specific purposes as laid down in these statutes. He is not a ‘Police Officer’ empowered to investigate into offence triable by a Magistrate, nor has he the power to submit a report under *s. 173 of the Cr.P.C.* [68] He can only

make a complaint before a competent Magistrate. [69]

44. II. Delhi Special Police Establishment Act, 1946.—

Under s. 6 of this Act, consent of the State Government is required before jurisdiction under s. 5 of the Act is exercised by Officers of the Special Police Establishment. No such sanction, however, would be required when the Court gives a direction to the C.B.I. to conduct an investigation. [70]

45. III. Prevention of Corruption Act.—

When the case was registered under s *s. 161* and *165* of the *Indian Penal Code* and under *Sections 5(2) of the Prevention of Corruption Act*, which offence can only be tried by Special Court, then the final report under *s. 173, Cr. P.C.*, submitted by Police to the Magistrate cannot be dealt with by the Magistrate. He cannot on accepting the said final report and discharge the accused person. He has to send all the papers along with the final report submitted by the Police under *s. 173, Cr. P.C.*, to the Special Judge having jurisdiction.[71]

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7 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 16 (w.e.f. 31-12-2009).

8 Inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 16 (w.e.f. 31-12-2009).

9 Substituted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), s. 17, for the words "or 376D of the *Indian Penal Code*" (w.e.f. 3-2-2013).

10 *Kapur v. State of Punjab,* [AIR 1960 SC 866 LNIND 1960 SC 96 1960 Crlj 1239]SC 866 (para 9) : AIR 1970 SC 1964 1970 Crlj 1407; Cf. *Gopalan v. Noordeen,* : (1969) 2 SCC 734 : .

11 *Kapur v. State of Punjab,* [AIR 1960 SC 866 LNIND 1960 SC 96 1960 Crlj 1239]SC 866 (para 9) : AIR 1970 SC 1964 1970 Crlj 1407; Cf. *Gopalan v. Noordeen,* : (1969) 2 SCC 734 : .

12 Cf. *Tara Singh v. State,* AIR 1951 SC 441 443 : 1951 Crlj 1491.

13 Cf. *Tara Singh v. State,* AIR 1951 SC 441 443 : 1951 Crlj 1491; *Ram Lal v. State,* AIR 1979 SC 1791 [*LNIND 1979 SC 11*](para 19) : (1979) 2 SCC 322 [*LNIND 1979 SC 11*] : 1979 Crlj 1346 .

14 *Taj Singh v. State,* (1988) Crlj 1634 (paras 6-7) Del (DB).

15 *Satya Narain v. State of Bihar,* AIR 1980 SC 506 : (1980) 3 SCC 152 : 1980 Crlj 227 .

16 *State of Haryana v. Mehal Singh,* 1978 Crlj 1810 (P&H) FB .

17 *Dinesh Dalmia v. C.B.I.,* (2007) 8 SCC 770 [*LNIND 2007 SC 1098*] : 2008 Crlj 337 : (2007) 4 Crimes 33 [*LNIND 2007 SC 1098*].

18 *Dinesh Dalmia v. C.B.I.,* (2007) 8 SCC 770 [*LNIND 2007 SC 1098*] : 2008 Crlj 337 : (2007) 4 Crimes 33 [*LNIND 2007 SC 1098*].

19 *Nathuram v. State of Rajasthan,* 2007 Crlj 2533 Raj .

20 *Fakruddin Ahmade v. State of Uttaranchal,* (2008) 17 SCC 157 [*LNIND 2008 SC 1787*] : 2008 Crlj 4377 : (2008) 6 All LJ 249.

21 Cf. *Tara Singh v. State,* AIR 1951 SC 441 443 : 1951 Crlj 1491.

22 *Taj Singh v. State,* (1988) Crlj 1634 (paras 6-7) Del (DB).

23 *State of Haryana v. Mehal,* AIR 1978 P&H 341 FB .

24 *Periasami* *v.* *Inspector* *of* *Police,*
(1984) Crlj 239 (Mad) .

25 *Shankar* *v.* *State,*
(1986) Crlj 707 (paras 18-19) Pat (FB).

26 *Shankar* *v.* *State,*
(1986) Crlj 707 (paras 18-19) Pat (FB).

27 *Shankar* *v.* *State,*
(1986) Crlj 707 (paras 18-19) Pat (FB).

28 *Ram* *Lal* *v.* *State,*
(1979) Crlj 1346 (paras 21-22) :
AIR 1979 SC 1791 [
LNIND 1979 SC 11]:
(1979) 2 SCC 322 [
LNIND 1979 SC 11].

29 *Shankar* *v.* *State,*
(1986) Crlj 707 (paras 18-19) Pat. (FB).

30 *Vijayaraghavan* *v.* *C.B.I.,*
(1984) Crlj 1277 (paras 10-11) Ker.

31 *Sarma* *v.* *Turgakamala,*
(1976) Crlj 1247 (para 14) AP.

32 *Ramesh* *Jogi* *v.* *State* *of* *U.P.,*
1998 Crlj 3861 All .

33 *Satya* *Narayan* *v.* *State* *of* *Bihar,*
AIR 1980 SC 506 .

34 *K.* *Viraswami* *v.* *Union* *of* *India,*
(1991) 3 SCC 655 [
LNIND 1991 SC 320] : 1991 SCC (Cr) 734.

35 *C.B.I.* *v.* *R.S.* *Rai,*
AIR 2002 SC 1644 [
LNIND 2002 SC 254]: 2002 SC (Cri) 950 :
2002 Crlj 2029 .

36 *V.C.* *Venkatareddy* *v.* *State* *of* *A.P.,*
1994 Crlj 257 AP .

37 *Dinesh* *Dalmia* *v.* *C.B.I.,*
(2007) 8 SCC 770 [
LNIND 2007 SC 1098] :

2007 Crlj 337 :
AIR 2008 SC 78 [
LNIND 2007 SC 1098]:
(2007) 4 Crimes 33 [
LNIND 2007 SC 1098].

38 *Tarab* *v.* *State,*
(1978) Crlj 87 (NOC) (Cal) .

39 *Tarab* *v.* *State,*
(1978) Crlj 87 (NOC) (Cal) ; *Shreeyest v. State of Bihar,*
(1977) Crlj 1597 (Pat) .

40 *State of Bihar v. Saldanna,*
AIR 1980 SC 328 (paras 12, 18).

41 *Daulat v. State of Rajasthan,*
(1977) Crlj 560 (Raj) .

42 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528 [
LNIND 1966 SC 208](para 30) :
1967 Crlj 528 :
(1967) 1 SCR 520 [
LNIND 1966 SC 208].

43 *Abhinandan* *v.* *Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144](paras 15, 19-20); *Bains v. State,*
AIR 1980 SC 1883 [
LNIND 1980 SC 423]:
(1980) 4 SCC 631 [
LNIND 1980 SC 423] :
1980 Crlj 1308 .

44 *India Carat v. State of Karnataka,*
(1989) Crlj 963 (968) :
AIR 1989 SC 885 [
LNIND 1989 SC 102]:
(1989) 2 SCC 132 [
LNIND 1989 SC 102].

45 *Gopal* *v.* *Bhuneshwar,*
(1982) 3 SCC 510 .

46 *Pancham* *v.* *State,*
AIR 1967 Pat 416 .

47 *Bains* *v.* *State,*
AIR 1980 SC 1883 [
LNIND 1980 SC 423](para 7) :
(1980) 4 SCC 631 [

LNIND 1980 SC 423] :
1980 Crlj 1308 .

48 *State of Maharashtra v. Saradchandra Vinayak Dongre,*
(1995) 1 SCC 42 [
LNIND 1994 SC 1469] (para 7) :
AIR 1995 SC 231 [
LNIND 1994 SC 1469]: 1995 SCC (Cr) 16.

49 *State of Rajasthan v. Aruna Devi,*
(1995) 1 SCC 1 [
LNIND 1994 SC 1319] (paras 3-4) :
(1994) 3 Crimes 849 : 1994 Supp (5) SCR 274.

50 *Daulat v. State of Rajasthan,*
(1977) Crlj 560 (Raj) .

51 *Indian Carat v. State,*
1989 Crlj 963 :
(1989) 2 SCC 132 [
LNIND 1989 SC 102] :
AIR 1989 SC 885 [
LNIND 1989 SC 102]; *Gopal v. Bhundwar,*
(1982) 3 SCC 510 : 1983 SCC (Cr) 110.

52 *Sampat Singh v. State of Haryana,*
(1993) 1 SCC 561 :
1993 SCC (Cri) 376 .

53 *State of Bihar v. P.P. Sharma,*
1991 Crlj 1438 .

54 *State of Rajasthan v. Aruna Devi,*
(1995) 1 SCC 1 [
LNIND 1994 SC 1319] :
1995 SCC (Cri) 1 [
LNIND 1994 SC 1319] :
(1994) 3 Crimes 849 .

55 *Union of India v. Prakash P. Hinduja,*
AIR 2003 SC 2612 [
LNIND 2003 SC 540]:
(2003) 6 SCC 195 [
LNIND 2003 SC 540] :
2003 SCC (Cri) 1314 [
LNIND 2003 SC 540] :
2003 Crlj 3117 .

56 *Bhunwa Ram v. State of Rajasthan,*
1998 Crlj 393 Raj .

57 *K. Chandra Sekhar v. State of Kerala,*
AIR 1998 SC 2001 [

LNIND 1998 SC 504]:
(1998) 5 SCC 223 [
LNIND 1998 SC 504] :
1998 SCC (Cri) 1291 :
1998 Crlj 2897 .

58 *Munir Alam v. Union of India,*
1999 Crlj 3523 :
AIR 1999 SC 2267 [
LNIND 1999 SC 511]:
(1999) 5 SCC 248 [
LNIND 1999 SC 511].

59 *R. Sarala v. T.S. Velu,*
AIR 2000 SC 1731 [
LNIND 2000 SC 657]: (2000) 4 SCC 459 :
2000 SCC (Cri) 823 [
LNIND 2000 SC 657] :
2000 Crlj 2453 .

60 *State of W.B. v. Sampat,*
AIR 1985 SC 195 [
LNIND 1984 SC 332](paras 14-15) :
1985 Crlj 516 :
(1985) 1 SCC 317 .

61 *State of W.B. v. Sampat,*
AIR 1985 SC 195 [
LNIND 1984 SC 332](paras 14-15) :
1985 Crlj 516 :
(1985) 1 SCC 317 .

62 *State of W.B. v. Sampat,*
AIR 1985 SC 195 [
LNIND 1984 SC 332](paras 14-15) :
1985 Crlj 516 :
(1985) 1 SCC 317 .

63 *Abhinandan v. Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144](paras 15, 19-20); *Bains v. State,*
AIR 1980 SC 1883 [
LNIND 1980 SC 423]:
(1980) 4 SCC 631 [
LNIND 1980 SC 423] :
1980 Crlj 1308 .

64 *Abhinandan v. Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144](paras 15, 19-20); *Bains v. State,*
AIR 1980 SC 1883 [
LNIND 1980 SC 423]:
(1980) 4 SCC 631 [
LNIND 1980 SC 423] :
1980 Crlj 1308 .

65 *Abhinandan* *v.* *Dinesh,* AIR 1968 SC 117 [*LNIND 1967 SC 144*] (paras 15, 19-20); *Bains v. State,* AIR 1980 SC 1883 [*LNIND 1980 SC 423*]: (1980) 4 SCC 631 [*LNIND 1980 SC 423*] : 1980 Crlj 1308 .

66 *Dalmia* *v.* *Delhi* *Administration,* AIR 1962 SC 1821 [*LNIND 1962 SC 146*] (paras 324-25).

67 *Dalmia* *v.* *Delhi* *Administration,* AIR 1962 SC 1821 [*LNIND 1962 SC 146*] (paras 324-25).

68 *Dalmia* *v.* *Delhi* *Administration,* AIR 1962 SC 1821 [*LNIND 1962 SC 146*] (paras 324-25).

69 *Raghubans* *v.* *State* *of* *Bihar,* AIR 1967 SC 1167 1169 : 1967 Crlj 1081.

70 *Raghubans* *v.* *State* *of* *Bihar,* AIR 1967 SC 1167 1169 : 1967 Crlj 1081.

71 *State* *of* *Bihar* *v.* *P.P.* *Sharma,* 1992 SCC (Cri) 192 [*LNIND 1991 SC 184*] : 1992 Supp (1) SCC 222 : AIR 1991 SC 1260 [*LNIND 1991 SC 184*].

72 *Gopal* *Vijay* *Verma* *v.* *Bhuneshwar,* (1982) 2 SCC 510 : 1983 SCC (Cr) 110.

73 *Jietndra* *Nath* *v.* *State,* 1476 Crlj 1296 ; *Shyama Charan v. State,* 1990 Crlj 456 .

74 *Bhawant* *v.* *Commr.,* AIR 1985 SC 1285 [*LNIND 1985 SC 150*] (para 4) : (1985) 2 SCC 537 [*LNIND 1985 SC 150*] : (1985) 1 Crimes 994 [*LNIND 1985 SC 150*].

75 *Bhawant* *v.* *Commr.,* AIR 1985 SC 1285 [*LNIND 1985 SC 150*] (para 4) : (1985) 2 SCC 537 [*LNIND 1985 SC 150*] :

(1985) 1 Crimes 994 [
LNIND 1985 SC 150].

76 *Union Public Service Commission v. S. Papaiah,*
(1997) 7 SCC 614 [
LNIND 1997 SC 827] :
1997 SCC (Cri) 1112 [
LNIND 1997 SC 827] :
1997 Crlj 4636 :
AIR 1997 SC 3876 [
LNIND 1997 SC 827].

77 *Bhagwan Das Agarwal v. State of U.P.,*
1990 Crlj 916 All .

78 *Mohammed Rafiq v. State of Bihar,*
1990 Crlj 717 Pat .

79 *M.K. Mohanraj v. Kandian Rajeev,*
1999 Crlj 824 Ker ; *P.V. Krishna Prasad v. Koteswara Rao,*
1991 Crlj 341 Ker overruled.

80 *Mahesh Chand v. B. Janaardan Reddy,*
(2003) 1 SCC 734 [
LNIND 2002 SC 771] :
2003 Crlj 866 :
AIR 2003 SC 702 [
LNIND 2002 SC 771].

81 *G.K. Murlidharan v. State of Kerala,*
2007 Crlj 417 Ker .

82 *Kamalapati v. State of W.B.,*
AIR 1979 SC 777 [
LNIND 1978 SC 383](para 34) :
(1980) 2 SCC 91 [
LNIND 1978 SC 383] :
1979 Crlj 679 .

83 Cf. *Gurbachan v. State of Pepsu,*
AIR 1957 SC 623 627 : 1957 Crlj 1009.

84 *Jhagru v. State of W.B.,*
AIR 1959 Cal 176 177 [
LNIND 1958 CAL 212]; *Chaturbhuj v. Naharkan,*
AIR 1958 MP 28 [
LNIND 1957 MP 131]; *Somasundaram v. Gopal,*
AIR 1958 Mad 341 [
LNIND 1958 MAD 178]; *Chandu,*
AIR 1960 AP 329 [
LNIND 1959 AP 250].

85 *Pukhia,*
AIR 1963 Raj 48 [
LNIND 1962 RAJ 193].

86 *Noor Khan v. State, of Rajashtan,*
AIR 1964 SC 286 [
LNIND 1963 SC 194]:
(1964) 1 Crimes 167 .

87 *Chowdhary v. State,*
(1984) Crlj 864 (paras 4, 6) (Del); *Gogikarn v. State,*
ILR (1955) Hyd 644 .

88 *Bimal v. State,*
(1976) Crlj 1594 (Cal) .

89 Cf. *Rajanikanta v. State of Orissa,*
(1976) Crlj 1674 (para 10) Or; Cf. *Khushi v. Hashim,*
AIR 1959 SC 542 : 1959 Crlj 658.

90 *State of M.P. v. Sheetha Sahai,*
(2009) 8 SCC 617 :
(2009) 3 SCC 901 (Cri) :
2009 Crlj 4436 .

91 Cf. *Gurbachan v. State of Pepsu,*
AIR 1957 SC 623 627 : 1957 Crlj 1009.

92 *Subramania v. State of Madras,*
AIR 1958 SC 66 70 : 1958 Crlj 238 :
1958 SCR 428 [
LNIND 1957 SC 86].

93 41st Rep., paras 14.21.

1 *Tej Singh v. State,*
(1988) Crlj 1634 (parass 11-12) Del (DB).

2 Decisions of the Supreme Court that there was no duty to supply to the accused copies of such documents in cases instituted on complaint [*e.g.* , *Srilal v. State of W.B.,*
AIR 1975 SC 393 : (1975) 1 SCC 336 :
1975 Crlj 423 ; *State of U.P. v. Durga Prasad,*
AIR 1974 SC 2136 [
LNIND 1974 SC 248]:
(1975) 3 SCC 210 [
LNIND 1974 SC 248] :
1974 Crlj 1465] have thus been modified by the new provisions.

3 *Hari v. State,*
(1977) Crlj 262 (NOC) (Del) .

4 *Hari* *v.* *State,*
(1977) Crlj 262 (NOC) (Del) .

5 *Hari* *v.* *State,*
(1977) Crlj 262 (NOC) (Del) .

6 41st Rep., paras 14.23.

7 *Raman,* in re.,
(1973) Crlj 1288 .

8 *Raman,* in re.,
(1973) Crlj 1288 .

9 *Ram Lal* *v.* *State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

10 *State of Bihar* *v.* *Saldanna,*
AIR 1980 SC 326 [
LNIND 1979 SC 448](para 18).

11 *Ram Lal* *v.* *State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

12 *Kishan Lal* *v.* *Dharmendra Babua,*
(2009) 7 SCC 685 [
LNIND 2009 SC 1478] :
(2009) 3 SCC 611 [
LNIND 2009 SC 1478](Cri) :
2009 Crlj 3721 .

13 *Manoj Narayan Agarwal* *v.* *Sashi Agarwal,*
(2009) 6 SCC 385 [
LNIND 2009 SC 845] :
(2009) 2 SCC 1096 (Cri) : (2009) 4 All LJ 528 (SC).

14 Cf. *State* *v.* *Mehar Singh,*
(1974) Crlj 970 (P&H) FB; *Arvindakshan v. State of Kerala,*
(1985) Crlj 1389 (para 13) Ker.

15 *Ram Lal* *v.* *State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [

LNIND 1979 SC 11] :
1979 Crlj 1346 .

16 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [
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17 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

18 *Kashmeri v. Delhi Admin.,*
AIR 1988 SC 1323 [
LNIND 1988 SC 251](para 7) : 1988 Supp SCC 482 :
1988 Crlj 1800 .

19 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](paras 21, 22) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

20 *Arvindakshan v. State of Kerala,*
(1985) Crlj 1389 (para 14) Ker.

21 *Kesavan v. Madhavan,*
(1984) Crlj 324 (para 20) Ker (FB); *Raghunath Singh v. State,*
(1990) 2 Crimes 310 (pat) .

22 *Ramsubbu v. State,*
(1988) Crlj 214 (para 6) Mad.

23 *Jitendra v. State,*
(1976) Crlj 1296 (Cal) .

24 *Jitendra v. State,*
(1976) Crlj 1296 (Cal) .

25 *Jitendra v. State,*
(1976) Crlj 1296 (Cal) .

26 *Yamuna v. State,*
(1994) Crlj 112 (NOC) (Pat) (DB).

27 *Reeta Nag v. State of West Bengal,* (2009) 9 SCC 129 [*LNIND 2009 SC 1683*] : (2009) 3 SCC 1051 (Cri) .

28 *Union Public Service Commission v. S. Papaiya,* (1997) 7 SCC 614 [*LNIND 1997 SC 827*] : 1997 SCC (Cri) 1112 [*LNIND 1997 SC 827*] : 1997 Crlj 4636 : AIR 1997 SC 3876 [*LNIND 1997 SC 827*].

29 *Pushpa Rani Samal v. S.K..Biswal,* 1998 Crlj 3764 .

30 *Surekha v. Commissioner of Police,* 2007 Crlj NOC 35Bom .

31 *Mahesh v. State of Rajasthan,* 1999 Crlj 4625 Raj .

32 *State of A.P. v. A.S. Peter,* AIR 2008 SC 1052 [*LNIND 2007 SC 1483*]: (2008) 2 SCC 383 [*LNIND 2007 SC 1483*] : (2008) 1 SCC 427 (Cri) .

33 *M.P. Patel v. State of Gujarat,* (2009) 6 SCC 332 [*LNIND 2009 SC 1172*] : (2009) 2 SCC 1047 (Cri) .

34 *Hemant v. C.B.I.,* (2001) 1 SCC 538 .

35 *Dinesh Dalmia v. C.B.I.,* (2007) 8 SCC 770 [*LNIND 2007 SC 1098*] : 2008 Crlj 337 : AIR 2008 SC 78 [*LNIND 2007 SC 1098*].

36 *Kedar Narayan Parida v. State of Orissa,* (2009) 9 SCC 538 [*LNIND 2009 SC 1838*].

37 *M.P. Jharia v. State of M.P.,* AIR 2007 SC 2677 [*LNIND 2007 SC 909*]: (2007) 7 SCC 358 [*LNIND 2007 SC 909*] :

(2007) 3 SCC 365 (Cri) :
2007 Crlj 3745 .

38 *Bank of Rajasthan v. Keshav Bangur,*
2008 Crlj 397 :
AIR 2008 SC 202 [
LNIND 2007 SC 1155]:
(2007) 13 SCC 145 [
LNIND 2007 SC 1155].

39 *K. Chandra Sekhar v. State of Kerala,*
AIR 1998 SC 2001 [
LNIND 1998 SC 504]:
1998 SCC (Cri) 1291 :
(1998) 6 SCC 223 :
1998 Crlj 2897 .

40 *Vijay Kumar v. Kamrauddin,*
1999 Crlj 1294 Ker .

41 *Nirmal Singh Kahlon v. State of Punjab,*
AIR 2009 SC 984 [
LNIND 2008 SC 2104]:
(2009) 1 SCC 441 [
LNIND 2008 SC 2104] :
(2009) 1 SCC 523 (Cri) :
2009 Crlj 958 .

42 *Rajesh v. Ramdeo,*
(2001) 10 SCC 759 : 2003 SCC (Cr) 1054 : 2000 Supp (1) JT 250.

43 *Kesavan v. Madhavan,*
(1984) Crlj 324 (para 20) Ker (FB); *Raghunath Singh v. State,*
(1990) 2 Crimes 310 (pat) .

44 *State of W.B. v. Salap,* (1994) Supp. (3) SCC 318 (para 2) : 1994 Supp (3) SCC 318.

45 *State of W.B. v. Salap,* (1994) Supp. (3) SCC 318 (para 2) : 1994 Supp (3) SCC 318.

46 *State of W.B. v. Salap,* (1994) Supp. (3) SCC 318 (para 2) : 1994 Supp (3) SCC 318.

47 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](para 21) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

48 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](para 21) :
(1979) 2 SCC 322 [

LNIND 1979 SC 11] :
1979 Crlj 1346 .

49 *Ram Lal v. State,*
AIR 1979 SC 1791 [
LNIND 1979 SC 11](para 21) :
(1979) 2 SCC 322 [
LNIND 1979 SC 11] :
1979 Crlj 1346 .

50 *Kesavan v. Madhavan,*
(1984) Crlj 324 (para 20) Ker (FB); *Raghunath Singh v. State,*
(1990) 2 Crimes 310 (pat) .

51 *Pounappa v. State of Karnataka,*
(1978) Crlj 1551 (para 7, 13) Knt.

52 *Ramsubbu v. State,*
(1988) Crlj 214 (para 6) Mad.

53 *Ram v. State of Bihar,*
(1986) Crlj 51 (para 14) Pat.

54 *Ladu Devi v. State of Rajasthan,*
2005 Crlj 543 Raj .

55 *Kunjalata v. State of Orissa,*
1985 Crlj 1047 Ori .

56 *Torab Ali v. State of West Bengal,*
1977 CHN 379 : 1978 Crlj NOC 87Cal .

57 *Shreeyesh v. State of Bihar,*
1977 Crlj 1597 Pat .

58 *Pusparani Samal v. S.K. Biswal,*
1998 Crlj 3704 Ori .

59 *State of Bihar v. Nagamani,*
(1977) Crlj 236 (NOC) Pat .

60 *Ram v. State of Bihar,*
(1986) Crlj 51 (para 14) Pat.

61 *Kunjalata v. State of Orissa,*
(1985) Crlj 1047 (paras 3-4) Or (DB).

62 *State of Bihar v. Saldanna,*
(1980) Crlj 98
AIR 1980 SC 326
LNIND 1979 SC 448
(1980) 1 SCC 554
LNIND 1979 SC 448
(para 25) : [ ]: [ ].

63 *State of W.B. v. Swapan,*
AIR 1982 SC 949
LNIND 1982 SC 34
(1982) 1 SCC 561
LNIND 1982 SC 34
1982 Crlj 819
[ ](paras 10, 65, 83) : [ ] : .

64 *Sanjib v. State of W.B.,*
(1986) Crlj 992
(para 9) Cal.

65 *State of W.B. v. Swapan,*
AIR 1982 SC 949
LNIND 1982 SC 34
(1982) 1 SCC 561
LNIND 1982 SC 34
1982 Crlj 819
[ ](paras 10, 65, 83) : [ ] : .

66 *Sharma v. Bipen,*
AIR 1970 SC 786
LNIND 1970 SC 121
(1970) 1 SCC 653
LNIND 1970 SC 121
1970 Crlj 764
[ ](*789*) : [ ] : .

67 *State of W.B. v. Sampat,*
AIR 1985 SC 195
LNIND 1984 SC 332
(1985) 1 SCC 317
1985 Crlj 516
[ ](paras 13, 25, 27, 29) : : .

68 *Ramesh Chandra Mehta v. State of W.B.,*
AIR 1970 SC 940
LNIND 1968 SC 317
1970 Crlj 863
(1969) 2 SCR 461
LNIND 1968 SC 317
(1986) Crlj 2018
[ ](para 5) : : [ ]; *Abdul v. Union of India,* (para 14) Bom.

69 *Ramesh Chandra Mehta v. State of W.B.,*
AIR 1970 SC 940
LNIND 1968 SC 317
1970 Crlj 863
(1969) 2 SCR 461
LNIND 1968 SC 317
(1986) Crlj 2018
[ ](para 5) : : [ ]; *Abdul v. Union of India,* (para 14) Bom.

70 *State of W.B. v. Sampat,*
AIR 1985 SC 195
LNIND 1984 SC 332
[ ](paras 13, 25, 27, 29) :

(1985) 1 SCC 317 :
1985 Crlj 516 .

71 *Sampat v. State of Haryana,*
(1993) 1 SCC 561 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 174
Police to enquire and report on suicide, etc.

(1) When the officer-in-charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more, respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such 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.

[When—

(i) the case involves suicide by a woman within seven years of her marriage; or

(ii) the case relates to the death of a woman within seven years of her marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman; or

(iii) the case relates to the death of a woman within seven years of her marriage and any relative of the woman has made a request in this behalf; or

(iv) there is any doubt regarding the cause of death; or

(v) the police officer for any other reason considers it expedient so to do,

he shall], subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.

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1. Amendment.—

The words within square brackets at the beginning of sub-sec. (3) have been substituted by Act 46 of 1983,— the *Criminal Law (Second Amendment) Act, 1983* , to deter offences against married women, for the following words—

"When there is any doubt ... he shall"

2. Scope of s. 174.—

It corresponds to *old* s. 174 with changes indicated in italics.

3. Object of s. 174.—

The report of a Police officer under this section is popularly known as the ‘inquest report’. This report to be made by the Investigating officer just to indicate the injuries which he has found on the bodies of the deceased persons. [73] It may be witnessed by one or two persons [s. 175], but is not necessary for the Investigating officer to record the statements of such witnesses or to get such statements signed by them. [74]

4. Scope of inquest report.—

1. The object of a proceeding under s. 174 is limited, *viz.* , to ascertain whether a person had died under circumstances which were doubtful or an unnatural death; and if so, what was the apparent *cause* of the death. [75]

2. It follows that questions regarding the details, as to *how* the deceased was assaulted or *who* assaulted him or under what circumstances he was assaulted, are beyond the scope of the report submitted by the Police under s. 174,[76] so that its value cannot be commented upon nor the evidence of prosecution witnesses disbelieved on the ground of omission of such extraneous particulars. [77]

3. Thus, it is not necessary to examine *all* the witness to the accident at an inquest and merely because a witness's name did not appear in the inquest report, it could not be urged that he was not an eye witness. [78]

   But where, in a murder case, the names of 5 accused were mentioned in the inquest report, and 4 others were omitted and no explanation was offered as to such omission, this, along with other circumstances, led to the conclusion that the names of the 4 accused had been added afterwards by the prosecution party on account of enmity. [79]

4. The whole purpose of holding an inquest is to investigate into and draw upon the report of the apparent cause of death, describing the wound that may be found on the body and stating in what manner or by what weapon or instrument, if any, such wounds appear to have been inflicted. In other words, for the purpose of holding an inquest, it is neither necessary not obligatory on the part of the Investigating Officer to investigate into or ascertain at that stage who were the persons responsible for the death. [80]

5. So, the object of the inquest report is only to notice as to whether the death was homicidal in nature or not, but not for making a note of identification marks of the accused. [81]

5. Scope limited.—

Investigation under *s. 174 Cr.P.C.* is limited in scope and is confined to ascertainment of apparent cause of death. It is concerned with discovering whether in a given case, the death was accidental, suicidal or homicidal or caused by animal and by what manner or by what weapon or instrument injuries on the body appear to have been inflicted. The details of the overt act need not be recorded in the inquest report. There is no requirement in law to mention the details of FIR, nor of the accused nor the name of the eye-witnesses or gist of their statements in the inquest report nor in the said report required to be signed by the witnesses.[82]

It is also not necessary to mention the details of the incident in the inquest report. [83]

So, non-mention of the names of the assailants in inquest report [84] or the name of witness [85] in the inquest report is not fatal for trial. Due to non-mention of the name of the accused in inquest report, it cannot be inferred that the F.I.R. was not in existence when the inquest was prepared. [86]

There is no requirement in law that the I.O. making the inquest should describe in details as to nature of injuries sustained by the deceased and/ or weapons used. [87]

Names of the accused need not be mentioned therein. [88] Inquest report need not contain the names of all witnesses. [89]

The witness allegedly saw the accused running away from the place near when the dead body was found. The fact that he did not mention this fact before the police officer holding the inquest does not detract the credibility of the witness in the trial. [90]

6. No cognizance on report under s. 174. —

The Police required to submit report under s. 174 before the District Magistrate or Sub-Divisional Magistrate. It is also required to submit another report before the Judicial Magistrate under s. 173(2), if during investigation under s. 174, it is found that an offence has been committed. But there is no question of Magistrate taking cognizance of an offence on the basis of the report under s. 174. [91]

7. Evidentiary value of the inquest report.—

1. An inquest report is not substantive evidence but may be used under *s. 145, Evidence Act*, for cross-examination, [92] or under s. 14 as confession of the witnesses examined at the inquiry. [93]

2. If any witness is examined at the inquest, it will attract s. 162 of the Code. [94]

3. Even though the inquest report, prepared under *s. 174,Cr.P.C.*, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details in proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR.[95]

8. Statement in inquest report, its value in trial.—

The statements contained in the inquest report as they relate to what the Investigating Officer saw and found are admissible in evidence, but the statements made therein by him on the basis of what he heard from others is hit by *s. 162 Cr.P.C.* [96]

When the witnesses to the inquest report are the alleged eye-witnesses failed to state the names of the assailants in the inquest report makes their presence at the time when the incident took place doubtful. [97]

In the inquest report, the gist of the FIR or cause of death is usually noted. Such noting is part of the inquest report and not to be treated as substantive evidence. [98]

9. Inquest report vis--vis post mortem report.—

While considering the evidentiary value of the inquest report and post mortem report, the Supreme Court has observed that the inquest report cannot be termed basic or substantive evidence being prepared by a police personnel being a non-medical man. It is pointed out that mere omission in the inquest report of a particular injury or indication therein of an additional one cannot invalidate the prosecution case. It is also pointed out that the post mortem report, which is a document which by itself is not a substantive evidence, but it is the evidence of the doctor in the Court based on such report is substantive evidence but not the post mortem report and that the discrepancy occurring between the inquest report and post mortem report cannot be termed fatal not even a suspicious circumstances, which would warrant a benefit to the accused. [1]

The inquest report is primarily intended to find out the nature of the injury and apparent cause of death, whereas the post mortem report certain details of injuries through scientific examination. [2]

Therefore, in case of discrepancy between the post mortem report and inquest report, post mortem report being an expert opinion and objective finding of an expert carries more weight. [3]

10. Duties of the Officer in charge. —

Section 174 lays down the following duties upon the officer in charge of a Police station on receipt of information as to an unnatural death *etc.* :

(a) He must inform the nearest Executive Magistrate empowered to hold inquest.

(b) In the absence of order to the contrary the Police officer must proceed to the spot and hold an inquest 'there'. [4]

(c) He must hold inquest in the presence of two or more respectable witnesses of the neighbourhood.

(d) He must then draw up a report as to the apparent cause of death, containing the particulars mentioned in sub-sec. (1), signed by himself and other persons as concur therein.

(e) He must forward the inquest report to the District Magistrate or Sub-Divisional Magistrate, without delay.

(f) He should forward the dead body for examination, to the medical man appointed by the State Government in this behalf, if the state of weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

He has discretion not to send the body for such examination where there cannot be any *doubt* as to the cause of the death. This discretion, however, is to be exercise prudently and honestly. [5]

11. Non holding of inquest or post mortem when immaterial.—

When death of twelve persons on account of indiscriminate firing by the accused persons have been

established and dead bodies were recovered from the spot itself and necessary death certificates were issued by the medical authority, non-holding of inquest or post mortem examination of the dead body by the doctor is immaterial for the purpose of proving the cause of death of the deceased persons. [6]

12. Punishment for false report. —

A Police officer who gives a false report under s. 174, knowing or believing it to be false, with the intention of screening the offender from punishment would be liable to be punished under s. 201. I.P.C. [7]

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72 Substituted by Act No. 46 of 1983, S. 3 (w.e.f. 25-12-1983).

73 *Narpal* *v.* *State* *of* *Haryana,* AIR 1977 SC 1066 [*LNIND 1977 SC 65*](para 16) : (1977) 2 SCC 131 [*LNIND 1977 SC 65*] : 1977 Crlj 642 .

74 *Narpal* *v.* *State* *of* *Haryana,* AIR 1977 SC 1066 [*LNIND 1977 SC 65*](para 16) : (1977) 2 SCC 131 [*LNIND 1977 SC 65*] : 1977 Crlj 642 .

75 *Basit* *v.* *State* *of* *M.P.,* (1976) Crlj 776 (para 8) MP.

76 *Pedda* *Narayana* *v.* *State* *of* *A.P.,* AIR 1975 SC 1252 [*LNIND 1975 SC 147*]: (1975) 4 SCC 153 [*LNIND 1975 SC 147*] : 1975 Crlj 1062 ; *Rajjac v. State,* (1994) Crlj 105 All (para 17).

77 *Basit* *v.* *State* *of* *M.P.,* (1976) Crlj 776 (para 8) MP; *Pedda Narayana v. State of A.P.,* AIR 1975 SC 1252 [*LNIND 1975 SC 147*]: (1975) 4 SCC 153 [*LNIND 1975 SC 147*] : 1975 Crlj 1062 ; *Rajjac v. State,* (1994) Crlj 105 All (para 17).

78 *Shakila* *v.* *Nausher,*
AIR 1975 SC 1324
(1991) Crlj 2653
(para 5); *Khujji v. State of M.P.,*
(para 8) SC.

79 *Balaka* *v.* *State* *of* *Punjab,*
AIR 1975 SC 1962
LNIND 1975 SC 156
(1975) 4 SCC 511
LNIND 1975 SC 156
1975 Crlj 1734
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](para 5) :
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80 *George* *v.* *State* *of* *Kerala,*
AIR 1998 SC 1376
LNIND 1998 SC 325
(1998) 4 SCC 605
LNIND 1998 SC 325
1998 Crlj 2034
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: 1998 SCC (Cr) 1232.

81 *Ravi* *v.* *State,*
AIR 2007 SC 1729
LNIND 2007 SC 554
2007 Crlj 2740
(2007) 5 SCR 766
LNIND 2007 SC 554
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82 *Radha* *Mohan* *Singh* *v.* *State* *of* *U.P.,*
AIR 2006 SC 951
LNIND 2006 SC 45
2006 Crlj 1121
(2006) 2 SCC 450
LNIND 2006 SC 45
(1996) 1 SCC 661
AIR 2003 SC 1164
LNIND 2003 SC 138
(2003) 2 SCC 518
LNIND 2003 SC 138
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(Cri) ; *Amar Singh v. Balwinder Singh,*
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83 *State* *of* *U.P.* *v.* *Abdul,*
AIR 1997 SC 2512
LNIND 1997 SC 790
(1997) 10 SCC 135
LNIND 1997 SC 790
1997 SCC (Cri) 804
1997 Crlj 2997
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84 *Shaikh* *Ayub* *v.* *State* *of* *Maharashtra,*
AIR 1998 SC 1285
LNIND 1998 SC 249
(1998) 9 SCC 521
LNIND 1998 SC 249
1998 SCC (Cri) 1055
LNIND 1998 SC 249
1998 Crlj 1656
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85 *Babu* *Singh* *v.* *State* *of* *Punjab,*
(1996) 8 SCC 699
LNIND 1996 SC 860
[
] :

1996 SCC (Cri) 930 [
LNIND 1995 SC 1269] :
1996 Crlj 2503 .

86 *Rama Shanker v. State of U.P.,*
2008 Crlj 129 All DB .

87 *Bur Singh v. State of Punjab,*
AIR 2009 SC 157 [
LNIND 2008 SC 1995]:
(2008) 16 SCC 65 [
LNIND 2008 SC 1995].

88 *Satbir Singh v. State of U.P.,*
AIR 2009 SC 2163 [
LNIND 2009 SC 450]:
(2009) 13 SCC 790 [
LNIND 2009 SC 450] : (2009) 3 All LJ 786.

89 *State v. Rajendran,*
AIR 2009 SC 925 [
LNIND 2008 SC 2291]:
(2008) 15 SCC 425 [
LNIND 2008 SC 2291] :
(2009) 3 SCC 957 (Cri) .

90 *Aftab Ahmad Anasuri v. State of Uttaranchal,*
AIR 2010 SC 773 [
LNIND 2010 SC 51].

91 *Babu Ram v. State,*
(1994) Crlj 68 (NOC) (Raj) (DB).

92 *Pandurang v. State of Hyderabad,* (1955) 1 SCR 1083 (1090).

93 *P.P. v. Ibrahim,*
AIR 1964 AP 548 [
LNIND 1963 AP 232](para 81) DB.

94 *Razik v. Chouhan,*
AIR 1975 SC 667 [
LNIND 1975 SC 58](*684*) :
(1975) 4 SCC 769 [
LNIND 1975 SC 58].

95 *Meharaj Singh v. State of U.P.,*
(1994) 5 SCC 188 (para 12) :
1995 Crlj 457 :
(1994) 2 Crimes 154 .

96 *George v. State of Kerala,* [AIR 1998 SC 1376 : LNIND 1998 SC 325 : (1998) 4 SCC 605 : LNIND 1998 SC 325 : 1998 Crlj 2034].

97 *Suresh Rai v. State of Bihar,* [AIR 2000 SC 2207 : LNIND 2000 SC 553 : (2000) 4 SCC 84 : LNIND 2000 SC 553 : 2000 SCC (Cri) 764 : LNIND 2000 SC 553 : 2000 Crlj 3457].

98 *Thanedar Singh v. State of M.P.,* [AIR 2002 SC 175 : LNIND 2001 SC 2451 : (2002) 1 SCC 487 : LNIND 2001 SC 2451 : 2002 SCC (Cri) 153 : LNIND 2001 SC 2451 : 2002 Crlj 254].

1 *Munshi Prasad v. State of Bihar,* [AIR 2001 SC 3031 : LNIND 2001 SC 2295 : (2002) 1 SCC 351 : LNIND 2001 SC 2295 : 2002 SCC (Cri) 175 : LNIND 2001 SC 2295 : 2001 Crlj 4708].

2 *Sunil Singh v. State of West Bengal,* [2007 Crlj 516 : Cal ; *Baldev Singh v. State of U.P.,* 2004 Crlj 2686 : All ; *M.N. Raval v. State,* AIR 1992 SC 2186 : LNIND 1992 SC 509 : 1992 Crlj 3710 : (1992) 4 JT 555 : LNIND 1992 SC 509 : 1992 SCC (Cri) 810 : LNIND 1992 SC 509].

3 *Rohit Yadav v. State of Bihar,* 2007 Crlj NOC 202Pat DB .

4 *Puranchandra v. P.P.,* [AIR 1975 SC 1925 : LNIND 1975 SC 316 : (1975) 2 SCC 570 : LNIND 1975 SC 316 : 1975 Crlj 1671](para 37).

5 *Puranchandra v. P.P.,* [AIR 1975 SC 1925 : LNIND 1975 SC 316](para 37) :

(1975) 2 SCC 570 [
LNIND 1975 SC 316] :
1975 Crlj 1671 .

6 *Banwari Ram v. State of U.P.,*
AIR 1998 SC 674 : (1998) 9 SCC 3 :
1998 SCC (Cri) 835 :
1998 Crlj 869 .

7 *Puranchandra v. P.P.,*
AIR 1975 SC 1925 [
LNIND 1975 SC 316](para 37) :
(1975) 2 SCC 570 [
LNIND 1975 SC 316] :
1975 Crlj 1671 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 175
Power to summon persons.

(1) A police officer proceeding under Section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case and every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which Section 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XII
INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

S. 176
Inquiry by Magistrate into cause of death.

(1) [8] [[9] [* * *] when the case is of the nature referred to in clause (i) or clause (ii) of sub-section (3) of section 174] the nearest Magistrate empowered to hold inquests shall, and in any other case mentioned in sub-section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

[(1-A) [10] Where,—

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman,

while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.]

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

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[(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (1-A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical man appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing .
]

Explanation. **—In this section, the expression "relative" means parents, children, brothers, sisters and spouse.**

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1. Scope of s. 176. —

This section corresponds to *old* s. 176 with these changes:

(a) Sub-sec. (1) has been divided into sub-secs. (1)-(2) and *old* sub-sec. (2) is now sub-sec. (3).

(b) Sub-sec. (4) has been added.

2. Legislative changes.—

1. The words "when any person dies in the custody of police or" has been omitted by the *Code of Criminal Procedure* (Amendment) Act, 2005 (with effect from 23.06.2006) as sub-section (1A) inserted by the Act, 2005 makes mandatory provision for enquiry into cause of death of a person while in police custody.

2. Sub-section (1A) mandatorily provides for inquiry by the Judicial Magistrate or Metropolitan Magistrate concerned, as the case may be, when any person dies or disappears while in police custody or when rape is alleged to have been committed upon a woman while in the custody of police.

3. Sub-section (5) provides that in case of death of a person while in police custody, the Judicial Magistrate, or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation has the obligation to send the dead body within twenty four hours of death of a person to be examined by the nearest civil surgeon or other qualified medical man to be appointed in this behalf. Sending the dead body for medical examination within twenty four hours of the death is also mandatory

unless it is not possible to do so for which reasons have to be recorded in writing who has to send the dead body for medical examination.

3. Notes on Clause.—

Clause 18 of the *Code of Criminal Procedure* Amendment Bill, 2005 which has amended *s. 176 Cr.P.C.* reads as follows :

" Section 176 is being amended to provide that in the case of death or disappearance of a person or rape of a woman while in the custody of police, there shall be a mandatory judicial enquiry, and in case of death, the examination of the dead body shall be conducted within twenty four hours of death."

4. Object.—

The original purpose of s. 174 as originally stood prior to the Amendment Act of 2005 was that on enquiry into a suspicious death should not depend merely upon the holding inquest into the dead body or an unnatural death but there should be a further check by enabling the Magistrate to hold an inquiry.

Such inquiry by the Magistrate was made mandatory when the death of a person occurred during the police custody or when the case involved suicide by a woman within seven year of her marriage or the case relates to the death of a woman within seven years of marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to that woman. They are commonly known as dowry death cases punishable under s. 304-B I.P.C. and in any other case inquiry by the Magistrate was not mandatory.

In view of the amendment to the Code by the Amendment Act, 2005, apart from dowry death cases, the death in the police custody or disappearance of a person from the police custody and rape allegedly committed on a woman while in the custody of the police have been brought within the purview of the mandatory judicial inquiry by the Judicial Magistrate or the Metropolitan Magistrate concerned. Sub-section (5) also mandatorily requires dead body of a person died in the police custody has to be sent for medical examination by the nearest civil surgeon or any other qualified medical man appointed by the State Government for this purpose. So, the *Cr.P.C.* (Amendment) Act, 2005 has expanded the scope of judicial inquiry.

However, inquiry by a Magistrate under this section may be a judicial proceedings under s. 2(i) ante and evidence may be taken by him, nevertheless he does not function as a Court or he has no power to deliver or enforce a judgment.

5. Recording of statement of the accused.—

It is competent for the Magistrate while making any inquiry into the cause of death to record the statement of the accused, even if such statement amounts to confession, it is not hit by *s. 26 of the Evidence Act* and if proved during trial, it can be admissible in

evidence. [12]

6. No joint enquiry. —

The enquiry into cause of death under *s. 176 of the Criminal Procedure Code, 1973* , is to be made independently by the Magistrate and not jointly with Police. Moreover, when the conduct of the Police is the matter of inquiry, joint enquiry by the Executive Magistrate and the Circle Inspector of Police was impermissible under s. 176 of the Code.[13]

7. Revision. —

1. Since the omission of *old* s. 435(3) in 1923, it is clear that proceedings under s. 176 are open to revision. [14]
2. But omission to hold an inquest would be curable under s. 465 (*post),* in the absence of failure of justice. [15]
3. Not being a judicial inquiry, a proceeding under s. 176 is not amenable to the writ of *certiorari* . [16]

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8 Substituted by Act 46 of 1983, S. 4, for the words "When any person dies while in the custody of the police" (w.e.f. 25-12-1983).

9 The words "When any person dies while in the custody of the police or" omitted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 18 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

10 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 18 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

11 Inserted by the *CrPC* (Amendment) Act, 2005 (25 of 2005), S. 18 . Enforced w.e.f. 23-6-2006 *vide* Notification No. S.O. 923(E), dt. 21-6-2006.

12 *M. Yallappa v. State of Karnataka,* 1993 Crlj 388 Kant .

13 *Nilabati v. State of Orissa,* AIR 1993 SC 1960 [*LNIND 1993 SC 1167*].

14 *Rajangam* *v.* *State* *of* *Madras,* [AIR 1959 Mad 294 305 *LNIND 1958 MAD 75*].

15 *Ghudo,* AIR 1945 Nag 143 .

16 *Rajangam* *v.* *State* *of* *Madras,* [AIR 1959 Mad 294 305 *LNIND 1958 MAD 75*].

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 177
Ordinary place of inquiry and trial.

Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

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1. Scope of s. 177.—

This section reproduces *old* s. 177.

It is not intended to be an exclusive provision. The provisions in s s. 177-184 are cumulative in effect and intended to facilitate the prosecution of offenders by providing a wider choice of courts for initiating inquiry or trial. [1]

2. Jurisdiction of Criminal Courts. —

The jurisdiction for trial of offences is of two kinds: [2]

(a) One type deals with the power of the Courts to try particular kinds of *offences.* This power is dealt with in Chap. III of the Code (*et seq., ante*). This is jurisdiction which goes to the root of the matter and if a Court not empowered to try a particular offence does try it, the entire trial is void. [3]

(b) The other kind is *territorial* jurisdiction. But the provisions relating to it in s s. 177*et seq.* are not peremptory in the same sense as the preceding class of substantive jurisdiction. Territorial jurisdiction

is provided just as a matter of convenience, keeping in mind the administrative point of view with respect to the work of a particular Court, the convenience of the accused who will have to meet the charge levelled against/him and the convenience of the witnesses who have to appear before the Court. [4] The object of the provisions in Chap. XIII is to enlarge as much as possible the ambit of the sites in which the trial of an offence might be held and to minimise as much as possible the inconvenience which would be caused to the prosecution, by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court. [5]

3. Effect of absence of jurisdiction. —

A defect of jurisdiction, where it is pecuniary or territorial, or where it is in respect of the subject-matter of the act ion, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. [6]

4. 'Shall ordinarily'.—

These words indicate that the general rule embodied in this exception is subject to the exceptions laid down in the succeeding sections [7] (*e.g.,* s. 178) [8] or some other law, [9] or some other provision of the Code, *e.g..,* ss. 13, 18, [10] ss. 223-239. [11]

2. In some cases, it was thought that the provisions of the Code which constituted exceptions to the rule in s. 177 were contained in Chap. XIII itself, and that in the absence of any such exceptional provisions being applicable to a given case, the application of the rule in s. 177 was mandatory. [12] But any such assumption has been *repelled* by the Supreme Court, [13] holding that s s. 218-223 [*old* ss. 233-239], should also be considered as exceptions to the rule under s. 172, because these other provisions also provide for the trial of one offence along with another in one Court, irrespective of the fact whether such offences were all committed within the jurisdiction of that particular Court. It is not the intention behind s. 220 or s. 239, for instance, that the Court having jurisdiction to try such offences cannot try an offence committed *in the course of the same transaction,* simply because it was committed beyond its local jurisdiction. [14]

3. As pointed out earlier, the Supreme Court has held [15] that the provisions of the present Chapter (XIII) are *not* peremptory, but are intended to enlarge the venue for trial as much as possible, in order that the prosecution might not be defeated by the technical plea of lack of territorial jurisdiction. s. 177, thus, leaves the place of trial open. [16]

4. As a result of this view of the Supreme Court—

(a) The Court having jurisdiction to try the offence of criminal conspiracy can also try all offences committed in pursuance of that conspiracy even if those offences were committed outside the jurisdiction of that Court. [17] , [18]

(b) Conversely, the Court having jurisdiction to try the offences committed in pursuance of a conspiracy can try the offence of conspiracy even if it was committed outside its jurisdiction. [19]

This view of the Supreme Court [20] , [21] has been incorporated in the Code itself by inserting *new*

s. 184, *post.* (See, further, under s. 184].

The expression 'ordinarily' has been interpreted by the Supreme Court in several decisions. The expression, according to the Supreme Court, indicates that the provision is a general one and must be read subject to the special provisions contained in other sections of the Chapter and that the word 'ordinarily' need not be limited to those specially provided for by the law and exception may be provided by law on consideration of convenience or may be implied from other provision of law permitting joint trial of offence by the same court. [22]

Every offence shall be ordinarily tried by a Court within whose local jurisdiction it was committed. But the said rule has several exceptions. But when no such exception is applicable to the case in hand, then the Magistrate had no jurisdiction to deal with the matter as no part of cause of action of the case arose within the jurisdiction of the Court where the proceedings was initiated. [23]

Rule of *s. 177 Cr.P.C.*, has to be read subject to any special provision which may modify it. These provisions are contained in s s. 178 to 182, ss. 184 to 186 and *s. 188 Cr.P.C.* The provisions of *s. 219* to *223 Cr.P.C.* also provide exceptions to s. 177.[24]

Similarly, *Sections 5 of the Extradition Act, 1962* overrides s *s. 177*, *178* and *179 Cr.P.C.* [25]

Thus, general rule of jurisdiction is contained in *s. 177 Cr.P.C.* and the Magistrate within whose jurisdiction the crime was committed or completed has the jurisdiction. This rule is subject to the exceptions contained in subsequent sections.[26]

The word "ordinarily" occurring in s. 177 must be given its natural meaning and provisions contained in s. 178 would be attracted when *s. 177 Cr.P.C.* cannot be given effect. For the purpose of finding out where enquiry or trial should be conducted, would be that the offence had taken place wholly or partly of the jurisdiction of one police station or wholly or partly in the jurisdiction of another police station and would depend upon the fact situation obtaining in each case.[27]

5. Section 177 Cr. P.C. does not control investigation.—

The complainant wife on being driven out of the house at Patiala lodged a complaint before S.H.O. Patiala. After she came to Delhi in her father's house, she received threats from the husband. So, she filed an FIR before the S.H.O. Paschim Vihar, New Delhi under Sections 406 and 498A I.P.C. for the offences at Patiala. The police of Paschim Vihar, New Delhi started investigation. The husband sought for quashing that

investigation on the ground that the police of the Paschim Vihar has no jurisdiction to investigate the offence alleged to be committed at Patiala. The High Court quashed the investigation. The Supreme Court set it asides. It is held that there is no legal bar to the S.H.O. Paschim Vihar to investigate into the FIR lodged with that police station because he has statutory duty to investigate any cognizable offence in view of *s. 156 Cr.P.C.* , and the High Court committed illegality by quashing the FIR only because the S.H.O. Paschim Vihar has no territorial jurisdiction and the order must be set aside.[28]

6. Power of the Legislature to provide exceptions.—

While s. 177 lays down the general rule as to territorial jurisdiction for criminal inquiries and trial, the word 'ordinarily' indicates that the competent Legislature may, by a special statute, provide a departure [29] from the general rule in s. 177,*e.g.,* by *Sections 134(1), Railways Act* , 1890; s. 66 of the Inland Steam-Vessels Act, 1917; s. 4, I.P.C. But the departure must be clearly expressed.[30]

7. '.... Within whose jurisdiction it was committed'.—

Where the commission of the offence arises out of an act of *omission,* the jurisdiction relates to the place where the act which is omitted ought to have been done. [31] Thus, where the charge is under the *Essential Commodities Act* , for violation of Cl. (7) of the Iron and Steel Control Order, 1956, the jurisdiction would be determined by s. 177 and not 181, and the Court having jurisdiction over the place where the materials received should have been utilised, *i.e.* , at the factory of the accused, shall have jurisdiction. [32]

2. The place where the offence was committed has to be determined from the definitions of the respective offences in the *Penal Code* , [33] or other law which created the offence, read with the averments in the complaint or charge-sheet. [34]

3. The 'offence', in this context, means the substantive offence with which the accused has been charged. Thus, there is no question of determining jurisdiction on the footing of conspiracy unless there is a definite complaint or charge for the offence of conspiracy under s. 120B, I.P.C. [35]

First dowry demand was made at the time of marriage at the maternal place of the complainant. The second demand was made by the accused to the father of the complainant on telephone from his own house. Both demands merge in each other. So, the matrimonial as well as maternal place of the complainant have jurisdiction. [36]

The complainant resided at place 'J' but married and went to in laws' at 'G'. The allegation of act s of cruelty and breach of trust were committed at place 'G'. So, the place 'J' has no jurisdiction to try such offence. [37]

The trial of dishonor of cheque under s. 138 of the Negotiable Instrument Act is to be held at the place, when the said negotiable instrument was required to be discharged by payment. So, the Court at another place where the cheque was presented cannot be said to have the jurisdiction to try the offence. [38]

When the act of cruelty was committed at the place ‘D’ where the complainant resided with her in-laws, the Court ‘D’ had territorial jurisdiction and not the place where paternal house of the complainant was situated. [39]

8. Bigamy (s. 494, I.P.C.).—

1. The offence is committed where the second marriage takes place, [40] subject, of course, to statutory modifications.
2. Alternative jurisdiction created by s. 182(2),*post,* is the place where the offender last resided with his or her spouse by the first marriage; or the wife by the first marriage has taken up her permanent residence [see under s. 182 (2),*post*].

When the second marriage has taken place at ‘B’, the Court at place ‘B’ can conduct the enquiry and trial of the offence of bigamy. But the Court at place ‘J’ where the complainant first wife is residing there at present has no jurisdiction to entertain the complaint of bigamy. [41]

9. Defamation case.—

In respect of a defamation case against a newspaper for publishing a defamatory article in the newspaper, if the newspaper is printed and published at one place and circulated at another place, the Court within jurisdiction of which the newspaper is circulated has also the jurisdiction to entertain the case. [42]

10. Offence under s. 498A I.P.C.—

The Court within whose jurisdiction dowry was demanded and cruelty caused would alone have the jurisdiction. The complaint filed in any of other place is liable to be quashed. [43]

When the offence of cruelty to wife for dowry demand was committed at place ‘M’ for the major part and also at place ‘C’, but none was committed at place ‘T’, where the wife was residing with her parents, the Court at ‘T’ had no jurisdiction. So, the Supreme Court transferred the proceedings at place ‘C’ where the matrimonial proceedings were pending. [44]

Similar is the case when the offence under Section 498A I.P.C. was committed at place ‘S’ or ‘N’ and none at place ‘H’, the Court at ‘H’ had no jurisdiction to entertain the complaint. [45]

All the alleged acts as per the complaint had taken place in the State of Punjab. But the complaint was filed in Sri Ganganagar in the State of Rajasthan against the appellant and challan was filed before the A.C.J.M., Ganganagar who framed charges against the appellants under ss. 498A and 406 I.P.C. But no part of cause of act ion took place at Sri Ganganagar even if they were then residing at Sri Ganganagar. The Court of Sri Ganganagar had no jurisdiction to try the case. So, the Supreme Court quashed the proceedings pending before the A.C.J.M., Sri Ganganagar, granting liberty to the complainant to file the complaint to appropriate

Court in the State of Punjab. [46]

11. Offence under Dowry Prohibition Act.—

The Offence under *Sections 3* and *4* of the *Dowry Prohibition Act* and ss. 406 and 498A I.P.C. even though offence of criminal breach of trust and cruelty were at place 'G', but marriage having taken place at 'B', then part of cause of action arose at place 'B'. So, the Court at 'B' had territorial jurisdiction to try all above the above offences.[47]

12. Offence of forgery and using forged document as genuine.—

The accused forged and fabricated the experience certificate to get the appointment as Transport Officer. The conspiracy of forging and fabricating the certificate took place at place 'D' and was used at place 'C' where he was interviewed the Court of either of the two places has the jurisdiction to entertain the complaints, but not the place 'B' where joined his post after being initially appointed. [48]

Bare perusal of the complaint filed under Sections 120B, 420, 467, 468 and 471 I.P.C. clearly showed that the cause of act ion arose with the jurisdiction of the Court at 'R' in State 'J', investigation was completed in 'R' all records and documents pertaining to the complaint and charges were before at the Court at 'R'. Only because part of cause of action arose in another State 'M', the Court of 'R' has definite jurisdiction to proceed with the trial. [49]

13. Offence under Copyright Act.—

The allegation in the petition of complaint did not show as to where the criminal conspiracy was hatched. No cause of act ion took place at place 'P'. The complaint filed at place 'P' has been quashed by the High Court for lack of territorial jurisdiction. [50]

When no part of cause of action took place pertaining to the commission of offence under s. 498A I.P.C. in the territorial jurisdiction at place 'A', the order quashing the proceedings and directing the complainant to file the complaint before the competent court is proper. [51]

When the offence of cruelty to wife and that of criminal breach of trust took place only at place 'G', the matrimonial home of the wife, the Court at place 'J' where the parental home of the wife was situated had not territorial jurisdiction. The order taking cognizance by the Court at place 'J' is liable to be quashed. [52]

14. Effect of trial at wrong jurisdiction.—

Section 46 Cr.P.C. states that no trial or other proceedings is liable to be set aside for the absence of territorial jurisdiction, unless it has occasioned failure of justice.[53]

The objection regarding the territorial jurisdiction has to be taken at the earliest stage and if it is taken, the Court may quash the proceedings and direct the complainant to file complaint in proper Court. But when the objection was not taken at the earliest stage, such objection taken before the Supreme Court cannot be sustained when no prejudice was caused to the accused by trial at wrong Court. [54]

15. S s. 177 and 220. —

Under s. 220 where two offences (*e.g.* , Kidnapping and rape [55] or Kidnapping and emasculation of a body) [56] constitute one transaction, they may be tried together by any Court within whose jurisdiction any of the act s constituting the offences was committed. [57] That jurisdiction is not lost because it is ultimately held that the acts did not in the eye of law constitute one or more of the offences. [58]

Similar view has been taken with respect to several act s of 'cruelty' under s. 498 A, I.P.C. [59]

Special Law

16. Offence under s s. 4-6, Child Marriage Restraint Act, 1929.—

To be inquired into by a Court having jurisdiction over the place where the marriage ceremony took place, [60] and not where they lived man and wife after the marriage.

17. Extradition Act, 1962.—

The Act, being a special provision dealing with the extradition of fugitive criminals, shall exclude from application the general provisions of the *Code of Criminal Procedure, 1973* . In any case, s. 5 of the said Code gives overriding effect to the special jurisdiction created under any special or local laws. Sections 177, 188 and 190 of the Code have no application to the proceedings under the Act.[61]

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1 41st Rep. of the Law Commission, para 15.13.

2 *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [LNIND 1961 SC 188]: (1961) 2 Crimes 728 .

3 *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [LNIND 1961 SC 188]: (1961) 2 Crimes 728 ; Cf. *State of U.P. v. Sabir Ali,*

AIR 1964 SC 1673 [
LNIND 1964 SC 100]:
(1964) 7 SCR 435 [
LNIND 1964 SC 100] :
(1964) 2 Crimes 606 .

4 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188]:
(1961) 2 Crimes 728 .

5 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188]:
(1961) 2 Crimes 728 .

6 *Kiran v. Chaman,*
AIR 1954 SC 340 [
LNIND 1954 SC 67]:
(1955) 1 SCR 117 [
LNIND 1954 SC 67] :
1954 SCJ 514 [
LNIND 1954 SC 67].

7 *Nikka Singh v. State,*
AIR 1952 Punj 186 .

8 *Banwarilal v. Union of India,*
AIR 1959 Ker 311 314 [
LNIND 1958 KER 61]; *Charu v. Emp.,*
AIR 1917 Cal 137 (FB) .

9 *Narumal v. State of Bombay,*
AIR 1960 SC 1329 1332 : 1960 Crlj 1674.

10 *Haridas,*
AIR 1959 All 82 [
LNIND 1958 ALL 117].

11 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188](para 15-17) :
(1962) 2 SCR 101 [
LNIND 1961 SC 188] :
(1961) 2 Crimes 728 , overruling *Siban v. State,*
AIR 1959 Cal 500 [
LNIND 1959 CAL 66]FB .

12 *Desai v. State of Mysore,*
AIR 1956 Mys 46 .

13 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [

LNIND 1961 SC 188](para 15-17) :
(1962) 2 SCR 101 [
LNIND 1961 SC 188] :
(1961) 2 Crimes 728 , overruling *Jiban v. State,*
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LNIND 1959 CAL 66]FB .

14 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188](para 15-17) : (1962) 2 SCR 101 :
(1961) 2 Crimes 728 , overruling *Jiban v. State,*
AIR 1959 Cal 500 [
LNIND 1959 CAL 66]FB .

15 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188](para 15-17) : (1962) 2 SCR 101 :
(1961) 2 Crimes 728 , overruling *Jiban v. State,*
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LNIND 1959 CAL 66]FB .

16 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188](para 15-17) : (1962) 2 SCR 101 :
(1961) 2 Crimes 728 , overruling *Jiban v. State,*
AIR 1959 Cal 500 [
LNIND 1959 CAL 66]FB .

17 *Purushottamdas v. State of W.B.,*
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LNIND 1961 SC 188](para 15-17) : (1962) 2 SCR 101 :
(1961) 2 Crimes 728 , overruling *Jiban v. State,*
AIR 1959 Cal 500 [
LNIND 1959 CAL 66]FB .

18 *Mukherjee v. State of Madras,*
AIR 1961 SC 1601 [
LNIND 1961 SC 185]:
(1962) 2 SCR 116 [
LNIND 1961 SC 185] :
(1961) 2 Crimes 736 ; *Banwarilal v. Union of India,*
AIR 1963 SC 1620 [
LNIND 1962 SC 382](para 23) : 1963 Supp (2) SCR 338 :
(1963) 2 Crimes 529 .

19 *Mukherjee v. State of Madras,*
AIR 1961 SC 1601 [
LNIND 1961 SC 185]:
(1962) 2 SCR 116 [
LNIND 1961 SC 185] :
(1961) 2 Crimes 736 .

20 *Purushottamdas v. State of W.B.,*
AIR 1961 SC 1589 [
LNIND 1961 SC 188](paras 15-17) :
(1962) 2 SCR 101 [
LNIND 1961 SC 188] :

(1961) 2 Crimes 728 , overruling *Jiban v. State,*
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LNIND 1959 CAL 66]FB .

21 *Mukherjee v. State of Madras,*
AIR 1961 SC 1601 [
LNIND 1961 SC 185]: (1962) 2 SCR 116 :
(1961) 2 Crimes 736 .

22 *Mohan Bhaitha v. State of Bihar,*
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LNIND 2001 SC 750]:
(2001) 4 SCC 350 [
LNIND 2001 SC 750] :
2001 Crlj 1738 :
(2001) 2 Crimes 83 [
LNIND 2001 SC 750].

23 *Y. Abraham Ajith v. Inspector of Police,*
AIR 2004 SC 4286 [
LNIND 2004 SC 806]:
(2004) 8 SCC 100 [
LNIND 2004 SC 806] :
2004 SCC (Cri) 2134 [
LNIND 2004 SC 806] :
2004 Crlj 4180 .

24 *ANZ Grindlays Bank v. Shipping and Clearing (Agents) Pvt. Ltd.,*
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25 *Rosiline George v. Union of India,*
(1994) 2 SCC 80 :
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26 *Nagesh v. State,*
1990 Crlj 2234 Kant .

27 *Prem Kumar v. State of Kerala,*
(2008) 17 SCC 264 [
LNIND 2008 SC 2505].

28 *Satvindar Kaur v. State (Government of NCT of Delhi),*
(1999) 8 SCC 728 [
LNIND 1999 SC 893] :
1999 SCC (Cri) 1503 [
LNIND 1999 SC 893] :
AIR 1999 SC 3596 [
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1999 Crlj 4566 .

29 *Narumal v. State of Bombay,*
AIR 1960 SC 1329 1332 : 1960 Crlj 1674.

30 *Narumal v. State of Bombay,* AIR 1960 SC 1329 1332 : 1960 Crlj 1674.

31 *Dhirendra v. State,* (1978) Crlj 637 (para 5).

32 *Dhirendra v. State,* (1978) Crlj 637 (para 5).

33 *Emp. v. Mohrulal,* AIR 1936 All 193 .

34 *State of M.P. v. Ghiara,* AIR 1957 SC 196 : 1957 Crlj 322.

35 *Patnaik v. Brinnand,* AIR 1970 Cal 110 [*LNIND 1969 CAL 181*].

36 *Babban v. State of Bihar,* 2007 Crlj 529 Pat .

37 *Dinesh Kumar Sharma v. State,* 2007 Crlj NOC 194Raj .

38 *Ahuja v. State,* 2007 Crlj 115 Bom .

39 *Suresh v. State,* 2007 Crlj NOC 678MP .

40 *Vasantha v. Krishnaswami,* AIR 1967 Mad 241 [*LNIND 1966 MAD 23*]; Cf. *Sarla Mudgal v. Union of India,* (1995) 3 SCC 635 [*LNIND 1995 SC 661*] (paras 26-27, 39) : AIR 1995 SC 1531 [*LNIND 1995 SC 661*]: 1995 Crlj 2926 .

41 *S. Karan Singh v. S, Jatinder,* 2007 Crlj 2588 (J & K).

42 *K.M. Mathew v. K. Abraham,* 1998 Crlj 327 Ker .

43 *Shakuntala v. State of MP.,* 2005 Crlj NOC 59MP .

44 *Ramesh v. State,* 2005 Crlj 1732 Mad .

45 *T. Venkateshwarlu v. State of A.P.,* 1999 Crlj 39 AP .

46 *Bhora Ram v. State of Rajasthan,* AIR 2008 SC 2666 [*LNIND 2008 SC 821*] (2008) 4 SCC 103 : 2008 Crlj 3496 .

47 *Suman v. State of U.P.,* 1999 Crlj 4659 All .

48 *Malli Pal v. State of Haryana,* 1997 Crlj 43 (P&H) .

49 *Rajendra Ram Chandra Kavalekar v. State of Maharashtra,* AIR 2009 SC 1792 [*LNIND 2009 SC 156*] (2009) 11 SCC 286 [*LNINDORD 2009 SC 563*] (2009) 3 SCC 133 : (Cri) 2009 Crlj 1592 .

50 *Dipankar v. State of Bihar,* 2007 Crlj 4360 Pat .

51 *Jaswant v. Gurdeep,* 2007 Crlj 4726 CHH .

52 *Dinesh v. State of Rajasthan,* 2007 Crlj NOC 194Raj .

53 *Mangaldas v. State,* AIR 1966 SC 128 [*LNIND 1965 SC 30*] 1966 Crlj 106 .

54 *Nasiruddin v. State,* AIR 1973 SC 186 : (1973) 3 SCC 99 : 1973 Crlj 241 .

55 *Dilip v. State of M.P.,* (1987) Crlj 212 (para 16) MP. [Contrary view in *Jagannath v. State of Haryana,* (1983) Crlj 1574 (para 9) does not appear to be sound].

56 *Lilade v. State of Gujarat,* (1983) Crlj 934 (para 9).

57 *Dilip* *v.* *State of M.P.,*
(1987) Crlj 212
(1983) Crlj 1574
(para 16) MP. [Contrary view in *Jagannath v. State of Haryana,* (para 9) does not appear to be sound].

58 *Dilip* *v.* *State of M.P.,*
(1987) Crlj 212
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(para 16) MP. [Contrary view in *Jagannath v. State of Haryana,* (para 9) does not appear to be sound].

59 *Vijay* *v.* *State of U.P.,*
(1988) Crlj 1581
(para 7).

60 *Radha Kishan* *v.* *Ellamma,*
(1984) Crlj 573
(Mad) (para 2).

61 *Rosiline George* *v.* *Union of India,*
(1994) 2 SCC 80
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 178
Place of inquiry or trial.

(a) When it is uncertain in which of several local areas an offence was committed, or

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

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

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

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

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1. Scope of s. 178. —

This section reproduces *old* s. 182, while *old* s. 178 has been numbered s. 185,*post,* as recommended by the Law Commission.

2. Section 178 is supplemental to s. 181. [62]

3. The applicability of s. 178 is to be determined with reference to the averments in the complaint or charge-sheet, unless they are positively disproved. [63]

2. Cl. (a) :'Uncertainty'. —

1. The following facts from a Supreme Court case will illustrate what is meant by uncertainty as to the place where an offence was committed [s. 177].

   The accused was the agent of a company having its head office at Nagpur. He was entrusted at Nagpur with a car for sale. The accused sold the car at Bombay and received the sale proceeds there. On returning to Nagpur, the accused failed to pay over the money to the company.

   A charge-sheet was field against him at Nagpur, under s. 408, I.P.C., without stating it specifically that the offence of breach of trust took place at Nagpur *or* at Bombay. There was no evidence to show that prior to his leaving Bombay for Nagpur the accused had entertained or even been animated with an intention to misappropriate the sale proceeds and there was nothing to show that he had utilised the funds for his own use during the period of his stay at Bombay between the 13th and 16th January.

   Held, it was uncertain whether the offence under s. 408 was committed at Nagpur or Bombay. Hence, the Court at either Bombay or Nagpur had jurisdiction to try the offence. [64]

2. The question of *uncertainty* is to be determined by the Court before which it is contended that another Court has jurisdiction to try the offence in question. [65]

3. Cl. (c): 'Continuing offence'.—

Normally a particular act constitutes an offence when the act is committed. But there are certain act s which constitute an offence and continue to constitute a fresh offence each day the act continues. [66] In such a case, the offence may be tried at any of the Courts within whose jurisdiction the different act s constituting the continuing offence were committed.

A continuing offence is one which is susceptible of continuance and distinguishable from one which is committed once for all. It is one of the offences which arise out of failure to comply with the Rule which visits the person with penalty. So, the liability continues on every occasion that disobedience and non-compliance occurs. [67]

When the offence of cruelty and ill-treatment was a continuing committed not only at the place when the parents in law resides but also continue at the place where the wife took shelter in her father's house by giving threats to her, the Court of the place in which the wife resides with the parents shall also have the jurisdiction. [68]

But an offence under s. 498A I.P.C. is not a continuing offence. No harassment in relation to the demand of dowry was made within local limits of Kanpur Court, the Court at Kanpur would have no jurisdiction to entertain the complaint under s. 498A I.P.C. [69]

The appellant was married with the Respondent No.2 and living in the matrimonial house at Jabalpur. The appellant No.1`s father-in-law lodged a complaint with the police of Jabalpur alleging ill-treatment to the Respondent No. 2, and demand of dowry from her by the appellant and the other family members. The Respondent No. 2, also lodged and FIR at Datia in Madhya Pradesh so much so that she had been forced to live with her parents at Datia. The Supreme Court has held that the offence is not a continuing one and *s. 177 Cr.P.C.* is attracted and the FIR could be lodged only at the place when the offence of ill-treatment on account of dowry was committed at Jabalpur. The High Court committed illegality by treating the offence to be continuing one that it continued even at the place at Datia when the Respondent No. 2 was forced to live and the mental cruelty and harassment even continued at Datia. So, the Supreme Court setting aside the order of the High Court directed the transfer of the criminal case pending before the C.J.M. Datia to the Court of C.J.M. Jabalpur.[70]

In a criminal proceedings under *s. 498A, IPC* for offences relating to cruelty by husband and his relatives, the specific allegation by wife about ill-treatment and cruelty was made at Ranchi. She was taken to her parental home at Gaya by her husband and threatened he for non-fulfillment of dowry. It was held by the Supreme Court that in view of s s. 178 and 179, the offence was a continuing one, having been committed in more local areas than one. Therefore clause (C) of s.178 is clearly attracted and the court at Gaya has jurisdiction to proceed with the case. [71]

4. Offence committed at more than one place.—

When the defamatory article in the newspaper was published at one place and it was circulated in another place, the place when the newspaper was circulated shall have the jurisdiction as it has also the jurisdiction to entertain the defamation case. [72]

When the offence of forgery was committed at place ‘D’ and it was used at place ‘C’ when the accused was interviewed, both the places ‘D’ and ‘C’ would have the jurisdiction but not the place ‘D; where the accused was initially appointed on the basis of the forged certificate. [73]

When the infringement of copyright of the firm took place at Hrishikesh where the film and cassettes were produced and at Moradabad film was exhibited in studios, both the Courts having the jurisdiction at Hrishikesh and that of Moradabad have the jurisdiction. So, the complaint filed at Dehradoon Court within whose jurisdiction Hrishikesh is situated had also the jurisdiction. [74]

When the accused is prosecuted under the *Prevention of Corruption Act* before the Special Court, the Special Court at place Delhi where part of his known source of income is situated at Delhi, the Special Court at Delhi has the jurisdiction as part of cause of action across in that place.[75]

Interpreting *s. 178 Cr.P.C.* , the Supreme Court has observed that when it is uncertain in which local areas the offence was committed or when several act s were done at different local areas, the said offence can be inquired into or tried having the jurisdiction over any of the local areas.[76]

For the offence of carrying smuggled goods, the Court of the place through which the goods were carried will have the jurisdiction to try the offence. [77]

For trial of offence under *s. 138 of the Negotiable Instruments Act, 1881* the place, where cheque was issued and returned unpaid at Pune and the payee having the registered office at Bombay served demand notice from Bombay, the Court at Bombay along with Court at Pune shall have the jurisdiction to try the offence.[78]

If different act s were done at different places, the offence can be inquired into and tried at any one of those places. [79]

When part of the offence was committed in India, Indian Court can try the offence. [80]

Complaint alleging acts of cruelty, harassment and demand for dowry has been filed at Delhi Court. Place of occurrence has been mentioned in the F.I.R. at a place in U.P. Therefore, court of Delhi has no jurisdiction to try the complaint. [81]

Offence under Section 498 I.P.C. is not a continuing offence. No harassment in relation to demand of dowry was caused to the complainant wife within the local limit of jurisdiction of Kanpur where she had been living after the alleged harassment by the husband. But it not being a continuing offence, no complaint can be filed in the Court of Kanpur. [82]

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62 *State of M.P. v. Ghiara,* AIR 1957 SC 196 : 1957 Crlj 322.

63 *State of M.P. v. Ghiara,* AIR 1957 SC 196 : 1957 Crlj 322.

64 *State of M.P. v. Ghiara,* AIR 1957 SC 196 : 1957 Crlj 322.

65 *Brinnand v. Patnaik,* (1971) 3 SCC 943 : 1972 SCC (Cr) 191.

66 *State v. Bhiwandiwalla,* AIR 1955 Bom 161 [

LNIND 1954 BOM 88]; cf. *P.P. v. Veerabhadrappa,* AIR 1953 Mad 204 .

67 *State of Bihar v. Deo Haran,* AIR 1973 SC 908 [LNIND 1972 SC 392]: 1973 Crlj 347 ; *Wire Machinery v. State of West Bengal,* 1978 Crlj 839 Cal .

68 *Sujata Mukherjee v. Prashant Kumar Kukhrejee,* AIR 1997 SC 2465 : 1997 Crlj 2985 : (1997) 5 SCC 30 : 1977 SCC (Cri) 673 ; *Amrendu Jyoti v. State,* 2007 Crlj 154 CHH .

69 *Sarojini v. State of U.P.,* 2008 Crlj 126 All .

70 *Manish Ratan v. State of M.P.,* (2007) 1 SCC 262 [LNIND 2006 SC 901] : (2007) 1 SCC 336 (Cri) : (2006) 4 Crimes 291 .

71 *Sunita Kumari Kashyap v. State of Bihar,* AIR 2011 SC 1674 [LNIND 2011 SC 405]: (2011) 11 SCC 301 [LNIND 2011 SC 405].

72 *K.M. Mathew v. K. Abraham,* 1998 Crlj 327 Ker .

73 *Mahi Pal v. State of Haryana,* 1997 Crlj 43 (P&H).

74 *Krishna Rao v. State of U.P.,* 1997 Crlj 1129 All .

75 *V.K. Puri v. C.B.I.,* 2007 Crlj 2929 : (2007) 6 SCC 91 [LNIND 2007 SC 551] : (2007) 3 SCC 57 (Cri) .

76 *Satvinder Kaur v. State,* (1999) 8 SCC 728 [LNIND 1999 SC 893] : 1999 SCC (Cri) 1503 [LNIND 1999 SC 893] : AIR 1999 SC 3596 [LNIND 1999 SC 893]: 1999 Crlj 4566 .

77 *Harbans Lal v. State of Haryana,* (1998) 8 SCC 319 [*LNIND 1998 SC 1009*] : 1999 Crlj 455 : AIR 1999 SC 326 [*LNIND 1998 SC 1009*].

78 *Yashomala Engineering Pvt. Ltd. v. Tata S.S.L. Ltd,* 1998 Crlj 4352 ; *Sanjay Makkar v. Saraswati Industrial Syndicate Ltd.,* 1999 Crlj 1988 All .

79 *K. Bhaskaran v. Sankaran Vadhyan Balan,* 1999 Crlj 4606 : AIR 1999 SC 3762 [*LNIND 1999 SC 874*]: (1999) 7 SCC 510 [*LNIND 1999 SC 874*].

80 *Vipin v. State,* 1998 Crlj 2327 All .

81 *Apsana v. State,* 2008 Crlj (NOC) 246 (Del).

82 *Sarojini v. State,* 2008 Crlj 1026 All .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 179
Offence triable where act is done or consequence ensues.

When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

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1. Scope of s. 179.—

This section corresponds to *old* s. 179, with verbal changes, and omitting the illustrations.

2. S s. 179 and 181.—

Though there was a controversy as to whether s. 179 could be applied to cases specifically mentioned in s. 181*(post),* the better view is that the two provisions are cumulative, and not exclusive of each other; and the one is not controlled by the other. [83]

3. Offence constituted of an act and its consequence. —

1. Section 179 applies to those offences which consist of an act and its consequence, *e.g.,* culpable homicide [s. 299, I.P.C.]. [84] The consequence contemplated by the section is a consequence which ensues from the act and *completes* the offence. It has no application where the consequence is not an integral part of the offence. [85]

2. When a person is accused of the commission of any offence by reason of two things,—by reason first of anything which has been done, and, secondly of any consequence which has ensued, then jurisdiction is conferred on the Court within whose local jurisdiction the act has been done or the consequence has ensued. But the offence must be charged by reason of those two things, the act done and the consequence which ensued. [86] Section 179 has no application where the accused could have been prosecuted for an offence even if the consequence had not ensued. [87]

When the complaint of the wife that the accused husband threatened her and her parents and demanded dowry, the consequences of the offence caused at the place when the complainant resides with her parents. [88]

When mere demand for bribe constitutes an offence, the offence can be tried at the place when bribe was demanded from the complainant. [89]

When certain defamatory utterances were made at one place and the defamation of the complaint took place at the place of his residence, the Court of his place of residence would have the jurisdiction to try the offence. [90]

The allegation is that miscarriage of the victim girl took place at Jabbalpore even if the acts allegedly took place at Indore, but as the consequences of that act took place at Jabbalpore, the Court of Jabbalpore would also have the jurisdiction to try the offence. [91]

In case of dishonour of cheque in view of s. 178(b) and *s. 179 Cr.P.C.* , the complaint can be filed in the Court within the jurisdiction of which the cheque has been issued or the place where the cheque was placed for collection or where the cheque was dishonoured would have the jurisdiction.[92]

4. Cheating (s. 420, I.P.C.). —

The offence is constituted of two acts: (a) dishonest inducement, followed by; (b) the person induced in delivering some property to any person or making, altering or destroying any property, as a result of such inducement. [93] Hence, where these two act s take place under different jurisdiction, the accused may be tried at both place. Thus,

(i) He may be tried at the place (S) where he made the representation to the person deceived;

(ii) He may be tried at the place (L) where the person deceived delivered money to the accused as a result of such inducement. [94]

(iii) When the misrepresentation is made by letter, the deceit took place where the person deceived received the letter and *also* the place from where the accused sent the letter [95] [see further, under s. 182,*post*].

But no part of cheating is committed at a place (*e.g.* , an intermediate station) where it is *discovered* that the consignor has committed cheating by despatching a consignment of spurious goods other than that stipulated (*e.g.* , husks in place of tea). [1]

The allegations against the accused persons are that they obtained loan from the bank by playing fraud with the help of forged document. The loan was sanctioned from the branch of the bank at "D". The Court at Place "D" has jurisdiction to try the case even though the procedural part regarding sanction of the loan was completed at place "B". Therefore, the criminal proceedings at place "D" cannot be quashed. [2]

5. Cheating and misappropriation.—

Considering *s. 178 Cr.P.C.* , fraudulent representation being one of the ingredients of the offence of cheating, the person accused of cheating could be prosecuted at the place where the said fraudulent representation was made. As regards the offence of criminal misrepresentation, the Court within jurisdiction the property had been entrusted or was to be accounted for could take cognizance. The appellant company having its place of business at Calcutta filed a criminal complaint under s. 156(3) *Cr.P.C.* for investigation of several offences of cheating, criminal mis-appreciation etc. committed by its agents in Calcutta and also in the States of U.P. did not commit any illegality as the agents admitted that reconciliation took place at Calcutta. So, if the fraudulent representation by the accused took place at Calcutta and a conspiracy was hatched them to commit the offences, the Magistrate at Calcutta had the jurisdiction to direct the Police to hold investigation under s. 156(3) *Cr.P.C.* So, the High Court at Allahabad erred in interfering with such order and transferring the case to the State of U.P.[3]

6. Offence under section 364A I.P.C.—

The offence under Section 364A I.P.C. could be tried by the Court within whose local jurisdiction any of the said ingredients of the said offence had taken place. So, when the victims were abducted at place in the State of U.P., demand for ransom was made by phone call at the house of the victims at place ‘N’ in another State and the victims were put to death at place ‘U’ in the State of U.P., the trial court at all the three places had the jurisdiction to try the offence in question. Since the offence was registered at place ‘N’ the Trial Court at place ‘N’ could try the offence. [4]

7. Conspiracy. —

By virtue of the present section, the Court having jurisdiction to try an accused for criminal conspiracy (s. 120B, I.P.C.) would be competent to try him for all offences committed in pursuance of that conspiracy irrespective of the fact that any or all of such offences were committed outside the territorial jurisdiction of that Court. [5]

8. Defamation.—

Where the defamatory statement is made at one place, and is published in a newspaper in another place [6] or the paper is published at one place and circulated in another place, [7] a complaint under s. 500, I.P.C. may be instituted in Courts having jurisdiction over *both* the places. The reason is that the offence of defamation consists of making the defamatory utterance and its publication, and the offence is committed on publication. [8]

9. Offence under Sections 138 of the Negotiable Instruments Act, 1881.—

When no part of cause of act ion arose in the place of residence of the complainant, mere fact of residence of the complainant at particular place cannot confer jurisdiction of that place when there is no agreement between the parties that the amount is payable at the place of residence of the complainant. [9]

10. Offences under Sections 498, 494 and 494A I.P.C.—

The accused is charged under Sections 498 9 494 A I.P.C. and Section 494A of the 4 of the *Dowry Prohibition Act* . Allegations made against the accused clearly showed that sufficient portion of the cause of action took place at Chennai. Therefore, the plea that no part of the cause of act ion arose at Chennai is liable to be rejected.[10]

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83 *Balchand* *v.* *State,* AIR 1961 Pat 260 (DB) . [This is now supported by the liberal view taken by the Supreme Court in *Purushottamdas* *v.* *State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*]: 1957 Crlj 322 ; *State of U.P. v. Chiara,* AIR 1957 SC 196 (para 7) : (1962) 2 SCR 101 [*LNIND 1961 SC 188*] : (1961) 2 Crimes 728 .

84 *Laxman* *v.* *Dayabhai,* AIR 1948 Nag 80 .

85 *Emp.* *v.* *Kashi* *Ram,* (1934) 56 All 1047 (FB) .

86 *Jivendas,* in re., AIR 1930 Bom 490 : (1930) 55 Bom 59(FB) .

87 *Emp.* *v.* *Kashi* *Ram,* (1934) 56 All 1047 (FB) .

88 *K.C.* *Mathew* *v.* *Reena* *Paul,* 1998 Crlj 2300 Ker .

89 *Yamma* *Prosad* *v.* *State of MP.,* 1997 Crlj 1352 .

90 *Ibrahim* *v.* *Mohammed* *Siraj,* 1997 Crlj 1352 .

91 *State of M.P. v. Suresh Kaushal,* 2002 Crlj 2177 : (2003) 11 SCC 126 .

92 *Canbank Financial Services v. Gitanjali Mohan,* 1995 Crlj 1272 Del ; *Prabhavati Agencies v. State,* 1991 Crlj 2529 .

93 *Satwant v. State of Punjab,* AIR 1960 SC 266 [*LNIND 1959 SC 191*](paras 14, 18) : (1960) 2 SCR 89 [*LNIND 1959 SC 191*] : 1960 Crlj 410 ; *Kamal v. State of U.P.,* 1999 Crlj 2345 All . This has been expressly provided in *new* s. 182,*post* overruling *Mobarik v. State of Bombay,* AIR 1957 SC 857 [*LNIND 1957 SC 81*](para 23) : 1957 Crlj 1346 : 1958 SCR 328 [*LNIND 1957 SC 81*].

94 *Satwant v. State of Punjab,* AIR 1960 SC 266 [*LNIND 1959 SC 191*](paras 14, 18) : (1960) 2 SCR 89 [*LNIND 1959 SC 191*] : 1960 Crlj 410 ; *Kamal v. State of U.P.,* 1999 Crlj 2345 All .

95 This has been expressly provided in *new* s. 182,*post* overruling *Mobarik v. State of Bombay,* AIR 1957 SC 857 [*LNIND 1957 SC 81*](para 23) : 1957 Crlj 1346 : 1958 SCR 328 [*LNIND 1957 SC 81*].

1 *State v. Chunilal,* AIR 1965 Pat 103 (see, however, s. 183,*post*].

2 *Vishwanatha v. State,* 2008 Crlj 1093 Del .

3 *Asit Bhattacharjee v. Hanuman Prasad Ojha,* AIR 2007 SC 1925 [*LNIND 2007 SC 675*]: (2007) 5 SCC 786 [*LNIND 2007 SC 675*] : (2007) 3 SCC 31 (Cri) : 2007 Crlj 3181 .

4 *Vishwanagath Gupta v. State of Uttranchal,* (2007) 11 SCC 633 [

LNIND 2007 SC 367] :
2007 Crlj 2296 .

5 *Banwarilal v. Union of India,*
AIR 1963 SC 1620 [
LNIND 1962 SC 382](para 23) : 1963 Supp (2) SCR 338
(1963) 2 Crimes 529 .

6 *Subramaniam v. Prabhakar,*
(1984) Crlj 1329 (para 9) Bom.

7 *Lankesh v. Shivappa,*
(1994) Crlj 3510 (para 16) Knt; *Bangarappa v. Ganesh,*
(1984) Crlj 1618 (paras 7, 18-19) Knt.

8 *Subramaniam v. Prabhakar,*
(1984) Crlj 1329 (para 9) Bom; *Lankesh v. Shivappa,*
(1994) Crlj 3510 (para 16) Knt.; *Bangarappa v. Ganesh,*
(1984) Crlj 1618 (parass 7, 18-19) Knt.

9 *P.M. Philipose v. P.C. Chandy,* AIR2010 (NOC) 303 (Ker).

10 *Victor v. State,*
2008 Crlj 774 Mad .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 180
Place of trial where act is offence by reason of relation to other offence.

When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence , the first mentioned offence may be inquired into or tried by a Court within whose local jurisdiction either act was done.

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1. Scope of s. 180.—

This section reproduces *old* s. 180, omitting Illustrations.

2. S s. 179-180.—

(a) S. 179 is attracted where the offence for which the accused is sought to be tried is constituted of an act and its *consequence,* taken together. Thus, if A is wounded in Madras and dies of his wounds in Bombay, the offence of culpable homicide may be tried either at Madras or at Bombay, because the offence of homicide was constituted by the wound, followed by death. If death had not ensued, there could not have been any charge of homicide.

(b) s. 180, on the other hand, applies where one act-is not the consequence of another act, but becomes an offence only because it is *related* to other, *e.g.* , the offence of abatement [11] of a principal offence. Under this section, the charge of abatement may be tried either where the principal offence or where its abatement took place.

3. Manufacture and Marketing of illicit goods.—

When illicit (*e.g.* sub-standard) goods are manufactured at one place and marketed at another, the manufacturer may be prosecuted and tried at *both* places (*e.g.,* under the Fertiliser Control Order, 1957, read with
Sections 13A of the Essential Commodities Act, 1955). [12] This case comes under both s s. 179 and 180. [13]

Where the manufacturer and seller are different persons they may be tried jointly [s. 223(d),*post*] in cases where there is unity of purpose. [14]

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11 *State* *v.* *Nathumal,*
AIR 1962 Bom 21
LNIND 1960 BOM 102
](para 6).

12 *State* *of* *Punjab* *v.* *Nohar,*
(1984) Crlj 1153
AIR 1984 SC 1492
LNIND 1984 SC 156
(1984) 3 SCC 512
LNIND 1984 SC 156
(para 7) :
[
]:
[
].

13 *State* *of* *Punjab* *v.* *Nohar,*
(1984) Crlj 1153
AIR 1984 SC 1492
LNIND 1984 SC 156
(1984) 3 SCC 512
LNIND 1984 SC 156
(para 7) :
[
]:
[
].

14 *Bhagwan* *v.* *Delhi* *Admn.,*
AIR 1975 SC 1309
LNIND 1975 SC 134
(1975) 1 SCC 866
LNIND 1975 SC 134
1975 Crlj 1091
[
](paras 19-20) :
[
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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 181
Place of trial in case of certain offences.

(1) Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

(2) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

(3) Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

(5) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received or retained it knowing or having reason to believe it to be stolen property.

1. Scope of s. 181. —

This section corresponds to *old* s. 181, with the changes indicated by

italics, and the following drafting changes:

(i) *Old* sub-sec. (4) is now sub-sec. (2);

(ii) *Old* sub-sec. (2) is now sub-sec. (4);

(iii) *Old* sub-sec. (3) has been divided into sub-sec. (3) and *new* sub-sec. (5).

2. Sub-sec. (1).—

1. By the words in italics, the *new* Code makes it clear that the venue of the offences specified in this sub-section shall be not only where the accused is found but also where the offence was committed.
2. These offences are : (i) Being a thug [s. 311, I.P.C.]; (ii) Murder committed by a thug [s. 300, I.P.C.]; (iii) Dacoity [s. 395]; (vi) Dacoity with Murder s. 396; (v) Belonging to a gang of dacoits[s. 400, I.P.C.]; (vi) Escaping from custody [s. 224, I.P.C.].

3. Belonging to a gang of dacoits.—

This offence, under s. 400, I.P.C., may be tried at a number of places, since different provisions of this Chapter would be attracted. Thus, if the headquarters of a gang of dacoits be located within West Bengal and members of such gang commit some dacoitis at Dhanbad in Bihar and are arrested and brought before a Dhanbad Court, the accused may be tried [15] —

(a) At Dhanbad, because some consequences of membership of the gang took place at Dhanbad [s. 179].

(b) At Dhanbad, under s. 181(1), because the accused were found and arrested there.

(c) At Dhanbad, because some of the dacoities committed by the members were within Dhanbad [s. 178(d): *old* s. 182].

(d) The place in West Bengal where the association was formed and the headquarters of the gang are located [s. 177].

4. Sub-sec. (2).—

1. This sub-sec. relates to the offences of kidnapping [s. 359, I.P.C.] and abduction [s. 362, I.P.C.].
2. The following Courts would have jurisdiction to try such offence:

(a) Within whose jurisdiction the person was kidnapped or abducted.

(b) Within whose jurisdiction the person was conveyed.

(c) Within whose jurisdiction such person was concealed or detained.

5. Sub-sec. (3). —

1. This sub-section relates to the offence of theft [s. 379]; extortion [s. 383, I.P.C.]; robbery [s. 390, I.P.C.].
2. These offences may be tried by the following Courts:

(a) Where the offence was committed.

(b) Where the stolen property was possessed by any person who *committed* the original offence.

(c) Where any person received or retained such property, knowing or having reason to believe that it was stolen property.

3. In this context, the relation between all the three offences connected with the offence of receiving stolen property, which is referred to in the letter part of this sub-section, should be noted. Section 410 defines 'stolen property' as property transferred by theft, extortion, robbery, and property in respect of which the offence of criminal misappropriation or breach of trust has been committed. Sections 411-412 define the offence of receiving or retaining stolen property with knowledge or having reason to believe that it is stolen property. The third part of s. 181(3) makes the place of such receipt of stolen property, an alternative forum for the trial of the offences of theft, extortion or robbery.
4. The venue for the substantive offences under ss. 411-414 is dealt with in sub-sec. (5), *below Old* sub-sec. (3) has been divided into sub-secs. (3) and (5), as recommended by the Law Commission.

6. Sub-sec.(4).—

This sub-section lays down that the jurisdiction for trying the offence of criminal misappropriation [s. 403, I.P.C.] or criminal breach of trust [s. 405, I.P.C.] shall be either—

(a) Where the offence was committed; or

(b) Where any part of the property involved was received or retained; or

(c) Where any part of such property was required to be returned or accounted for by the accused person.

A. *Where the offences was committed.*

I. In the case of criminal misappropriation [s. 403, I.P.C.], the place where the offence was committed [16] is—

(a) Where the original intention was to misappropriate,—the place where the property was taken by the accused from the possession of the lawful owner.

(b) Where the original intention lawful, but the offence was constituted by a subsequent change of intention,—the place where the subsequently conversion took place. [17] Thus, if *A* borrows a book from his friend *B* at Calcutta, but subsequently sells the book at Delhi and appropriates the sells proceeds to his own benefit,—the offence was committed at Delhi.

II. In the case of criminal breach of trust, as defined in s. 405, the place of commission of the offence is—

(a) Where the property was dishonestly misappropriated; or converted to the use of the accused, as just explained.

(b) Where the accused dishonestly *uses* or *disposes* of the property in violation of any law or contract prescribing the mode of discharge of the trust.

B. *Where any part of the property involved was received or retained.* [18]

C. *Where any part of the property involved was required to be returned or retained.*

1. It is often difficult for the complainant to ascertain the place where the dishonest conversion, use or disposal took place because these are matters within the special knowledge of the accused. But the place where the property was required to be returned or accounted for but the accused failed to discharge that obligation, being a matter arising out of agreement, is known to both parties and may often be a more convenient venue from the point of view of the complainant. But since there was no express provision on this point in *old* s. 181(2), a serious controversy arose whether the place stipulated for accounting or return of the property could furnish jurisdiction. [19] In some cases, s. 179 was held applicable in the absence of express provision in s. 181. [20]

2. The Law Commission sought to cut the Gordian knot by recommending that the place for accounting or return should be an alternative forum in cases of criminal misappropriation or breach of trust. [21] The *new Code* has accordingly added, these words at the and of s. 181(4).

3. The words ‘required to do returned or accounted for, [22] in addition to the generic expression ‘was committed’ in *old* sub-sec. (2), clarifies the position. Thus, where *B* received goods of *A* to deliver, as a carrier, the goods at Bangalore, but fails to deliver them, having committed criminal breach of trust, the Bangalore Court would have jurisdiction to try the alleged offence of criminal breach of trust. [23]

4. In view of the express provision now made in s. 181(4), there is no scope of invoking s. 179 in such cases.

5. It is, therefore, clear that the offence of criminal breach of trust or criminal misappropriation may be inquired into or tried by a Court within whose local jurisdiction, the offence was committed or where any part of the incriminating property was received or retained. [24]

6. When the accused agreed to deliver the goods at place 'B', the offence of criminal breach of trust may be inquired into or tried at place 'B'. [25]

7. But when the agreement to supply goods is at the branch office of the complainant, the Court where his head office is situated has no jurisdiction to try the offence of criminal breach of trust. [26]

8. In an offence of criminal breach of trust when the FIR discloses that the accused was required to remit and account for the money to the company at its head office, then the Court where the head office was situated was competent to entertain the complaint and to direct the police to investigate the case. [27]

9. When the accused promised to deliver the goods at Banglore but did not do so but converted the same to his own use, the Court at Banglore shall have the jurisdiction to try the offence. [28]

10. When the articles of dowry were made to the accused at the place, 'D' complaint of criminal breach of trust by the wife can be filed at place 'D' but not at the place where the complainant wife subsequently shifted her residence. [29]

11. The allegation of the wife is that his in-laws harassed her for demand of dowry and non-fulfilment of dowry demand and returned the articles of dowry with them, the wife could lodge the complaint at the place of her parents where she was forced to reside upon being turned out by the in-laws because dowry articles were given at the residence of her parents. [30]

12. Cheating and criminal mis-appropriation against the agent can be tried at the place when the fraudulent representation was made by the agent i.e., in Calcutta. Agent also admitted that reconciliation was made in Calcutta. Even if major part of misappropriation took place in the State of U.P., the Magistrate at Calcutta is competent to entertain the complaint and direct the police to investigate the case under s. 156(3) *Cr.P.C.* [31]

7. Sub-sec. (5).—

Sub-section (3) deals with the forum for offences of theft, extortion and robbery, and makes possession of stolen property an alternative criterion for venue of trial. Sub-section (5), on the other hand, lays down the forum for the trial of the substantive offences under ss. 411-414, I.P.C., which involves the possession of stolen property as an ingredient to constitute the offence. The forum for these latter offences is—(a) Where the offence was committed; or (b) Where the stolen property was possessed by any person with knowledge or reason to believe that it was stolen property.

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15 *Lalchand* *v.* *State,* AIR 1961 Pat 260 (DB) .

16 Cf. *Emp.* *v.* *Mohrulal,* AIR 1936 All 193 .

17 Cf. *Emp.* *v.* *Mohrulal,* AIR 1936 All 193 ; *Gaukaran v. Saryu,* AIR 1921 Pat 85 ; *Santi v. Chandrakant,* (1972) Crlj 794 (Pat) .

18 Cf. *State of U.P.* *v.* *Santosh,* (1975) Crlj 734 (para 6) All.

19 Cases where the *negative* view was taken included. *Jivandas,* in re., AIR 1930 Bom 490 FB ; *Patnaik v. Brinnand,* AIR 1970 Cal 110 116 .

20 *Rashid* *v.* *Emp.,* AIR 1926 All 466 .

21 41st Rep., paras 11. 24.

22 Cf. *Sheo Shankar* *v.* *Mohan,* AIR 1921 All 12 [servant bound to account to master at the latter's shop on whose behalf the servant collected dues from customers]; *Emp.* *v.* *Mohrulal,* AIR 1936 All 193 .

23 *Mysore Manufacturers* *v.* *Ray Choudhury,* (1978) Crlj 577 (Ker) ; *State of U.P. v. Santosh,* (1975) Crlj 734 (para 7) All. [contract for delivery after repair].

24 *Aarjeet Singh v. State of Punjab,* 1986 Cr.LJ 2070 (P&H).

25 *Dhiren Bhowmick* *v.* *State of West Bengal,* 1978 Crlj 637 Cal .

26 *Jai Prakash* *v.* *Dinesh,* 1991 Crlj 418 Del .

27 *Jahangir* *v.* *State,* 1999 Crlj 154 Raj .

28 *Mysore Manufacturers* *v.* *Roy Chowdhury,* 1978 Crlj 577 Kant .

29 *Harjeet Singh* *v.* *State,* 1986 Crlj 2070 (P&H).

30 *Shiv Dayal* *v.* *Renu,* 2007 Crlj 2972 (P&H).

31 *Asit Bhattacharyya v. Hanuman Prasad Ojha,* [AIR 2007 SC 1925 *LNIND 2007 SC 675*]: [(2007) 5 SCC 786 *LNIND 2007 SC 675*] : (2007)M 3 SCC (Cri) 31 : 2007 Crlj 3181 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 182
Offences committed by letters, etc.

(1) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(2) Any offence punishable under *Section 494* or *Section 495* of the *Indian Penal Code (45 of 1860)* may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage,[32] [or the wife by the first marriage has taken up permanent residence after the commission of the offence.]

1. Scope of s. 182. —

There was no corresponding provision in the Code of 1898. This section has been inserted on the recommendation of the Law Commission. [33]

2. Sub-sec (1): Cheating. —

Section 182(1) deals with the offence of cheating when it is committed through the post or telegram or telephone.

The reason why this special provision was needed has been explained in para. 15.30 of the 41st Rep. of the Law Commission as follows:

> "15.30 Controversial questions have frequently arisen in regard to the venue for the offence of cheating where the fraudulent or dishonest misrepresentation is made by post, telegram or long distance telephone and where the property of which the person deceived or cheated is delivered to a common carrier other agent at one place and received by the cheat at another place. In the such absence of special provisions similar to those contained in s. 181, such questions have necessarily to be decided with reference to the general principles laid down in s s. 177, 179 and 181, (now s s. 177, 178, 179). Different views have been expressed by the High Courts in applying these principles to the facts of the particular cases before them." [34]

It is clear from the comments of the Law Commission in para. 15.30 that it visualised the provision of s. 182 as dealing with those cases where deception is practiced by letters or telecommunication messages. Such cases are classified into two: (i) the earlier part covered all cases of deception by letters or telecommunication messages, and (ii) the letter part was confined to such deception by letters or telecommunication messages where, in addition to deception, property is also delivered to the offender. It must be remembered that s. 415, I.P.C. has been recognised to deal with two distinct classes of offences of cheating: (i) where property is delivered and (ii) where property is not delivered, but an act or omission is done in addition to the practice of deception in both cases. [35]

Dealing with the cases of cheating generally by letters or telecommunication messages, the earlier part of *s. 182, Crpc* leaves option with the complainant to choose his forum out of *any* of the two places, *viz.* , the Court within whose local jurisdiction the letters or messages were either sent, or received; but in those particular cases of cheating where delivery of goods is also made in consequence of deception by letters or telecommunication messages, the jurisdiction is confined to the Court within whose local jurisdiction the goods are delivered. But *in either case* , the deception must be practised by letters or telecommunication messages. [36]

3. Sub-sec. (2): Bigamy.—

The jurisdiction to try the offence of bigamy has been widened by the amendment of sub-sec.(2) by Act 45 of 1978. In a case of bigamy, under s. 494 or 495 I.P.C., *any* of the following Courts have territorial jurisdiction to inquire into or try the offender—

(a) The Court within whose jurisdiction the second marriage took place;

(b) The Court within whose jurisdiction the offender last resided with his or her spouse by the first marriage;

(c) The Court within whose jurisdiction the wife by the first marriage has taken up permanent residence offer the commission of the offence. [37]

When after the husband committed the offence of bigamy, the first wife took her residence at her father's house, the Court of that place will have the jurisdiction to enquire into or try the offence of bigamy filed by the first wife. [38]

However, even where the first wife had living in her father's house from the offence committed by the husband, the Court of that place would have the jurisdiction in view of *s. 182 Cr.P.C.* as amended by the Amendment Act of 1978.[39]

In order that the Court within whose local jurisdiction the offender resided with his or her first spouse must mean the place where the accused last resided with the first spouse at the time of commission of the offence of bigamy. The place when the spouse with the other spouse was living prior to the commission of the offence of bigamy and not at the time of commission of the offence of bigamy would have no jurisdiction to enquire into or try the offence. [40]

The impact of the amended provision of *s. 182 Cr.P.C.* is that the Court within whose local jurisdiction the offence took place or where the offender last resided with his or her spouse by first marriage would have the jurisdiction. So, when the first wife last resided with her husband at Warud from which she deserted her husband, the Court of Warud would have the jurisdiction to try the offence of bigamy also, apart from the place when the offence of bigamy took place.[41]

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32 Inserted by Act No. 45 of 1978, s. 15 (w.e.f. 18-12-1978).

33 41st Rep., paras 15, 36-37.

34 41st Rep., paras 15, 36-37.

35 *Kanumukkala v. State of A.P.,* AIR 1965 SC 333 [LNIND 1964 SC 95] (1964) 7 SCC 410 (1965) 1 Crimes 355.

36 *Krishna v. Mahabir Agencies,* (1984) Crlj 1682 (paras 14-15) All.

37 *Sukhaswarooplal v. State of M.P.,* (1987) Crlj 921 (paras 5, 10) MP.

38 *Amrit Kaur v. Indrajit Kaur,* 1991 Crlj 789 Pat ; *Mamgappa v. Kelabati,* 1986 Crlj 1719 : ILR (1986) Kant 211 [*LNIND 1985 KANT 170*].

39 *P. Nagalakshmi v. Premabati,* 1997 Crlj 808 Mad .

40 *S. Elangu v. S. Ravindran,* 1998 Crlj 3095 Mad .

41 *Saroj v. Ganesh,* 2007 Crlj NOC 101Bom .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 183
Offence committed on journey or voyage.

When an offence is committed whilst the person by or against whom, or the thing in respect of which, the offence is committed is in the course of performing a journey or voyage, the offence may be inquired into or tried by a Court through or into whose local jurisdiction that person or thing passed in the course of that journey or voyage.

1. Scope of s. 183.—

It corresponds to *old* s. 183, with changes recommended by the Law Commission. [42]

42 41st Rep., paras 15, 41.

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CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 184
Place of trial for offences triable together.

Where—

(a) the offences committed by any person are such that he may be charged with, and tried at one trial for, each such offence by virtue of the provisions of Section 219, Section 220 or Section 221, or

(b) the offence or offences committed by several persons are such that they may be charged with, and tried together by virtue of the provisions of Section 223,

the offences may be inquired into or tried by any Court competent to inquire into or try any of the offences.

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1. Scope of s. 184.—

1. This section is a *new* provision, engrafted at the recommendation of the Law Commission, [43] to codify the results of the Supreme Court decisions, [44] which we have already discussed under s. 177,*ante.* under the *old* Code, it was not clear whether the provisions of the present Chapter regarding territorial jurisdiction were also subject to the provisions in Chap. XVII, relating to joinder of charges and trials. The Supreme Court answered this question in the affirmative, though there was no express provision in the present Chapter to that effect. That lacuna was sought to be filled up by adopting *new* s. 184.

2. The general provision relating to charges is that there is to be a separate charge for every distinct offence and every such charge against an accused has to be tried separately [s. 218; *old*

s. 233]. To this general rule, exceptions for joinder of charges and trial are laid down in the succeeding provision of Chap. XVII, *post.*

These exceptional provisions, mentioned in s. 184 are:

Section 219 [*old* s. 234] provides that an accused may be jointly charged with, and tried at one trial for, any number of offences of the *same kind* committed within a period of 12 months.

Section 220[*old* s. 235] provides that an accused may similarly by charged with, and tried at one trial, for any number of offences committed by a series of acts which are so connected together as to form the *same transaction,* or where the several act s are connected in any of the ways specified in sub-secs. (2)-(4) of s. 220,*post.*

Section 221[*old* ss. 236, 237(1)] speaks of charges in the alternative at the same trial in cases of doubt as to what offences had been committed by the facts involved.

Section 223 [*old* s. 239] deals with joinder of charges and trial as against *several accused persons,* in the circumstances specified in the several clauses of that section. It is to be noted that the Proviso, *newly added* to that section, widens the ambit of the section by empowering the Court to resort to such joint trial, even in *other* cases, if the several accused persons themselves apply and the Magistrate is satisfied that they would not be prejudiced by such joint trial.

The net result of engrafting s. 184 in the *new* Code would be that in any of the cases covered by the foregoing provisions, joint trial by the same Court of all the offences or charges would not be bed even if *some* of those offences might have been committed outside the local jurisdiction of such Court. In short, s s. 219, 220, 221 and 223 shall additional exceptions to the provision in s. 177 (see, *ante*).

However, when two accused persons were charged for conspiracy to forge and fabricate experience certificate at Delhi and they were used when another accused interviewed at Chandigarh, the charge sheet filed before the C.J.M. Bhiwani was not proper because no part of offences by the two accused persons was committed at Bhiwani. Only because the complainant had its head office at Bhiwani, the Court of Bhiwani shall have no jurisdiction to hold the joint trial of the above two accused persons. [45]

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43 41st Rep., paras 15, 45-47.

44 *Purushottam,* AIR 1961 SC 1589 [

LNIND 1961 SC 188]:
(1962) 2 SCR 101 [
LNIND 1961 SC 188] :
(1961) 2 Crimes 728 ; *Mukherjee,*
AIR 1961 SC 1601 1962 2 SCR 116 :
(1961) 2 Crimes 736 .

45 *Mahi Pal v. State of Haryana,* 1997 Crlj 43 (P&H) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 185
Power to order cases to be tried in different sessions divisions.

Notwithstanding anything contained in the preceding provisions of this Chapter, the State Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division :

Provided **that such direction is not repugnant to any direction previously issued by the High Court or the Supreme Court under the *Constitution*, or under this Code or any other law for the time being in force.**

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1. Scope of s. 185.—

1. This section corresponds to old s. 187, with the changes indicated in italics.

2. Where a case is triable by a Court of Session, the Magistrate has, under the provisions of s s. 177-184, to commit it for trial to the Court of Session within whose jurisdiction the offence was committed *etc.* The present section confers power upon the State Government to direct a particular case or class of cases should be committed to some other sessions division of the district, [46] —without prejudice to the powers of the High Court and the Supreme Court to transfer cases, under Cl. 27 of the Letters Patent; ss. 406-407 of the Code *(post), Art. 227 of the Constitution*, or some other law.

3. An order under s. 185 thus confers jurisdiction on sessions division *other than* the division within whose local jurisdiction the offence was committed. [47]

2. Remedies of person aggrieved. —

1. A person aggrieved by an order under s. 185 may have it set aside by a petition under Art. 226. [48]

2. But even without setting aside the order under s. 185, the party may resort to s. 407 (*post)* for transferring the case to the usual sessions division or some other division, for, the scope of the provisions in s s. 185 and 407 is different and as the Proviso to s. 185 expressly states, s. 185 does not control any of the powers vested in the High Court or the Supreme Court as regards transfer of cases, by the *Constitution* , the Code or any other law. [49] An order of transfer may be made under s. 407 for the convenience of the parties or the ends of justice. [50]

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46 Cf. *Haridas v. State of U.P.,* AIR 1959 All 82 [LNIND 1958 ALL 117]]; Cf. *P.P. v. Reddy,* (1976) Crlj 1252 (AP) .

47 Cf. *P.P. v. Reddy,* (1976) Crlj 1252 (AP) .

48 Cf. *P.P. v. Reddy,* (1976) Crlj 1252 (AP) .

49 Cf. *P.P. v. Reddy,* (1976) Crlj 1252 (AP) .

50 Cf. *P.P. v. Reddy,* (1976) Crlj 1252 (AP) .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 186
High Court to decide, in case of doubt, district where inquiry or trial shall take place.

Where two or more Courts have taken cognizance of the same offence and a question arises as to which of them ought to inquire into or try that offence, the question shall be decided—

(a) if the Courts are subordinate to the same High Court, by that High Court;

(b) if the Courts are not subordinate to the same High Court, by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced,

and thereupon all other proceedings in respect of that offence shall be discontinued.

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1. Scope of s. 186.—

This section reproduces *old* s. 185, with drafting changes.

2. It has two parts :

(i) Cl. (a) applies where the two Courts with respect to which the conflict of jurisdiction arises are subordinate to the *same* High Court.

(ii) Cl. (b) applies where such Courts are subordinate to *different* High Courts.

Section 186 Crpc is based on the principle of convenience and expediency. The main object and intention of the Legislature in enacting *s. 186 Crpc* is to prevent the accused persons from being unnecessarily harassed for the same offences alleged to have been committed within the territorial jurisdiction of more than one courts. However, the sine qua non for the application of this provision is that the persons implicated as an accused in different cases must be the same. If these conditions are satisfied then subsequent proceeding has to be discontinued.[51]

2. Cls. (a)-(b).—

When such a question of conflict of jurisdiction arises, the first question to be determined is—who is to decide this question?

(a) When the conflicting courts are subordinate to the same High Court, little difficulty arises: the question must be decided by the High Court to which the conflicting courts are subordinate.

(b) But when the conflicting courts are subordinate to different High Courts. there is a conflict, in the first instance, between the two or more separate High Court. Hence, some test must be adopted to answer the question—who will decide the question of jurisdiction between the subordinate Courts. That test is expressly laid down in Cl. (b), *viz.* ,—that High Court within whose appellate jurisdiction, the proceedings in question were 'first commenced'. We must, therefore, next advert to the interpretation of this expression.

3. '... First commenced'. —

In a complaint case, it is obvious that this expression will refer to that Court before which the complaint, earlier in point of time, was filed.

4. Considerations relevant for deciding the question. —

A Single Judge of the Calcutta High Court [52] has taken the view that under Cl. (b) the sole test for determining the question of jurisdiction is in which subordinate court the criminal proceedings had been first instituted, while no such condition has been imposed upon the unfettered discretion of the High Court under Cl. (a). It is submitted that his view does not appear to be correct. In Cl. (b), the words 'the proceedings were first commenced' have been provided as the test for determining which of the several High Courts involved shall have the jurisdiction to decide the question of conflict as between the subordinate Courts as has arisen under s. 185. The section does not impose any conditions to fetter the discretion of the High Court under either Cl. (a) or (b).

2. In the Author's opinion, the same considerations should be relevant under both Cls. (a) and (b), *e.g.,* convenience of the parties, [53] particularly the accused; [54] nature of the case and facts thereof; [55] nature of the evidence; [56] the desirability of the trial of an offence of criminal conspiracy together with overt acts committed in pursuance thereof [57] or abatement thereof, [58] by the same Court, even though they might have taken place under different jurisdictions; [59] the applicability of the doctrine of 'issue estoppel', in case different Courts try different parts of the same offence,; [60] , [61] or offences committed in course of the same transaction. [62] , [63]

3. This section shall have no application unless the offences in the two proceedings are the same and arise out of the same transaction. [64]

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51 *State of Rajasthan v. Bhagwan Das Agrawal* , *2014 (1) MLJ (Crl) 236* [*LNIND 2013 SC 1091*] : 2014 Crlj 1006 .

52 *Supriyo v. Sunil,* AIR 1970 Cal 80 83 .

53 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 [*LNIND 1961 SC 188*] : (1961) 2 Crimes 728 .

54 *Supriyo v. Sunil,* AIR 1970 Cal 80 83 .

55 *Supriyo v. Sunil,* AIR 1970 Cal 80 83 .

56 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 [*LNIND 1961 SC 188*] : (1961) 2 Crimes 728 .

57 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 : (1961) 2 Crimes 728 .

58 Cf. *Gurdit v. Emp.,* AIR 1917 Lah 237 240 .

59 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 : (1961) 2 Crimes 728 .

60 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 : (1961) 2 Crimes 728 .

61 *Pritam Singh v. State of Punjab,* AIR 1956 SC 415 422 : 1956 Crlj 805.

62 Cf. *Purushottamdas v. State of W.B.,* AIR 1961 SC 1589 [*LNIND 1961 SC 188*](para 11) : (1962) 2 SCR 101 : (1961) 2 Crimes 728 .

63 *Babulal v. Emp.,* AIR 1938 PC 130 133 .

64 *Sreeramulu v. Rangswamy,* (1978) Crlj 1475 (AP) .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 187
Power to issue summons or warrant for offence committed beyond local jurisdiction.

(1) When a Magistrate of the first class sees reason to believe that any person within his local jurisdiction has committed outside such jurisdiction (whether within or outside India) an offence which cannot, under the provisions of Sections 177 to 185 (both inclusive), or any other law for the time being in force, be inquired into or tried within such jurisdiction but is under some law for the time being in force triable in India, such Magistrate may inquire into the offence as if it had been committed within such local jurisdiction and compel such person in the manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is not punishable with death or imprisonment for life and such person is ready and willing to give bail to the satisfaction of the Magistrate acting under this section, take a bond with or without sureties for his appearance before the Magistrate having such jurisdiction.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

1. Scope of s. 187.—

This section corresponds to s. 186 of the Code of 1898, with the changes indicate in *italics.* When a Judicial Magistrate of the first Class reasonably suspects a person to have committed an offence (cognizable or non-cognizable) outside his jurisdiction (whether within or outside India), such Magistrate, though he cannot take cognizance of the offence, is empowered by this section to inquire into it as if it had been committed within his jurisdiction, send the person for trial to the Magistrate having jurisdiction; or bind him to appear before such Magistrate. This provision is supplemental to those in ss. 70-81, *ante.*

65 *Sagarmal,*
AIR 1940 Bom 397 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 188
Offence committed outside India.

When an offence is committed outside India—

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :

Provided **that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.**

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1. Scope of s. 188.—

This section (corresponding to *old* s. 188) [66] codifies two exceptions, acknowledged by International law, to the general proposition that the jurisdiction over crimes is territorial, namely, that—

(i) A Sovereign does not lose its sovereignty over its in own citizens wherever they may be residing for the time being;

(ii) The territory of a Sovereign extends to its national ship or aircraft, wherever laying for the time being and that, accordingly, has jurisdiction over persons aboard such ship or aircraft even when it is within a foreign territory. [67]

When the offence was committed by a person not an Indian citizen and outside Indian neither *Indian Penal Code* nor the *Code of Criminal Procedure* is attracted and *s. 188 Cr.P.C.* does not cover the case of such an accused who is not an Indian citizen.[68]

2. Cl. (a):'Citizen of India'.—

The rule enunciated in this clause is based on the principle that *qua* citizens the jurisdiction of courts is not lost by reason of the venue of the offence. [69] It means that if at the *commission* of the offence, the person committing it is a citizen of India, then even though the offence is committed outside India, he is subject to the jurisdiction of the courts in India. The clause has no application if, at the time of commission of the offence, he was not a citizen of India. [70] Thus, a person accused of an offence committed in a district which after the partition of India because Pakistan, could not be tried of the offence by a criminal court in India, after his migration to India, thereby acquiring Indian citizenship. [71]

Thus, from a perusal of the provisions of Section 4 of *s. 188 Cr.P.C.* , it is clear that even if the offence is committed by a citizen of India outside the country, the same is subject to the jurisdiction of the Courts in India.[72]

The scheme envisaging *s. 188 Cr.P.C.* is to dispel any objections or plea of want of jurisdiction at the behest of the fugitive who has committed an offence in any other country, if such person is found anywhere in India and the offence can be inquired into and tried by any Court in India that may be approached by the victim.[73]

So, the victim can file a complaint for offences committed by an Indian citizen in abroad to any competent Court in India which he may find convenient. The expression 'at which he may be found' as used in *s. 188 Cr.P.C.* has been interpreted by the Supreme Court by observing that the finding of the accused for the purpose of *s. 188 Cr.P.C.* has to be the Court and not by the Police or the complainant. So, when the accused was a resident of Mumbai, the complaint filed by the victim at Ghaziabad has been upheld by the Supreme Court.[74]

3. Proviso to s. 188 : Previous Sanction of the Central Government.—

The expression 'to enquire into and try' used in the proviso to *s. 188 Cr.P.C.* indicates that in investigation stage no sanction of the Central Government is necessary.[75]

So, the previous sanction of the Central Government is not necessary to the taking of cognizance of the offence

committed outside India. Sanction can be obtained before the commencement of the trial. [76]

So, the word 'enquiry' in the proviso to *s. 188 Cr.P.C.* is confined to the proceedings before the Magistrate prior to the trial, but cannot be extended to investigate by the police. So, the bar contemplated by the proviso to *s. 188 Cr.P.C.* will operate in enquiry before the Magistrate after the police submitted charge sheet against the accused.[77]

4. Sanction when not necessary.—

When the conspiracy was initially hatched in India and even accepting the accused appellant's case that he was at Dubai and part of conspiracy and overt act s in furtherance thereof had taken place at Dubai, the offence cannot be said to be wholly committed outside India when part of conspiracy was hatched in India. So, the conspiracy being a distinct offence having been committed inside India even if part of conspiracy and some overt acts were committed at Dubai, proviso to *s. 188 Cr.P.C.* is not attracted and previous sanction of the Central Government for any enquiry or trial in India is not necessary.[78]

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66 With the omission of the 2nd Proviso, as recommended by the Law Commission, 41st Rep., (para 15.66).

67 This section is thus in accord with *s. 4, IPC* .

68 *Fatima Bibi Ahmed Patel v. State of Gujarat,* AIR 2008 SC 2392 [LNIND 2008 SC 2806] : (2005) 6 SCC 789 : (2008) 3 SCC 151 (Cri) : 2008 Crlj 3065 : (2008) 2 KLT 907 [LNIND 2008 SC 2806].

69 *Central Bank of India v. Ramnarain,* AIR 1955 SC 36 38 : 1955 Crlj 152 : (1955) 1 SCR 697 [LNIND 1954 SC 126].

70 *Central Bank of India v. Ramnarain,* AIR 1955 SC 36 38 : 1955 Crlj 152 : (1955) 1 SCR 697 [LNIND 1954 SC 126].

71 *Central Bank of India v. Ramnarain,* AIR 1955 SC 36 38 : 1955 Crlj 152 :

(1955) 1 SCR 697 [
LNIND 1954 SC 126].

72 *A V Mohan Rao v. M. Krishna Rao,*
AIR 2002 SC 2653 [
LNIND 2002 SC 437]: (2002) 6 SCC 174 :
2002 SCC (Cri) 1281 .

73 *Om Hemrajani v. State of U.P.,*
AIR 2005 SC 392 [
LNIND 2004 SC 1181]:
(2005) 1 SCC 617 [
LNIND 2004 SC 118] :
2005 SCC (Cri) 443 :
2005 Crlj 665 .

74 *Om Hemrajani v. State of U.P.,*
AIR 2005 SC 392 [
LNIND 2004 SC 1181]:
(2005) 1 SCC 617 [
LNIND 2004 SC 118] : 2005 SCC (Cri) 443 :
2005 Crlj 665 .

75 *Remia v. Sub-Inspector of Police,*
1993 Crlj 1098 Ker .

76 *Ajay Agarwal v. Union of India,*
AIR 1993 SC 1637 [
LNIND 1993 SC 431]:
1993 SCC (Cri) 961 [
LNIND 1993 SC 431] :
1993 Crlj 2516 .

77 *Vijaya v. Devi,*
2007 Crlj 636 AP .

78 *Ajay Agarwal v. Union of India,*
AIR 1993 SC 1637 [
LNIND 1993 SC 431]: 1993 SCC (Cri) 961 :
1993 Crlj 2516 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIII
JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS

S. 189
Receipt of evidence relating to offences committed outside India.

When any offence alleged to have been committed in a territory outside India is being inquired into or tried under the provisions of Section 188, the Central Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before a judicial officer in or for that territory or before a diplomatic or consular representative of India in or for that territory shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

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1. Scope of s. 189.—

This provision corresponds to *old* s. 189 and is consequential upon s. 188.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 190
Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

STATE AMENDMENTS

Punjab. — *The following amendments were made by Punjab Act No. 22 of 1983 (w.e.f. 27-6-1983)* .

S. 190-A. —After Section 190,S. 190A inserted—

"190A. Cognizance of offences by Executive Magistrates. —Subject to the provisions of this Chapter any Executive Magistrate may take cognizance of any specified offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

Union Territory of Chandigarh. — *The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983)* .

S. 190-A. —After S. 190, insert as under—

"190A. Cognizance of offences by Executive Magistrates. —Subject to the provisions of this Chapter any Executive Magistrate may take cognizance of any specified offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

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1. Scope of s. 190. —

This section corresponds to *old* s. 190, with the following changes: [1]

(i) The power to take cognizance, under sub-sec. (1) has been taken away from Executive Magistrate and vested in (a) Judicial Magistrate of the First Class; (b) any Second Class Judicial Magistrate, as may be specially empowered in this behalf, by the Chief Judicial Magistrate (instead of by the State Government), under sub-sec.(2).

(ii) In Cl. (b) of sub-sec. (1), for the words ‘a report in writing... by any Police-officer’ the words ‘a Police report of such facts’ have been substituted. The effects of this substitution will be explained hereafter.

(iii) In Cl. (c), the words ‘or suspicion’ have been omitted, with the result that a Magistrate shall no longer have any power to take cognizance on his suspicion, though his power to take cognizance on his knowledge as well as information from any person other than a Police officer has been retained.

2. The only modes under which a Magistrate may take cognizance under the Code are laid down in s. 190. [2] Where the conditions laid down in this section and the succeeding provisions of this Chapter are not fulfilled, the Magistrate does not obtain *jurisdiction* to try the offence. [3]

3. But the three clauses (a), (b)and (c) of sub-sec. (1) are not mutually exclusive. [4]

2. S s. 190 and 156(3).—

Section 156 is placed in Chap. XII which deals with the powers of the Police to investigate a crime, while s. 190 occurs in Chap. XIV which deals with the initiation of proceedings against an accused person by a Magistrate. The provisions in s s. 190 and 156 (3) are thus mutually exclusive and operate in entirely different spheres. In the result, even if a Magistrate receives a complaint under s. 190, he can under s. 156(3) provided he does not take cognizance. [5] Once he takes cognizance under s. 190, he cannot resort to s. 156(3); [6] if he wants investigation, he may then proceed under s. 202. [7]

3. S s. 190 and 193.—

While s. 193 deals with the power of Magistrate to take cognizance of offences, s. 193 deals with the power of a Court of Session to take cognizance of an offence for trial. The special feature of this provision is that the Court of Session cannot take cognizance unless the case has been 'committed' to it by a Magistrate, in accordance with s. 209, or the Code provides otherwise (see under s. 193,*post*).

4. S s. 190 and 195-199.—

Though a magistrate may have power to take cognizance under s. 190(1), his jurisdiction may be taken away or subjected to conditions by the provisions in s s. 195-199. [8] At the time of taking cognizance, therefore, he must examine the facts of the complaint, *etc.* and determine whether his jurisdiction to take cognizance has been taken away by any of these latter provisions. [9]

2. The question whether any of these latter provisions applied shall have to be determined with reference to the point of time when the cognizance is being taken. [10]

3. The main purpose behind s. 190(1)(b) is to ensure freedom and safety of the subject by giving him a right to approach the Court if he considers that a wrong has been done to him. [11] That freedom is curtailed by s. 195 when the offence complained of is against public justice or the authority of public servants. Hence, before taking cognizance, the Magistrate must determine whether his power is barred by any other provision, e.g ., 195 (1). [12]

5. S s. 190 and 202.—

See under s. 202,*post.* [13]

6. S s. 190 and 345.—

While s. 190 provides for the cognizance of cognizable or non-cognizable offences by a Magistrate, s. 345 is a special provision limited to the cognizance of a specific offence, namely, 'contempt *ex facie* ', relating to ss. 175, 178, 179, 180 and 228, I.P.C., and empowers *any* 'Civil; Criminal or Revenue Court' in whose presence such offence may have been committed, to take cognizance of it. Section 345, again, is a self-contained provision which provides for a summary hearing and punishment of the offender guilty of the offence.

7. S s. 190 and 350. —

Like s. 345[*old* s. 480], s. 350 [*old*

s. 485A] also deals with a specific offence its summary punishment, namely, non-attendance of a witness in obedience to summons, and 'without just excuse'. The power to take cognizance of this offence belongs to all 'Criminal Courts', [14] referred to in s. 6.

8. Sub-sec. (1) : Jurisdiction of different classes of Magistrates for taking cognizance.—

I. According to the opening words of sub-sec. (1), a Magistrate of the *First class* is competent to take cognizance of 'any' offence, without being specially empowered for this purpose, whether he is competent to *try* such offence or not.

Hence, he is entitled to take cognizance also of offences which are triable exclusively by a Court of Session; [15] in the letter case, he is to commit the accused for trial by the Court of Session, after taking cognizance, in accordance with s. 209.

II. The jurisdiction of a Magistrate of the *Second Class* to take cognizance is limited by two conditions:

(a) He must be 'specially empowered' by the Chief Judicial Magistrate to try the offences so specified [sub-sec. (1)].

(b) The offence must be such that he competent to inquire into or try it [sub-sec. (2)].

III. As to the jurisdiction of the Session Court to take cognizance, see under s. 193,*post.*

9. 'Taking cognizance'.

1. What is 'taking cognizance' has not been defined in Code. But before it can be said that any Magistrate has taken cognizance of any offence under s. 190(1)(a) of the Code, he must not only have applied his mind to the contents of the petition of complaint but he must have done so, for proceeding in a particular way as indicated in subsequent provisions of the Chapter. When the Magistrate applies his mind not for proceeding under subsequent sections of the Chapter but for taking act ion of some other kind, *e.g.,* ordering investigation under s. 156(3) or issuing a search-warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence. [16]

2. It is only when a Magistrate applies his mind for the purpose of proceeding under s. 200 and subsequent sections of Chap. XV or under s. 204 of Chap. XVI that it can be positively said that he had taken cognizance. [17]

3. 'Taking cognizance' by a competent Magistrate, in accordance with the provisions of the Chapter is a condition requisite of proceeding under the Code for the trial of an offence; no Court can otherwise have jurisdiction to try the offence. [18]

4. 'Taking cognizance' does not, however, invoke any *formal* action. It only means that magistrate the has applied his mind to the contents of the petition of complaint, information or 'Police report', for the purpose of proceeding under the subsequent provisions of Chap. XV. [19] In taking cognizance, the Magistrate exercises a judicial function. Magistrate can refuse to take cognizance if he is satisfied that the complaint, case diary and statements of witnesses recorded under Sections 161 and 164, do not

make out any offence. However, he cannot appreciate and weigh the evidence and the balance of probability in order to reach a conclusion as to which evidence is acceptable. [20] Under Section 190, it is the application of judicial mind to the averments in the complaint that constitute cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting conviction can be determined only at the trial. [21]

For taking cognizance of offence, it is not open to the court to analyse the evidence produced at that stage. The court has to consider avernments made in the complaint or the charge-sheet. [22]

5. It follows that 'taking cognizance' is not a continuing process, [23] but refers to the point of time when the Magistrate or Judge first takes judicial notice [24] of the offence to proceed under Chap. XV. When, therefore, a Magistrate took cognizance of a case upon a charge-sheet submitted by the Police under ss. 419/109, 468 and 471, I.P.C. and issued process, but at a subsequent stage he found that a charge under s. 120B would be better one and altered the charge accordingly; it could not be urged that he had taken cognizance of the case at that later stage, so as to attract s. 196(2). [25] There is no scope for 'taking cognizance' twice in the same proceeding. [26]

6. Returning the charge-sheet filed under s. 173(2) for want of material papers contemplated under s. 173(5) does not amount to taking cognizance. It is merely an *administrative act* and not a judicial act. [27]

7. In taking cognizance, the Magistrate is not required order nor is he precluded from considering other materials on the record besides the Police report. [28]

8. Even though the Court has not defined the expression 'take cognizance' but it is well settled by series of decisions of the Supreme Court that when the Magistrate takes notice of the accusation and applies its mind either to the petition of complaint or police report or information and on being satisfied that the allegation, if proved, would constitute an offence, decides to initiate the judicial proceedings against the offender, he said to have taken cognizance of the offence. The cognizance is in regard to offence and not to the offender. [29]

9. Taking of cognizance does not include any formal act ion or ante action of any kind but occurs as soon as the Magistrate applies his mind to suspect the commission of an offence, so the cognizance, therefore, takes place at a point of time when a Magistrate takes first judicial notice of an offence, be it on complaint or on police report or on his own knowledge or information. [30]

10. When a Magistrate takes cognizance on a police report, he takes cognizance of the whole case of all offences disclosed in or by materials under *s. 161 Cr.P.C.* and documents seized and enclosed in the police report.[31]

11. However, taking cognizance is not a mere formality. Before taking cognizance, the Magistrate has to apply his judicial mind to see if from the facts alleged, there is *prima facie* case to issue process. [32]

12. But returning the charge sheet to the police for want of material papers annexed with the charge sheet is not taking cognizance on the basis of police report. [33]

13. So, it is clear that taking of cognizance contemplates application of mind to the contents of the petition for the purpose of proceeding in a particular way. [34]

10. Duty of the Magistrate at the time of taking cognizance.—

At the stage of taking cognizance, the Magistrate considers only averments of facts in the petition of complaint or the charge sheet. He is not required to shift or appreciate the evidence at this stage. [35]

In a complaint case when the statement made in the petition of complaint and the statement of the complaint and his witnesses under *s. 202 Cr.P.C.* taken on a face value makes out the offence, the taking of cognizance by the Magistrate is held to be justified.[36]

When *prima facie* the allegations disclosed that the dispute was of civil nature but the complainant filed a private complaint of cheating after lapse of more than ten years, order for taking cognizance by the Magistrate and confirmed by the High Court has been set aside by the Supreme Court. [37]

Even where the complainant filed a petition under s. 156(3) *Cr.P.C.* for sending the complaint to the police to investigate, the Magistrate can take cognizance after examining the complainant on oath and on being satisfied, the *prima facie* offence alleged was made out. [38]

Once the Magistrate on perusal of the complaint is satisfied that the complaint disclosed the commission of offence, there is no reason to reject the complaint at this stage and he can proceed further in the matter by issuing process. Even if the words 'cognizance taken' is not mentioned in the order but it must be held that the Magistrate has taken cognizance of the offence. In such a case, the issuing of process against the accused indicates that prior to issuing such process, the Magistrate had taken cognizance. [39]

Cognizance cannot be taken unless that there is at least some material indicating the guilt of the accused. So, since there is no material on the basis of which cognizance was taken by the Magistrate, the order taking cognizance was quashed by the Supreme Court. [40]

The complainant, the purchaser of tractor files the complaint against the appellant, the manufacturer and the dealer. But in the complaint, no allegations against the manufacturer have been made. So, taking of cognizance against the appellant manufacturer has to be quashed. [41]

11. Taking cognizance and trial.—

1. The Code makes distinction between the taking cognizance of a case and its subsequent trial. [42]
2. The Court which takes cognizance of a case may not necessarily be the Court trying it. Thus,

(i) S. 191 enables the accused, on his application, to have the case tried by a Magistrate other than the Magistrate who took cognizance. [43]

(ii) S. 192 authorises the Chief Judicial Magistrate or a Magistrate of the 1st Class (specially empowered) to transfer a case for trial, after taking cognizance, to a subordinate Magistrate who is competent to try it. [44]

(iii) If the offence of which cognizance has been taken is exclusively triable by a Court of Session (vide Sch. I), the Magistrate who took cognizance is bound to commit it to the Court of Session for trial [s.209 (a), read with s. 193]. [45]

(iv) Ss. 406-407 provide for transfer of a case (*inter alia)* from the Court of the Magistrate who took cognizance to another Court for trial, subject to the conditions laid down therein. [46]

12. 'May take cognizance'.—

A.

1. There was a controversy as to whether a Magistrate is bound to take cognizance as soon as a compliant is filed before him, or it is open to him to take other steps. It is now **settled** [47] , [48] that as soon as a complaint is filed the Magistrate is *not* bound to take cognizance of the offence and proceed under the provisions of Chap. XV. He may, instead, order a Police investigation under s. 156(3) or issue a search-warrant for the purpose of investigation.

2. An order for investigation by the Police under s. 156(3) can, however, be made by a Magistrate only *before* taking cognizance on a complaint. [49] Where he decides to take cognizance under the provisions of Chap. XIV, he is not entitled to order any investigation under s. 156(3), though in cases not falling within the Proviso to s. 202 he can order investigation by the Police which would be in the nature of an inquiry, as contemplated by s. 202,*post.* [50]

3. Where an order for investigation has been validly made under s. 156(3), and the Magistrate receives the final report from the Police, he may take cognizance, issue notice to the complainant, record his statement and the statement of other witness an then issue process under s. 204,*post* ; [51] or he may discharge the accused. [52]

4. If, however, the Magistrate does not make an order under s. 156(3) or issue a search-warrant or any like order for the purpose of investigation, he would be bound [53] to take cognizance and then proceed under Chap. XV, there being no other alternative open to him. He shall then examine the complainant and his witnesses (if any), under s. 200 and then either dismiss the complaint under s. 203 or proceed under s. 202 or s. 204. [54]

B. Even when a 'police report' is received under s. 190(1)(b), the Magistrate is not bound, in every case, to take cognizance, unless there is a special statute which makes it obligatory [55] [see under s. 173,*ante*].

When in the instant case, no case was made out for taking cognizance under s. 420 I.P.C., it was obligatory on the part of the Magistrate to apply his mind to the contents of the charge sheet. Such application of mind should have been reflected in his order, When it was not done taking of cognizance of the offence under s. 420 I.P.C. against the accused is liable to be set aside. [56]

Thus, where the investigation has been tainted with some illegality which is curable, the Magistrate, instead of taking cognizance, may direct re-investigation [57] or further investigation, under s. 156(3).

C. On the other hand—

As soon as a Magistrate finds that complaint contains all the requirements to satisfy the definition in s. 2(d), he cannot reject it on the ground of eligibility of the person to make the complaint, unless there is any statute requiring special qualifications for being a complaint under that statute. [58]

13. Filing of complaint before the Magistrate under order of the High Court.—

When the police refused to register the FIR, the complainant moved the High Court to direct the police to register the case, the High Court refused to direct the police to register the complaint but gave the complainant leave to file the complaint before the Magistrate and on receipt of such complaint, the Magistrate has to consider such complaint on its merits without any prejudice by any observation made by the High Court in disposing the criminal revision. [59]

14. Cognizance taken without approval of the Central Vigilance Commission.—

When C.B.I. submitted charge sheet in the Bofors case without the approval of the Central Vigilance Commission, the Magistrate can take cognizance and the charge sheet cannot be quashed nor would further proceedings be quashed only on that ground. [60]

Even if there is no bar in entertaining the second complaint petition by the same petitioner and on same facts, yet after first complainant was dismissed for non-prosecution subsequent complaint filed after sixteen years. Without any adequate explanation, the Magistrate should not take cognizance on the second complaint, when the fact of the earlier police case and complaint case had been suppressed purposely. So, the taking of cognizance by the Magistrate is an abuse of the process of the Court. [61]

15. 'Of an offence'. —

1. Once it is held that a Magistrate has applied his mind and taken judicial notice of a complaint or police report *etc.* , he has taken cognizance at that moment of the offence or offences specified in the complaint or police report. Any subsequent alteration of the charge does not alter the factum of 'taking cognizance'. [62]

2. What the Magistrate takes cognizance of is the 'offence' and not the offender. [63] Once the Magistrate take cognizance of an offence, he acquires the jurisdiction and duty to proceed against those who are really involved in the offence as would transpire during the proceedings initiated by such cognizance,— including those offenders whose names might not have been known to the complainant when the complaint had been filed and even those who had not been sent up by the Police in their report under s. 173. [64]

3. The same principle applies to Sessions cases. [65] Section 193 provides that a Sessions Court cannot take cognizance of an offence unless the case has been committed by a Magistrate by the Court. This only means that the Magistrate shall take cognizance of an offence *qua* the persons accused who are before the Magistrate, and then commit the case to the Sessions Court. Once this is done, the bar under s. 193 would be out of the way, and thereafter the Sessions Court would be competent to summon *other* persons who appear to be involved in the crime

from the evidence laid during trial of those who had been committed. Summoning such additional persons would not constitute 'taking cognizance' on the part of the Sessions Court but only as a normal process following the cognizance already taken by the committing Magistrate. [66]

4. There was total absence of *bona fide* of the complainant to lodge an F.I.R. against the old-lady. The concerned I.O. totally subverted the investigation and started prosecution against an old lady and she was arrested and had to be in jail for more than week. The Supreme Court expressed its dissatisfaction as to investigation in such a case and taking cognizance by the Trial Court of non-existent offence mechanically. [67]

5. Offence, of course, includes both cognizable and non-cognizable offences. (See the First Sch., *post.*)

16. Who may take cognizance.—

1. Under the *new* Code. cognizance of an offence under s. 190 can be taken only by the following Magistrate :

   (a) Any Judicial Magistrate of the First class.

   (b) Any Judicial Magistrate of the Second Class, if so specially empowered in that behalf, by the Chief Judicial Magistrate.

2. As to what would happen if a Magistrate of the Second class, who is not so empowered under sub-sec. (2), takes cognizance. Sections 460- 461,*post* , make a distinction as between the three modes of taking cognizance under s. 190(1) :

   (a) If he takes cognizance on information or on his own knowledge under s. 190(1)(c), his proceedings shall be entirely void [s. 461(k)].

   (b) If he takes cognizance upon a complaint or police report under Cl. (a) or (b) of s. 190(1), his proceedings shall *not* be set aside if he has taken cognizance, thought not empowered: (a)erroneously; and (b) in good faith [s. 460(e)].

17. Cl. (a) : What is a 'complaint'. —

The ingredients of a 'complaint' have been at pp. 11-13, under s. 2(d),*ante.*

18. Who may be a complainant. —

1. See pp. 16, 17, *ante* .

2. The general rule is that any one can put the criminal law into motion, as a complainant, except where the statute which creates the offence indicates to the contrary, [68] , [69] expressly or impliedly. [70] In the

absence of such contrary provision, a private complainant is entitled to move the Court for taking cognizance for offences under—

Section 6(1)(a) of the Criminal Law Amendment Act , 1952. [71]

On the other hand, in view of contrary provisions in the governing statute, the Court under s. 6 cannot take cognizance of offences under—

Section 5A of the Prevention of Corruption Act , 1947.[72]

19. Taking cognizance upon complaint after adverse Police report under s. 156(3).—

1. When a Magistrate receives a complaint, he may, instead of taking cognizance at once under s 190(1)(a) at once, direct a Police investigation under s. 156(3),*ante.* [73]

2. Where, after completion of the investigation, the Police sends and adverse report under s. 173(1), the Magistrate may take *any* of the following steps: [74]

   i. If he agrees with Police report, and finds that there is no sufficient ground for proceeding further, he may drop the proceeding and dismiss the complaint.

   ii. He may not agree with the police report and may take cognizance of the offence on the basis of the original complaint, [75] under s. 190(1)(a), and proceed to examine the complainant under s. 200.

   iii. Even where he disagrees with the adverse report, he may, instead of taking cognizance at once upon the complaint, direct an inquiry under s. 202, and after such inquiry, take act ion under s. 203. [76]

3. The accused persons allegedly assaulted and kidnapped the deceased for murder. But the police filed a negative final report. The complainant protested by filing a protest petition. The Magistrate is not bound to follow the procedure under *Sections 200* and *202* *Cr.P.C.* before taking cognizance. If the materials are there in the negative final report to take cognizance and issue process, the Magistrate can take cognizance under Sections 302 and 365 I.P.C. and issue process against the accused. Such order not being illegal, no interference by the High Court is warranted.[77]

4. When the cognizance was taken by the Magistrate differing with the final report submitted by the police, at this stage, the Magistrate was required to find out whether there *prima facie* case is made out or not. So, when the order of the Magistrate indicates that there was sufficient ground for the

Magistrate to proceed against the accused, the order taking cognizance cannot be interfered with. Only because there is political rivalry between the complainant and the accused, no presumption of innocence or false implication can be inferred in favour of the petitioner. [78]

5. When the Court took cognizance on the basis of material available in the original charge sheet though the police submitted a supplementary report in the case, such taking of cognizance on the basis of original materials was not proper and liable to be set aside. [79]

6. However, even if the police report indicates that no case is made out against the accused, the Magistrate can ignore the same and can take cognizance on applying his mind independently to the case. [80]

7. When the police submitted a final report on investigation of the case, the Magistrate cannot direct the police to submit the charge sheet. However, on passing the materials in the charge sheet, he may take cognizance or direct further investigation. [81]

20. Examination of complaint.—

When a complaint is before a Magistrate, he is to examine it to see [82] —

(i) whether the facts averred constitute an offence;

(ii) whether such offence has been committed within his jurisdiction;

(iii) whether an action is required to be taken; if so against whom where the persons are named in the complaint. The complaint cannot be thrown outright because no person is named therein as accused, because of the definition in s. 2(d),*ante.* Where the complainant could not know the name of the accused, but the commission of an offence was disclosed, it would be for the Magistrate to order a Police investigation; [83]

(iv) whether he has jurisdiction to take cognizance of the offences constituted by the facts alleged in the complaint and whether it is barred by any of the provisions contained in ss.195-199. [84]

21. Steps which the Magistrate may take after taking cognizance upon complaint.—

1. The following steps may be taken by a Magistrate after taking cognizance of an offences upon a complaint :

(a) He shall examine the complainant and his witnesses (if any) and record their evidence [s. 200].

(b) If he finds that there is sufficient ground for proceeding, he may at once issue process for attendance of the accused [s. 204]. [85] Such process cannot be refused unless the Magistrate finds that the evidence led before him is self-contradictory or intrinsically untrustworthy. [86]

(c) Conversely, if he finds from such evidence that there is no sufficient ground for proceeding, *i.e.* , no *prima facie* case against the accused, [87] he *shall dismiss* the complaint [s. 203], *e.g.* , where complaint does not disclose the commission of any ‘offence’. [88]

(d) But instead of taking step either of issuing the process or dismissing the complaint at once, he may take an intermediate step, namely, to make an inquiry into the truth or falsehood of the complaint or have an investigation made by the Police [s. 202] to ascertain whether there is *prima facie* evidence so as to justify the issue of process. [89] , [90]

After the inquiry is over, he shall take into consideration the result of such inquiry together with the complainant's evidence, and then make an order under s. 203 or s. 204.

But, where, instead of taking cognizance on a complaint, the Magistrate makes an order for police investigation under s. 156(3), his order cannot be challenged on the ground that he could not make such order without examining the complainant under s. 200, at that stage. [91]

2. In short, on receipt of a complaint, the Magistrate is not bound to take cognizance. [92] He can, without taking cognizance, direct investigation by the Police under s. 156(3). Once, however, he takes cognizance, he must examine the complainant and his witnesses under s. 200. Thereafter, if he requires police investigation or judicial inquiry, he must proceed under s. 202. [93]

22. Taking of cognizance and issuing of process.—

The cognizance is taken at the initial stage while the Magistrate applies his judicial mind to the facts mentioned in the complaint or upon police report or upon information received from any other person that an offence has been committed. The issuance of process is at the subsequent stage when after considering the materials placed before it, the Magistrate decides to proceed against the offenders against whom *prima facie* case is made out. [94]

The jurisdiction of the Magistrate in the matter of taking cognizance or issuing process depending upon the existence of conditions precedent therefore. The Magistrate has the jurisdiction in the event a report in final form is filed,—

(a) to accept the final report in final form;

(b) in the event a protest petition is filed to treat the same as a complaint petition and if *prima facie* case is made out, to issue process;

(c) to take cognizance against a person although a report in the final form has been submitted against him, in the event he comes to the opinion that sufficient materials exist in the case itself therefore; and

(d) to direct re-investigation into the matter. [1]

When the case is exclusively triable by the Sessions Judge, the Magistrate can even take cognizance and issue process against the persons against whom no charge sheet is filed. [2]

23. Defence not to be considered.—

At the time of taking cognizance, the Magistrate is not required to consider the defence of the accused. [3]

24. Whether a second complaint can be entertained after dismissal of a previous one under s. 203.—

Though there is no bar to a Magistrate taking cognizance of an offence on second complaint after a previous one has been dismissed under s. 203, this would be lawful only if there are special circumstances, *e.g.* ,—

(i) where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish; [4] or where there was no proper investigation on the previous complaint; [5] or there was a miscarriage of justice, for instance, where instead of determining whether there was ground for putting the accused upon trial, the Magistrate dismissed the earlier complaint on the finding that there was no sufficient evidence for conviction; [6]

(ii) where the second complaint is based on facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings. [7]

25. Cl. (b) : Cognizance of a case on police report.—

1. Section 173 provides that as soon an investigation under Chap. XII is completed, the officer in charge of the police station shall forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with circumstances of the case, and stating whether the accused is forwarded in custody or has been released on bail or on his own bond. [8] This report may be what is popularly called a 'final report' in which the police after investigation finds that no case is made out (s.169); or it may be what is called a 'charge-sheet' or 'challan' submitted to a competent Magistrate for the purpose of taking cognizance of the offence.

2. For the purpose of taking cognizance upon a 'police report', the Magistrate may look not only at the report, which contains the opinion of the investigating officer, but also all the statements which are required to accompany that report, [9] according to s. 173(5)[10] [see *ante*]. It is upon a consideration of all these documents together that the Magistrate determines whether they *prima facie* disclose an offence as set out in the report; if so, he takes cognizance of that offence. [11] , [12]

3. But a 'police report' on which a Magistrate is entitled to take cognizance is a police report which contains the facts referred to in sub-sec. (2) of s. 173[13] [see *ante*], It does not cease to be so because—

(i) It is not accompanied by the documents or statements referred to in sub-sec. (5) of s. 173; [14] or

(ii) The investigating officer, when he submitted his report under s. 173(2), was still awaiting the reports of experts; [15] or

(iii) The Police-Officers labels his report as incomplete, provided what has submitted contains the particulars required by s. 173(2),*ante* , and the Magistrate is satisfied from such particulars that the material is sufficient for him to him to take cognizance of the offence. [16]

4. There was a controversy as to whether s. 190(1)(b) would be applicable not only where the Police reports under s. 173(2), but also where the report of the police is a 'final report' under s. 169,—that there is no case to send the accused to trial, or that the case was of a civil nature, but the Magistrate disagreeing with such report, takes cognizance of the offence.

The Supreme Court has held that in such a case it cannot be held that the Magistrate has taken cognizance upon a complaint s. 190(1)(a) or upon suspicion or upon information received by the Magistrate from any person other than the Police. [17] What the Magistrate does is to act upon the statements of witness collected by the Police as well as other materials in the Police report, but *not* the *conclusion* arrived at by the Police officer,—which is not binding upon the Magistrate. [18] , [19]

Hence, where the Magistrate has taken cognizance, after disagreeing with the report under s. 169, he must still be regarded as having taken cognizance upon a Police report under s. 190(1)(b), [20] , [21] so that he had not examine the complainant under s. 200 before taking cognizance, in such a case, [22] of course, it is open to him to act under s. 200 or 202 as well. [23]

5. The foregoing propositions would hold good even where the aggrieved party initially filed a complaint but the Magistrate, instead of taking cognizance thereupon, ordered investigation under s. 156(3), and the Police submits a report under s. 173(2), that no case been made out against the accused. On receipt of that report, the Magistrate has two courses open to him. [24]

(a) He may ignore the conclusion arrived at in the Police report, and yet take cognizance of the case, under s. 190(1)(b); or

(b) He can take cognizance of the original complaint, under s. 190(1)(a), and then proceed under s. 200 or 202. [25]

6. There was a long drawn controversy under the *cold* Code as to whether the report of a police officer of a non-cognizable offence or under some other provision of the Code or some other law, should be treated as a police report for the purposes of taking cognizance under s. 190(1)(b),

The *new* Code has steered clear of all this controversy, by changing the definitions of 'complaint' in s. 2(d) [pp. 10-20], and 'police report' in s. 2(r) [p. 32], which have been fully explained under those provisions, *ante.* The propositions resulting under the *new* Code are :

(a) By virtue of the *Explanation* to s. 2(d), the report of the Police of the commission of a non-cognizable offence, shall be treated as a 'complaint', under s.190(1)(a), and the Police-officer making such report shall be treated as a 'complainant', except where a Magistrate has ordered a Police-officer to investigate under s.155(2), in which case, the report submitted by the Police-officer would constitute a 'police report' under s. 173(2), and consequently, for the purpose of s. 190(1)(b).

(b) A report submitted to the Magistrate in pursuance of s. 157(1) is *not* a 'police report'. [26]

(c) It is only such report as is submitted by a Police-officer under s. 173(2), that will constitute a 'police report' under s. 190(1)(b), by virtue of the express definition in s. 2(r)[27] [see *ante*].

(d) It follows that when some law other than the Code authorises a public servant to investigate an offence under such special law and to submit a report to the Magistrate, the Magistrate can take cognizance only under Cl. (a) [28] and not Cl. (b) of s. 190(1), except where the special statute itself provides that the officer so empowered shall be deemed to be an officer in charge of a police station who is competent to make a report under s. 173(2). [29]

7. In warrant-cases, different procedures are prescribed for cases of which cognizance has been taken on police report [ss. 238-243, *post*] and cases of which cognizance has been taken on complaint or information [ss. 244-247, *post*].

26. Defect or illegality in Police report or proceedings anterior to report.—

1. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in *s. 190,Cr.P.C.* , as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance.[30]

2. An illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial. [31] It is an irregularity or error in a proceeding anterior to a trial, which is curable under s. 465 [*old* s. 537], unless it is shown to have bought about a miscarriage of Justice. [32]

3. In other words, where cognizance has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. [33]

4. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for.

27. Whether an invalid police report can be treated as complaint or information.—

As has just been pointed out, a police report does not give *jurisdiction* to the Court taking cognizance upon it, and that, by reason of s. 465, after completion of the proceedings, the order or sentence of the Court cannot be quashed on the ground of invalidity either of the investigation made by the police or of the police report. [34] The effects of change made by the *new* Code are to be noticed :

(a) The definition of 'complaint' in s. 2(d) expressly *excludes* a 'Police report', which is defined s. 2(r) as a 'report forwarded by a Police-officer' to a Magistrate under s. 173(2). Hence, if such a report is received under s. 173(2), but the Magistrate finds that it is invalid for contravention of some provision of the law, it would not be competent, under the *new* Code for the Magistrate to take cognizance under s.

190(1)(a), treating the invalid police report as a 'complaint'. Of course, if there is any defect in the *investigation,* he may direct reinvestigation. [35]

(b) Nor can an invalid report under s. 173(2) be treated as 'information' under s. 190(1)(c), because it excludes information received from a 'Police-officer'. Taking cognizance under s. 190(1)(c) on 'suspicion' raised by the police report is also no longer possible, because 'suspicion' has been omitted by the *new* Code (see *below*).

28. Duties of Magistrate while considering Police report and rights of the parties.—

1. The Supreme Court has held [36] that where, on receipt of a Police report under s. 173(2)(i), the Magistrate is of the opinion that he is not entitled to take cognizance of the case or not to proceed against some of the persons named as accused in the F.I.R., the Magistrate must give notice to the informant who had lodged the F.I.R and give him an opportunity to be heard so that he can make his submissions as to why the Magistrate should take cognizance. [37]

2. It has also been held that though the injured person or relative of the deceased is not entitled to any notice, they are entitled to appear before the Magistrate at this state and if they do, the Magistrate must hear them before making his decision on the Police report. [38]

3. On the other hand—

> Once the Magistrate takes cognizance of the offence and issues process, the responsibility to pursue the complaint rests on the State. Hence, if thereafter the accused is discharged, the information or complainant need be given a fresh opportunity to be heard before making such order of discharge. [39]

29. Cl. (c) : Sources of information. —

As this clause states, the source of the information under this clause may be—

(i) the knowledge of the Magistrate himself; or

(ii) information received from *any* person, other than a police-officer,—irrespective of the legality or otherwise of such person in the matter of discovering the facts. [40]

30. Invalid complaint may be treated as information. —

1. The three clauses of s. 190(1) are *not* mutually exclusive. [41] Hence, there is nothing to debar the Magistrate from treating a complaint which is invalid under Cl. (b) as an information to proceed under Cl. (c), provided he follows the condition imposed by s. 191. [42]

2. It follows, on the other hand, that when the Magistrate thus treats a complaint as information, his order of transfer under s. 192 cannot be challenged on the ground that he did not examine the complainant under s. 200. [43]

31. Effect of omission of 'suspicion'.—

1. The words 'or suspicion' have been omitted from CI. (c), by the *new* Code. Prior to this amendment, it was held by the Supreme Court in *Abhinandan's case* [44] that even when the Police sends a 'final report' [s. 169/173] on the ground that there is no sufficient evidence or reasonable ground to proceed against the accused, the Magistrate may take cognizance on his *suspicion* that an offence has been committed, arising out of the police report.
2. The question is whether this decision would still hold good after omission of the word 'suspicion', A Single Judge of the Allahabad High Court [45] has opined that the Magistrate may still take cognizance, in such a case, under remaining expression in Cl. (c)—'upon his *own knowledge* .' According to this decision, [46] the expression 'own knowledge' would include—(a) personal knowledge as well as, (b) *knowledge derived from documents,* so that when the Magistrate takes cognizance on the basis of the facts stated in the 'final report' of the Police, he would be act ing on his 'own knowledge'.

   It is difficult to agree with the foregoing view for a number of reasons:

   (i) Read in the context of the preceding clauses of s. 190(1), it is evident that words 'own knowledge' relate to the 'facts which constitute the offence', *e.g.* , where he was passing by when the incident happened. When he reads statements made in the Police papers, he cannot be said to have acquired his own knowledge as to such incidents.

   (ii) The expression 'own knowledge' was in CI. (c) when the judgment in *Abhinandan's case* [47] was pronounced. If that be so, there is no reason why the Court relied on 'suspicion' instead of 'own knowledge', if the interpretation offered by the learned Single Judge were correct. [48]

3. A Special Bench of the Patna High Court has avoided the forgoing difficulties by holding that it is implicit in s. 190(1)(b) that even where the Magistrate takes cognizance after differing from the Police report, it would still be acting on the police-report under s. 190(1)(b). [49]
4. The better view would be that where the Police officer has omitted to submit charge-sheet against any accused person, the Magistrate cannot take cognizance against such person on 'suspicion', but if on the evidence it transpires that such person should be proceeded against, the Magistrate may proceed against him under s. 319,*post* [50]

32. Revision.—

1. Taking cognizance of an offence is an interlocutory order, so that revision against such order would ordinarily be barred by s. 397(2),*post* . [51]
2. But s. 482 is not controlled by s. 397(2), so that even in the case of an interlocutory order. such as taking cognizance [52] or issuing process, the High Court may quash the order and subsequent proceedings (if any), where the order is without jurisdiction or would constitute an abuse of the process of the Court. [53] Thus.

3. Revision lies for quashing the proceedings after the Magistrate has taken cognizance on the ground that the provisions of s. 190[54] or subsequent provisions have not been complied with; [55] or that on the facts disclosed in the complaint or F.I.R., no offence had been committed in law; [56] or that the Magistrate act ed upon the police report without applying his mind to it; [57] or where the entertainment of a second complaint, in the absence of any special circumstances, constituted a gross abuse of the process of the Court; [58] or that he had no jurisdiction to take cognizance of the case or that this jurisdiction has been taken away by any of the clauses of s. 195(1),[59] *e.g.* , if there is a legal bar against the institution or continuance of the proceedings is invalid for want of the requisite sanction; [60] where a mandatory statutory provision has been violated. [61]

4. The point of time with reference to which the legality of the cognizance taken by a Magistrate is to be adjudged is the time when the cognizance was actually taken. [62] , [63]

5. Even apart from s. 482, there is authority for the view that where such order is without jurisdiction it would be a nullity [64] and, therefore, the bar under s. 397(2) cannot be invoked. [65] (See, further, under s. 204,*post*).

33. No interference on merits.—

Since the only function of the Magistrate in taking cognizance is to see whether there is a *prima facie* case for proceeding against the accused, and not to enter into the merits or demerits of the case. the High Court, in its revisional jurisdiction, too, enter into the question of merits. [66] , [67]

34. Remedy under Art. 226 of the Constitution.—

1. Since taking cognizance is an exercise of statutory power, relief under Art. 226 should be available [68] where it is without jurisdiction [69] or where it is based on a false report made by the Police, act uated by *mala fides.*

2. If, however, the legality of the criminal proceedings depends on facts to be proved before the Criminal Court, neither revision nor a writ under *Art. 226 of the Constitution* should issue to quash the proceedings before the Criminal Court. [70]

35. Remedy under s. 227 of the Code.—

The fact that an application for revision or under *Art. 226 of the Constitution* has not been entertained on the ground that it involved an investigation into the merits, it is still open to the Court of Section to discharge the accused, under s 227, *post* , if after considering the records and the submission of the parties, at the opening stage, it is satisfied that "there is no sufficient ground for proceeding against the accused". [71]

36. Special law.—

1, A special law may provide for taking cognizance of an offence otherwise than in accordance with s. 190,[72] or taking cognizance to be obligatory. [73]

2. *Section 11 of the Essential Commodities Act, 1955* provides that cognizance of an offence under the Act can be taken only upon the report in writing of a 'public servant' as defined under s. 21 of the I.P.C. The report of Police officer under *s. 173(2),Cr.P.C.* would answer this requirement.[74]

3. But where a special law, such as the *Prevention of Food Adulteration Act, 1954* , prescribes the mode in which only cognizance can be taken, the Magistrate would not be entitled to take cognizance under s. 190(1)(c), in contravention of the provision of that special statute.[75]

4. Section 8(1) of the Criminal Law Amendment Act of 1952 does not bar the special Judge to take cognizance of an offence under the *Prevention of Corruption Act* , 1947, in any of the modes specified in s. 190(1),*e.g.* , a private complaint or a Police report under *s. 173(2) of the Cr.P.C.*
[76]

5. Where the act s alleged against the accused constitute an offence under the I.P.C. as well as under s. 3 of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989, cognizance of that offence by the Magistrate will *not* be valid. [77]

No order of commitment by the Magistrate is necessary. In such a case the Magistrate shall if satisfied that *prima facie* materials exist to show commission of offences punishable under the Act, return it for presentation to the proper Court with an endorsement to that effect. [78]

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1 As recommended by the Law Commission (41st. Rep., paras, 15.70-82).

2 *Safi v. State of W.B.,* AIR 1966 SC 69 [*LNIND 1965 SC 102*](para 5) : (1965) 3 SCR 467 [*LNIND 1965 SC 102*] : 1966 Crlj 75 .

3 *Safi v. State of W.B.,* AIR 1966 SC 69 [*LNIND 1965 SC 102*](para 5) : (1965) 3 SCR 467 [*LNIND 1965 SC 102*] : 1966 Crlj 75 .

4 *Gajendra v. Baleswar,* (1989) Crlj 129 (para 11) Pat (FB).

5 *Tula Ram v. Kishore,* AIR 1977 SC 240 .

6 *Tula Ram v. Kishore,*
AIR 1977 SC 240 .

7 *State of Assam v. Abdul,*
(1970) 3 SCC 10 (para 13) :
AIR 1970 SC 1365 : 1970 Crlj 1264.

8 *Sethi v. Kapur,*
AIR 1967 SC 528 [
LNIND 1966 SC 208](para 10) :
(1967) 1 SCR 520 [
LNIND 1966 SC 208] :
1967 Crlj 528 .

9 *Sethi v. Kapur,*
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LNIND 1971 SC 295] (para 12) :
AIR 1971 SC 1708 [
LNIND 1971 SC 295]:
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10 *Sethi v. Kapur,*
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11 *Patel v. State of Gujarat,*
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LNIND 1971 SC 301] (para 4) :
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LNIND 1971 SC 308]:
1971 Crlj 1422 .

12 *Govind v. State of Bihar,*
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LNIND 1971 SC 295] (para 12) :
AIR 1971 SC 1708 [
LNIND 1971 SC 295]:
1971 Crlj 1266 .

13 *Sharma v. Manmohan,*
(1955) Crlj 387 (para 6) Or.

14 *Gulat v. Lajya Ram,*
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](para 15) :
(1966) 1 SCR 560
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LNIND 1965 SC 196
] :
1966 Crlj 465
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15 *Beni v. State of Rajasthan,*
(1983) Crlj 633
(para 9) Raj.

16 *Char v. State of U.P.,*
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; *Nirmaljit Singh Hoon v. State of W.B.,*
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: (1973) 2 SCR 66; *Jamuna v. Bhadai,*
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(1964) 5 SCR 37
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LNIND 1963 SC 226
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(1964) 2 Crimes 468
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17 *Lakshminarayana v. Narayana,*
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](para 14) :
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(1971) 3 SCC 936
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LNIND 1970 SC 479
] (para 15).

18 *Safi v. State of W.B.,*
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21 *Bhushan Kumar v. State (NCT of Delhi),*
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23 *Shriyans Prasad v. Shanti,* (1977) Crlj 1270 (para 60).

24 *Ajit v. State of W.B.,* (1963) Supp. 1SCR 953.

25 *Darshan v. State of Maharashtra,* AIR 1971 SC 2372 [*LNIND 1971 SC 436*]: (1971) 2 SCC 654 [*LNIND 1971 SC 436*] : 1971 Crlj 1697 .

26 *Uma Shankar v. State of Bihar,* (1975) Crlj 1954 (para 9) Pat.

27 *Venkatareddy v. State,* (1994) Crlj 257 (AP) (para 10).

28 *State of W.B. v. Mohammed Khalid,* (1995) 1 SCC 684 (paras 78, 81) : AIR 1995 SC 785 : (1995) 1 Crimes 397.

29 *Keshan Singh v. State of Bihar,* (1993) 2 SCC 16 [*LNIND 1993 SC 17*] : 1993 SCC (Cri) 470 [*LNIND 1993 SC 17*] : 1997 Crlj 700 : (1993) 1 Crimes 494 [*LNIND 1993 SC 17*].

30 *Darshan Singh v. State,* AIR 1971 SC 2371 : (1971) 2 SCC 654 : 1971 Crlj 1697 .

31 *J. Muthukrishnan v. State,* 1990 Crlj 2570 Mad .

32 *Dayal Trading v. State of Orissa,* 1990 Crlj 715 .

33 *M.C. Venkata Reddy v. State of A.P.,* 1994 Crlj 257 AP .

34 *Dilwar Singh v. State of Delhi,*
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35 *Rashmi Kumar v. Mahesh Kumar,*
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36 *Ajay Mehra v. Durgesh Babu,*
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37 *Suresh v. Mahadevappa Shivappa Dasannava,*
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38 *Ram Swarup v. Mohammed Javed Razack,*
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43 *Gulat* *v.* *Lajya* *Ram,*
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45 *Gulat* *v.* *Lajya* *Ram,*
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[ ](para 15) : [ ] :
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46 *Gulat* *v.* *Lajya* *Ram,*
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48 *Tula* *Ram* *v.* *Kishore,*
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52 *Tula Ram v. Kishore,* AIR 1977 SC 240 (para 14); *Gopal v. State of Assam,* AIR 1961 SC 986 [*LNIND 1961 SC 27*]: (1961) 2 Crimes 39 .

53 Cf. *Ramlakhan v. Rameshwar,* (1975) Crlj 866 (para 5) (Pat).

54 Cf . *Ramlakhan v. Rameshwar,* (1975) Crlj 866 (para 5) (Pat).

55 *Aggarwal v. Ram Kali,* AIR 1968 SC 1 [*LNIND 1967 SC 229*]: (1968) 1 SCR 205 [*LNIND 1967 SC 229*] : 168 Crlj 82.

56 *Devendra v. State of U.P.,* (2009) 7 SCC 495 [*LNIND 2009 SC 1158*] : (2009) 3 SCC 461 [*LNIND 2011 SC 798*](Cri) .

57 Cf. *Rishbud v. State of Delhi,* AIR 1955 SC 196 [*LNIND 1954 SC 177*]: (1955) 1 SCR 1150 [*LNIND 1954 SC 177*] : 1955 Crlj 526 .

58 *Vishwa Mitter v. Podder,* AIR 1984 SC 5 [*LNIND 1983 SC 277*](para 4) : (1983) 4 SCC 701 [*LNIND 1983 SC 277*] : 1984 Crlj 1 .

59 *Ravinder Kaur v. State of Punjab,* (2006) 9 SCC 188 : (2006) 2 SCC 617 (Cri) .

60 *Union of India v. Prakash P. Hinduja,* AIR 2003 SC 2612 [*LNIND 2003 SC 540*].

61 *Ravinder Nath v. State of Bihar,* 2007 Crlj 1564 Pat .

62 *Darshan Singh v. State of Maharashtra,* (1971) 2 SCC 654 [*LNIND 1971 SC 436*].

63 *Raghubans v. State of Bihar,*
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64 *Raghubans v. State of Bihar,*
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66 *Joginder v. State of Punjab,*
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67 *Paraminder Kaur v. State of U.P.,*
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68 *Vishwa Mitter v. Podder,*
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74 *Bains v. State,* [
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75 *Bains v. State,* [
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(1980) 4 SCC 631
LNIND 1980 SC 423] :
1980 Crlj 1308 ; *Tula Ram v. Kishore,* [
AIR 1977 SC 2401
LNIND 1977 SC 284]: (1977) 4 SSC 459 : 1978 Crlj 8.

76 *Bains v. State,* [
AIR 1980 SC 1883
LNIND 1980 SC 423](paras 6-7) : [
(1980) 4 SCC 631
LNIND 1980 SC 423] :
1980 Crlj 1308 .

77 *Sukha Ram v. State,*
2007 Crlj 644 Raj .

78 *Tarakashwar Singh v. State of Bihar,*
2007 Crlj 1281 Pat .

79 *Sri Niwas Prosad v. State of Bihar,*
2007 Crlj 4498 Pat .

80 *Minu Kumari v. State of Bihar,* [
AIR 2006 SC 1937
LNIND 2006 SC 267]:
(2006) 4 SCC 359 [
LNIND 2006 SC 267] :

(2006) 3 SCC 310 (Cri) :
2006 Crlj 2468 .

81 *Ram Naresh Prosad v. State of Jharkhand,*
(2009) 11 SCC 299 [
LNIND 2009 SC 324] :
(2009) 3 SCC 1336 (Cri) .

82 *Sevantilal v. State,*
AIR 1969 Guj 14 [
LNIND 1967 GUJ 112](para 4).

83 *Sevantilal v. State,*
AIR 1969 Guj 14 [
LNIND 1967 GUJ 112](para 4).

84 *Sethi v. Kapur,*
AIR 1967 SC 528 [
LNIND 1966 SC 208](para 10) :
1967 Crlj 528 ; *Govind v. State of Bihar,*
(1971) 3 SCC 329 [
LNIND 1971 SC 295] (paras 12, 21) :
AIR 1971 SC 1708 [
LNIND 1971 SC 295]:
1971 Crlj 1266 .

85 *Darshan Singh v. State of Maharashtra,*
(1971) 2 SCC 654 [
LNIND 1971 SC 436].

86 *Nirmaljit v. State of W.B.,*
(1973) 3 SCC 753 (para 22) :
AIR 1972 SC 2639 : (1973) 2 SCR.

87 *Nirmaljit v. State of W.B.,*
(1973) 3 SCC 753 (para 22) :
AIR 1972 SC 2639 : (1973) 2 SCR.

88 *Gopal v. State of Assam,*
AIR 1 9961 SC 986 989 : (1961) 2 Crimes 39.

89 *Nirmaljit v. State of W.B.,*
(1973) 3 SCC 753 (para 22) :
AIR 1972 SC 2639 : (1973) 2 SCR.

90 *Vadilal v. Ghadigaonker,*
AIR 1960 SC 1113 [
LNIND 1960 SC 158]:
1960 Crlj 1499 :
(1961) 1 SCR 1 [
LNIND 1960 SC 170].

91 *Gopal v. State of Assam,*
AIR 1961 SC 986 989 : (1961) 2 Crimes 39.

92 *Jamuna v. Bhadai,*
AIR 1964 SC 1541 [
LNIND 1963 SC 226]:
(1964) 2 Crimes 468 .

93 *Jamuna v. Bhadai,*
AIR 1964 SC 1541 [
LNIND 1963 SC 226]:
(1964) 2 Crimes 468 .

94 *State of Karanataka v. Pratap P. Raju,*
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LNIND 2006 SC 584]:
(2006) 6 SCC 7289 :
(2006) 3 SCC 179 (Cri) :
2006 Crlj 4045 .

1 *Popular Muthaiah v. State,*
(2006) 7 SCC 296 [
LNIND 2006 SC 458] :
(2006) 3 SCC 245 [
LNIND 2006 SC 458](Cri) :
(2006) 3 Crimes 23 .

2 *Veer Singh v. State of M.P.,*
2007 Crlj 4506 MP .

3 *Rabindra Nath v. State of Bihar,*
2007 Crlj 350 Pat .

4 *Pramatha v. Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](paras 21-23, 48, 59, 61) : 1962 Supp (2) SCR 297 : (1962) 1
Crimes.

5 *Pramatha v. Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](paras 21-23, 48, 59, 61) : 1962 Supp (2) SCR 297 : (1962) 1
Crimes.

6 *Pramatha v. Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](paras 21-23, 48, 59, 61) : 1962 Supp (2) SCR 297 : (1962) 1
Crimes.

7 *Pramatha v. Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](paras 21-23, 48, 59, 61) : 1962 Supp (2) SCR 297 : (1962) 1
Crimes.

8 *Satya* *v.* *State* *of* *Bihar,* (1980) Crlj 227 (paras 6, 9-12).

9 *India* *Carat* *v.* *State* *of* *Karnataka,* AIR 1989 SC 885 [*LNIND 1989 SC 102*](para 16) : (1989) 2 SCC 132 [*LNIND 1989 SC 102*] : 1989 Crlj 963 .

10 *Satya* *v.* *State* *of* *Bihar,* (1980) Crlj 227 (paras 6, 9-12).

11 *Darshan* *v.* *State* *of* *Maharashtra,* AIR 1971 SC 2372 [*LNIND 1971 SC 436*]: (1971) 2 SCC 654 [*LNIND 1971 SC 436*] : 1971 Crlj 1697 .

12 *Satya* *v.* *State* *of* *Bihar,* (1980) Crlj 227 (paras 6, 9-12).

13 *State of Haryana v. Mehal Singh,* AIR 1978 P&H 341 (paras 15, 16A, 17) FB; *Pulandar v. State of M.P.,* (1979) Crlj NOC 155(MP) .

14 *State of Haryana v. Mehal Singh,* AIR 1978 P&H 341 (paras 15, 16A, 17) FB; *Pulandar v. State of M.P.,* (1979) Crlj NOC 155(MP) .

15 *State of Haryana v. Mehal Singh,* AIR 1978 P&H 341 (paras 15, 16A, 17) FB; *Pulandar v. State of M.P.,* (1979) Crlj NOC 155(MP) .

16 *State* *of* *Maharashtra* *v.* *Sharad,* AIR 1955 SC 231 (para 7).

17 *Bains* *v.* *State,* AIR 1980 SC 1883 [*LNIND 1980 SC 423*](paras 6-7) : (1980) 4 SCC 631 [*LNIND 1980 SC 423*] : 1980 Crlj 1308 .

18 *Bains* *v.* *State,* AIR 1980 SC 1883 [*LNIND 1980 SC 423*](paras 6-7) : (1980) 4 SCC 631 [*LNIND 1980 SC 423*] : 1980 Crlj 1308 .

19 *India* *Carat* *v.* *State* *of* *Karnataka,* AIR 1989 SC 885 [*LNIND 1989 SC 102*](para 16) :

(1989) 2 SCC 132
LNIND 1989 SC 102
1989 Crlj 963

20 *Bains* *v.* *State,*
AIR 1980 SC 1883
LNIND 1980 SC 423 (paras 6-7)
(1980) 4 SCC 631
LNIND 1980 SC 423
1980 Crlj 1308

21 *Abhinandan* *v.* *Dinesh,*
AIR 1968 SC 117
LNIND 1967 SC 144
1968 Crlj 97

22 *Ravish* *v.* *State* *of* *U.P.,*
(1986) Crlj 866 (paras 14-16) All.

23 *India* *Carat* *v.* *State* *of* *Karnataka,*
AIR 1989 SC 885
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LNIND 1989 SC 102
1989 Crlj 963

24 *Tula* *Ram* *v.* *Kishore,*
AIR 1977 SC 2401
LNIND 1977 SC 284 : (1977) 4 SSC 459 : 1978 Crlj 8.

25 *Tula* *Ram* *v.* *Kishore,*
AIR 1977 SC 2401
LNIND 1977 SC 284 : (1977) 4 SSC 459 : 1978 Crlj 8.

26 *Pala* *Singh* *v.* *State* *of* *Punjab,*
(1972) 2 SCC 640
LNIND 1972 SC 377
AIR 1972 SC 2679
LNIND 1972 SC 377
1973 Crlj 59

27 *Shyam* *v.* *State* *of* *Assam,*
(1988) Crlj 1560 (para 5).

28 Cf. *Badaku* *v.* *State* *of* *Mysore,*
AIR 1966 SC 1746
LNIND 1966 SC 68
(1966) 3 SCR 698
LNIND 1966 SC 68
1966 Crlj 1353

29 *Raja* *Ram* *v.* *State* *of* *Bihar,*
AIR 1964 SC 828

LNIND 1963 SC 94](para 10) :
(1964) 2 SCR 752 [
LNIND 1963 SC 94] :
(1964) 1 Crimes 705 .

30 *Rishbud* *v.* *State* *of* *Delhi,*
AIR 1955 SC 196 [
LNIND 1954 SC 177](203-04) :
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] :
1955 Crlj 526 ; *Nanakchand,*
AIR 1974 SC 765 : (1974) 4 SCC 218 :
1974 Crlj 660 .

31 *Prabhu* *v.* *Emp.,*
AIR 1944 PC 73 .

32 *Rishbud* *v.* *State* *of* *Delhi,*
AIR 1955 SC 196 [
LNIND 1954 SC 177](203-04) :
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] :
1955 Crlj 526 ; *Nanakchand,*
AIR 1974 SC 765 : (1974) 4 SCC 218 :
1974 Crlj 660 .

33 *Rishbud* *v.* *State* *of* *Delhi,*
AIR 1955 SC 196 [
LNIND 1954 SC 177](203-04) :
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] :
1955 Crlj 526 ; *Nanakchand,*
AIR 1974 SC 765 : (1974) 4 SCC 218 :
1974 Crlj 660 .

34 *Rishbud* *v.* *State* *of* *Delhi,*
AIR 1955 SC 196 [
LNIND 1954 SC 177](203-04) :
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] :
1955 Crlj 526 ; *Nanakchand,*
AIR 1974 SC 765 : (1974) 4 SCC 218 :
1974 Crlj 660 .

35 *Rishbud* *v.* *State* *of* *Delhi,*
AIR 1955 SC 196 [
LNIND 1954 SC 177](203-04) :
(1955) 1 SCR 1150 [
LNIND 1954 SC 177] :
1955 Crlj 526 ; *Nanakchand,* AIR1974 SC 765 :
(1974) 4 SCC 218 :
1974 Crlj 660 .

36 *Bhagwant* v. *Commr.,*
AIR 1985 SC 1285 [
LNIND 1985 SC 150](paras 4-5) :
(1985) 2 SCC 537 [

LNIND 1985 SC 150] :
(1985) 1 Crimes 994 [
LNIND 1985 SC 150].

37 *Bhagwant* v. *Commr.,*
AIR 1985 SC 1285 [
LNIND 1985 SC 150](paras 4-5) :
(1985) 2 SCC 537 [
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(1985) 1 Crimes 994 [
LNIND 1985 SC 150].

38 *Bhagwant* v. *Commr.,*
AIR 1985 SC 1285 [
LNIND 1985 SC 150](paras 4-5) : (1985) 2 SCC 537 :
(1985) 1 Crimes 994 [
LNIND 1985 SC 150].

39 *Gurcharan* *v.* *Suresh,*
(1988) Crlj 823 (para 10) Del.

40 *Ram* *v.* *State,*
(1979) Crlj 1145 (para 4) All.

41 *Bharat* *v.* *Judhistir,*
AIR 1929 Pat 473 FB .

42 *Channu* *v.* *R.,*
AIR 1949 All 692 .

43 *Jagia* *v.* *Sant* *Lal,*
(1977) Crlj 523 (Pat) .

44 *Abhinandan* *v.* *Dinesh,*
AIR 1968 SC 117 123 : (1968) Crlj 97 :
(1967) 3 SCR 668 [
LNIND 1967 SC 144].

45 *Ganga* *Prasad* *v.* *State,* (1975)
CrLJ 1565 (1567).

46 *Ganga* *Prasad* *v.* *State,* (1975)
CrLJ 1565 (1567).

47 *Abhinandan* *v.* *Dinesh,*
AIR 1968 SC 117 [
LNIND 1967 SC 144](*123*) :
(1968) Crlj 97 :
(1967) 3 SCR 668 [
LNIND 1967 SC 144].

48 *Ganga Prasad* v *State,* (1975) CrLJ 1565 (1567).

49 *Kuli v. State of Bihar,* AIR 1978 Pat 298 . [This view finds indirect support from *Hareram Satpathy v. Tikaram,* AIR 1978 SC 1568 [*LNIND 1978 SC 482*]: (1978) 4 SCC 58 [*LNIND 1978 SC 482*] : 1978 Crlj 1687].

50 *Hiro v. State of Bihar,* (1979) Crlj 55 (Pat) .

51 *Madhu Limaye v. State of Maharashtra,* AIR 1978 SC 47 [*LNIND 1977 SC 302*](para 10) : (1977) 4 SCC 551 [*LNIND 1977 SC 302*] : 1978 Crlj 165 ; modifying *Amar v. State of Haryana,* AIR 1977 SC 2185 [*LNIND 1977 SC 233*]: (1977) 4 SCC 137 [*LNIND 1977 SC 233*] : 1977 Crlj 1891 .

52 Cf. *India Carat v. State of Karnataka,* AIR 1989 SC 885 [*LNIND 1989 SC 102*](para 2.) : (1989) 2 SCC 132 [*LNIND 1989 SC 102*] : 1989 Crlj 963 .

53 *Madhu Limaye v. State of Maharashtra,* AIR 1978 SC 47 [*LNIND 1977 SC 302*](para 10) : (1977) 4 SCC 551 [*LNIND 1977 SC 302*] : 1978 Crlj 165 ; modifying *Amar v. State of Haryana,* AIR 1977 SC 2185 [*LNIND 1977 SC 233*]: (1977) 4 SCC 137 [*LNIND 1977 SC 233*] : 1977 Crlj 1891 .

54 Cf. *Safi v. State of W.B.,* AIR 1966 SC 69 [*LNIND 1965 SC 102*](para 5) : 1966 Crlj 75 .

55 Cf. *State of W.B. v. Bejoy,* AIR 1978 SC 188 [*LNIND 1977 SC 339*]: (1978) 1 SCC 173 [*LNIND 1977 SC 339*] : 1978 Crlj 138 .

56 *Kapur v. State of Punjab,* AIR 1960 SC 866 869 : 1960 Crlj 1239.

57 *Vasudeo v. State of Bihar,* (1977) Crlj 55 (N) (Pat) .

58 *Pramatha v. Saroj,* AIR 1962 SC 876 [*LNIND 1961 SC 400*] (paras 23, 48, 61) : 1962 Supp (2) SCR 297 : (1962) 1 Crimes 770 .

59 *Govind v. State of Bihar,* (1971) 3 SCC 329 [*LNIND 1971 SC 295*] (para 12); *S. Dutt v. State of U.P.,* AIR 1966 SC 523 [*LNIND 1965 SC 195*]: 1966 Crlj 459 .

60 Cf. *Safi v. State of W.B.,* AIR 1966 SC 69 [*LNIND 1965 SC 102*] (para 5) : 1966 Crlj 75 .

61 *Madhu Limaye v. State of Maharashtra,* AIR 1978 SC 47 [*LNIND 1977 SC 302*] (para 10) : (1977) 4 SCC 551 [*LNIND 1977 SC 302*] : 1978 Crlj 165 ; modifying *Amar v. State of Haryana,* AIR 1977 SC 2185 [*LNIND 1977 SC 233*]: (1977) 4 SCC 137 [*LNIND 1977 SC 233*] : 1977 Crlj 1891 .

62 *Sethi v. Kapur,* AIR 1967 SC 528 [*LNIND 1966 SC 208*] (para 10) : 1967 Crlj 528 .

63 *Govind v. State of Bihar,* (1971) 3 SCC 329 [*LNIND 1971 SC 295*] (paras 12); *S. Dutt v. State of U.P.,* AIR 1966 SC 523 [*LNIND 1965 SC 195*]: 1966 Cr:LJ 459.

64 Cf. *Madhu Limaye v. Ved Murti,* AIR 1971 SC 2481 [*LNIND 1970 SC 448*] (para 16) : (1970) 3 SCC 739 [*LNIND 1970 SC 501*] : 1971 Crlj 1715

65 *Satyabrata* *v.* *Jarnal,*
(1976) Crlj 446 (para 6) Or (DB).

66 *Nagawwa* *v.* *Veeranna,*
AIR 1976 SC 1947 1950 : 1976 Supp SCR 123 :
(1976) 3 SCC 736 [
LNIND 1976 SC 188] :
1976 Crlj 1533 .

67 *Hareram* *v.* *Tikaram,*
AIR 1978 SC 1563 (paras 10-11).

68 *State* *v.* *Mehar* *Singh,*
(1974) Crlj 970 (para 12) P&H (FB).

69 *Nagawwa* *v.* *Veeranna,*
AIR 1976 SC 1947 1950 : 1976 Supp SCR 123 :
(1976) 3 SCC 736 [
LNIND 1976 SC 188] :
1976 Crlj 1533 .

70 *D.D.A.* *v.* *Lila* *D.* *Bhagat,*
AIR 1975 SC 495 (paras 7, 10) :
(1975) 1 SCC 410 :
1975 Crlj 435 .

71 *Sanjay* *v.* *Union* *of* *India*
AIR 1978 SC 514 [
LNIND 1978 SC 47]:
(1978) 2 SCC 39 [
LNIND 1978 SC 47] :
1978 Crlj 642 .

72 Cf. *Safi* *v.* *State* *of* *W.B.,*
AIR 1966 SC 69 [
LNIND 1965 SC 102](para 5) :
1966 Crlj 75 .

73 *Jai* *Charan* *v.* *State* *of* *U.P.,*
AIR 1968 SC 1 [
LNIND 1967 SC 229](para 12) :
1968 Crlj 82 ; *Aggarwal v. Ram Kali,*
AIR 1968 SC 1 [
LNIND 1967 SC 229](para 12) :
(1968) 1 SCR 205 [
LNIND 1967 SC 229] :
1968 Crlj 82 .

74 *Satya* *v.* *State* *of* *Bihar,*
(1980) Crlj 227 :
AIR 1980 SC 506 : (1980) 3 SCC 152.

75 *Nutrine Confectionery v. State of H.P.,*
(1979) Crlj 219 (para 12) HP.

76 *Antulay v. Nayak,*
AIR 1984 SC 718 [
LNIND 1984 SC 42](para 14) :
(1984) 2 SCC 500 [
LNIND 1984 SC 42] :
1984 Crlj 647 .

77 *Udhaba v. Gora,*
(1994) Crlj 3815 (paras 6, 7) Or.

78 *Udhaba v. Gora,*
(1994) Crlj 3815 (paras 6, 7) Or.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 191
Transfer on application of the accused.

When a Magistrate takes cognizance of an offence under Clause (c) of sub-section (1) of Section 190, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate, and if the accused or any of the accused, if there be more than one, objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

STATE AMENDMENTS

Punjab. — *The following amendments were made by Punjab Act No. 22 of 1983 (w.e.f. 27-6-1983)* .

S. 191. —In S. 191, for the words, brackets and figures "Clause (c) of sub-section (1) of s. 190", substitute the word, figures and letter " Section 190A," and for the word "Magistrate" wherever occurring, and the words "Chief Judicial Magistrate" substitute the words "Executive Magistrate" and "District Magistrate".

Union Territory of Chandigarh. — *The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983)* .

S. 191. —Amendment of S. 191 as under—

S. 191 shall be so read as if for the words, brackets and figures "Clause (c) of sub-section (1) of Section 190", the word, figures and letter " Section 190A," were substituted and for the word "Magistrate" wherever occurring, and the words "Chief Judicial Magistrate" the words "Executive Magistrate" and "District Magistrate", respectively, were substituted.

1. Scope of s. 191.—

1. This section corresponds to *old* s. 191 with the changes indicated in italics.

2. When the Magistrate act s on information or on his own knowledge, under CI. (c), the Magistrate acts on his own initiative as distinguished from the cases where he takes cognizance on the formal complaint of a third person or on report from the Police. Hence, s. 191 provides that in the cases coming under CI. (c), the Magistrate must, before proceeding further, inform the accused that he has a right to be tried by some other Magistrate. [79]

2. ‘ Shall be transferred to such other Magistrate’.—

Under the *old* Code, where objection was raised on behalf of the accused, the Magistrate who had acted under s. 190(1)(c) might either transfer the case to another Magistrate or commit the accused to the Court of Session. From this, it was held that where he elected to send the accused to the Court of Session, he was competent to make the inquiry necessary for such commitment. This would virtually mean that inspite of the accused’s objection, the Magistrate could proceed with the case.

This has been obviated by the *new* Code, by omitting the alternative of committing to the Court of Session, as recommended by the Law Commission. [80]

3. Effect of failure to comply with s. 191.—

Failure on the part of the Magistrate to inform the accused of his right to have the case transferred is an illegality which vitiates the trial. [81]

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79 *Baldeo,* (1930) 12 Pat 758.

80 41st Rep., para 15.81.

81 *State of kerala,* in re., AIR 1969 Ker 111 117 ; *Nilamani v. State,* AIR 1970 Tri 72 : 1970 Crlj 1386.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 192
Making over of cases to Magistrates.

(1) Any Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

(2) Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify, and thereupon such Magistrate may hold the inquiry or trial.

STATE AMENDMENTS

Punjab. — *The following amendments were made by Punjab Act No. 22 of 1983 (w.e.f. 27-6-1983)* .

S. 192. —In S. 192, for the words "Chief Judicial Magistrate", and the words "Magistrate of the First Class" or "Magistrate" wherever occurring, substitute the words "District Magistrate" and "Executive Magistrate" respectively.

Union Territory of Chandigarh. — *The following amendments were made by (Punjab Amendment) Act, 1983 (Act 22 of 1983)* .

S. 192. —Amendment of S. 192 as under—

S. 192 shall be so read as if for the words "Chief Judicial Magistrate", and the words "Magistrate of the first class," or "Magistrate" wherever occurring, the words "District Magistrate" and "Executive Magistrate", respectively, were substituted.

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1. S s. 192 and 35.—

In this connection reference may be made to s. 35(1) which says that the powers and duties of a Magistrate may be exercised or performed by his successor-in-office. It follows from s. 35(1) that where a Judicial Magistrate takes cognizance of an offence, subsequent steps in the proceeding may be taken by his successor-in-office, without involving any 'transfer'. [82]

2. Sub-sec. (1) : 'Case'.—

1. The word 'case' by itself is a expression which may cover proceedings. The words 'taking cognizance' in *old* s. 192(1), again, were not controlled by the words 'of an offence'. From this it was held that proceedings other than those for the trial of offences could also be transferred under the present provision, *e.g.* , proceedings under s s. 107, 133, 144, 145,147. [83]

2. The law Commission considered the foregoing position to be anomalous inasmuch as the present Chapter is confined to cognizance of offence for trial, and recommended [84] that the section should be revised to confine it to cases of which Magistrate has taken cognizance under s.190.

3. Section 192 cannot, therefore, be resorted to for transferring proceedings under s s. 107, 133,*etc.* [85]

[For that power, see ss. 407-408, *post.*]

3. 'After taking cognizance'.—

1. These words, together with the language in s. 202(1) lead to the result that a *complaint* case may be transferred by the Magistrate taking cognizance, before issuing process, and that the transferee Magistrate may issue process thereafter. [86]

2. Conversely, these words also make it clear that where a Chief Judicial Magistrate or a Judicial Magistrate of the First Class specially empowered merely sends a case for disposal to another Magistrate, without first 'taking cognizance', it would not amount to a 'transfer' within the meaning of s. 192. [87] Nor can a mere order of 'transfer' be taken as 'taking cognizance' of the case and then making the transfer, there must be something to show that the Magistrate had applied his mind to the facts of the case and come to the conclusion that there was a case to proceed further, [88] *i.e.* , where the order states that he was *prima facie* satisfied from the F.I.R. or complaint that the accused had committed the offence alleged. [89]

4. Transfer before taking cognizance.—

A Magistrate, who receives the case on transfer by the Chief Judicial Magistrate who transfers it before taking cognizance, is competent to take cognizance and his taking of cognizance would not become incompetent because the sanction of the transfer of the case to his file is not in accordance with law. [90]

5. Effect of transfer.—

After the transfer the transferee Magistrate is to decide the entire case and dispose of it finally. It gives no power to any Magistrate to direct another Magistrate to decide a particular issue or point and to send the case back to the transferor Court. [91]

6. Irregularity in transfer, how far curable.—

The irregularity in an order of transfer under s. 192(2) is curable under s. 460(f) [*old* s. 529(f)], provided the two conditions specified therein (erroneously and in good faith) are satisfied. If either of those two conditions are absent, the irregularity is not curable. Thus,

(i) If there are grounds on which the validity of the order is challenged *other* than the fact that the Magistrate who made the order was not empowered under s. 192(1),s. 460(f) will not cure such defect *e.g.* , where the Magistrate who made the order of transfer had not taken cognizance of the case, as required by s. 192(2). [92]

(ii) If the Magistrate who made the order did it with knowledge that he was not empowered [93] or in wilful disregard of that fact, [94] it is not curable.

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82 Cf. *Kamal v. State,* (1978) Crlj 1492 (para 5) Cal (DB).

83 Cf. *Bardeswari v. Rabinandan,* (1955) 60 CWN 10 .

84 41st Rep., paras 15. 83-84.

85 *Mahesh v. Raghu,* (1991) Crlj 72 (para 9) Pat.

86 *Uma Shankar v. State of Bihar,* (1975) Crlj 1954 (para 9) Pat (DB).

87 *Gopal v. State of Assam,* AIR 1961 SC 986 [*LNIND 1961 SC 27*]: (1961) 2 Crimes 39 : (1961) 1 SCJ 573 .

88 *Gangadharam v. State,* (1975) Crlj 1574 (para 5) AP. 80. Cf . *Mowu v. Supdt,*

(1971) 3 SCC 936 [
LNIND 1970 SC 479] (paras 15, 17).

89 Cf. *Mowu* v. *Supdt,*
(1971) 3 SCC 936 [
LNIND 1970 SC 479] (paras 15, 17).

90 *Anil Sarah v. State of Bihar,*
(1995) 6 SCC 142 [
LNIND 1995 SC 819] :
1995 SCC (Cri) 1051 [
LNIND 1995 SC 819] :
AIR 1996 SC 204 [
LNIND 1995 SC 819]:
1996 Crlj 408 .

91 *Prankrishna v. Shyamsundar,*
AIR 1949 Cal 637 .

92 *Tulsibala v. Ghoshal,*
(1951) 56 CWN 193 .

93 *Khudidram v. State,*
(1953) 57 CWN 512 .

94 *Tulsibala v. Ghoshal,*
(1951) 56 CWN 193 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 193
Cognizance of offences by Courts of Session.

Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

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1. S s. 193 and 319.—

The conflict of decisions [95] as to the relation between these two sections has now been settled by the Supreme Court as follows :

(a) The bar on the Sessions Court under s. 193 applies to the pre-committal stage; [96] that ban is lifted as soon as the case is committed to the Court of Session under s. 209 of the Code. Thereupon the Court of Session gets unfettered jurisdiction of a Court of original jurisdiction to take *cognizance* of the offences including the power to summon a person or persons whose complicity in the commission of the crime can *prima facie* be gathered from the material *available on the record* [97] (as committed under s. 209).

(b) S. 319 comes to operate at a later stage, namely, when the Sessions Court takes evidence on the case as committed, and *from that evidence,* the involvement of persons other than those arraigned in the charge-sheet comes to light. [98]

(c) Since the jurisdiction of the Court of Session depends on the state of the trial, mention of a wrong section would not vitiate the order. [1]

2. Section 193 : Scope.—

Except as otherwise provided by this Code or any other law, no Court of Session can take cognizance of any offence directly, without the case being committed to it by a Magistrate. [2]

3. Commit the case.—

But *section 193 Cr.P.C.* contemplates that the Magistrate has to commit the case and not the accused. So, after commitment, the Session Judge has the power to add certain persons as accused even though they were not included in the commitment order.[3]

So, once the case is committed to the Court of Session, there is no bar to the Court of Sessions to summon any person as accused for trial. [4]

Even if the Sessions Judge at the time of framing of the charge inadvertently did not summon the petitioner against whom *prima facie* was disclosed in the charge sheet, that could not be ground to restrain the Sessions Judge exercising the power under *s. 193 Cr.P.C.* to summon him at subsequent stage.[5]

Sessions Judge is competent to issue process against a person who was not charge sheeted after having begun the trial and after having some evidence, this power can be exercised under s. 193 read with *s. 319 Cr.P.C.* [6] However, after commitment, the Magistrate becomes functus officio and cannot again take cognizance of the same offence which would include summoning of any other persons. After commitment, it is the Sessions Judge who gets unfettered jurisdiction to take cognizance of offence and summon any person. [7]

4. 'Except as otherwise expressly provided by this Code or any other law'.—

1. The general rule in s. 193 that a Court of Session cannot take cognizance of any offence without commitment by a Magistrate, subject to the following exceptions provided by other provisions of the Code itself:

   (i) S. 199(2): Defamation of constitutional dignitaries, *e.g.* , the President.

   (ii) S. 344: Summary punishment for giving false evidence.

   (iii) S. 345: *Ex facie* contempt, which power belongs to any Criminal Court, including the Court of Session. [8]

   (iv) Ss. 349-350 : Summary trial and punishment for offences committed by witnesses,—which power belongs to all Criminal Courts. [9]

2. As the opening words of s. 193 itself say, exceptions to the general rule laid down in this section may be provided by special law,—which is also the import of s. 5. Thus, s. 5 of the tribunal Criminal Jurisdiction Act, 1952, provides that when a Sessions Judge acts as a 'tribunal' under this Act, he may

take cognizance of any of the scheduled offences 'without the accused being committed to it for trial'. Hence, the very order of the Government allotting a case to such Sessions Judge enables him to take cognizance, though the case not been committed by a Magistrate under s. 193. [10]

5. Offence under Section 12A of the Essential Commodities Act .—

Special Court presided over by the Additional Sessions Judge to try offence under the *Essential Commodities Act* cannot get the jurisdiction to try the offence by mere transfer of the case by the High Court. For taking cognizance of the offence under the provisions of Sections 12A and 12AA have to be complied it. [11]

6. Special Judge under the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989.—

A Special Judge appointed to try offence under the *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* is essentially a Court of Session and it can cognizance of the offence under the Act only when the case is committed to him by the Magistrate in view of *s. 193 Cr.P.C.* [12]

So, when the Special Judge as Sessions Judge took cognizance of the offence under the Act directly the whole proceedings are vitiated. [13]

7. Cases received by Court of Session on transfer under ss. 406-47.—

1. Under s. 406 [*old* s. 527] [14] or s. 407 [*old* s. 526], [15] a Court may receive for trial a case on transfer by the Supreme Court or the High Court (as the case may be). Though these sections do not expressly exclude the general rule of commitment under s. 193, it has been held [16] that in these cases, the Sessions Judge, on receipt by transfer, has to proceed to trial according to Chap. XVIII (*post*), without any need for taking cognizance, for cognizance of the cases transferred has already been taken by some Magistrate. Nor is there any need for commitment by any Magistrate, because the transfer itself vests jurisdiction in the Sessions Court to proceed to trial. [17]

2. Both ss. 406-407 authorise transfer of a case from a Magistrate's Court to a Court of Session. [18] , [19]

8. Procedure to be followed by Court of Session after a case is committed to it.—

1. It is to be remembered that *all* the provisions of Chap. XVIII of the *old* Code have been omitted on the recommendation of the Law Commission. [20]

2. Under the *new* Code, when a case is committed by a Magistrate to a Court of Session under s. 209(a), read with s. 193, the Court of Session is to proceed according to Chap. XVII (*new*), which contains, self-contained provisions in this behalf. The first step is laid down in s. 226,*post* , which starts as follows: "When the accused appears.....in pursuance of a commitment of the case under s. 209 " (See, further, under s. 209).

9. Validity of order of commitment.—

See under s. 209,*post.*

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95 *Abdul v. State,* (1978) Crlj 239 (Del) ; *Lingaiah v. State,* (1977) Crlj 415 (AP) .

96 *Krishna v. State of Bihar,* (1993) 2 SCC 16 [*LNIND 1993 SC 17*] (paras 16-17); *Nisar v. State of U.P.,* (1995) Crlj 2118 (para 9) : 1995 SCC (Cr) 306 : (1995) 2 SCC 23 [*LNIND 1994 SC 1028*].

97 *Krishna v. State of Bihar,* (1993) 2 SCC 16 [*LNIND 1993 SC 17*] (paras 16-17); *Nisar v. State of U.P.,* (1995) Crlj 2118 (para 9) : 1995 SCC (Cr) 306 : (1995) 2 SCC 23 [*LNIND 1994 SC 1028*].

98 *Nisar v. State of U.P.,* (1995) 2 SCC 23 [*LNIND 1994 SC 1028*] (para 8) : 1994 Supp (5) SCR 368 : 1995 Crlj 2118 : 1995 SCC (Cr) 306.

1 *Krishna v. State of Bihar,* (1993) 2 SCC 16 [*LNIND 1993 SC 17*] (paras 16-17); *Nisar v. State of U.P.,* (1995) Crlj 2118 (para 9) : 1995 SCC (Cr) 306 : (1995) 2 SCC 23 [*LNIND 1994 SC 1028*].

2 *Moly v. State of Kerala,* AIR 2004 SC 1890 [*LNIND 2004 SC 378*]: (2004) 4 SCC 584 [*LNIND 2004 SC 378*] : 2004 Crlj 1812 .

3 *E.P. Narayan v. State of Kerala,* 1989 Crlj No 8Ker ; *Joginder Singh v. State of Punjab,* AIR 1979 SC 339 : (1979) 1 SCC 345 : 1979 Crlj 333 .

4 *S.K. Lutfar Rahaman v. State of Bihar,*
1985 Crlj 1238 Pat FB .

5 *Vipin Kumar Agarwal v. State of U.P.,*
1998 Crlj 2327 All .

6 *Tek Narayana v. State of Bihar,*
1999 SCC (Cri) 356 .

7 *Sri Niwas Prosad v. State of Bihar,*
2007 Crlj 4498 Pat .

8 *Gulati v. Lajya Ram,*
AIR 1966 SC 595 [
LNIND 1965 SC 196](para 15) :
1966 Crlj 465 .

9 *Gulati v. Lajya Ram,*
AIR 1966 SC 595 [
LNIND 1965 SC 196](para 15) :
1966 Crlj 465 .

10 *Ananta v. State of W.B.,*
(1976) 2 Crlj 167 (para 4).

11 *Jagdish Prosad Gupta v. State of Rajasthan,*
1995 SCC (Cri) 924 : 1995 Supp (3) SCC 386.

12 *Gangula Ashok v. State of Andhra Pradesh,*
AIR 2000 SC 740 [
LNIND 2000 SC 185]:
(2000) 2 SCC 504 [
LNIND 2000 SC 185] :
2000 SCC (Cri) 488 [
LNIND 2000 SC 185] :
2000 Crlj 819 .

13 *A. Gounder v. State of T.N.,*
2007 Crlj 271 Mad .

14 Cf. *Harbhajan v. State,*
AIR 1966 SC 97 [
LNIND 1965 SC 65](para 5) :
1966 Crlj 82 .

15 *Gulati v. Lajya Ram,*
AIR 1966 SC 595 [
LNIND 1965 SC 196](para 15) :
1966 Crlj 465 .

16 *Gulati* *v.* *Lajya* *Ram,* [AIR 1966 SC 595 *LNIND 1965 SC 196*](para 15) : 1966 Crlj 465 .

17 *Gulati* *v.* *Lajya* *Ram,* [AIR 1966 SC 595 *LNIND 1965 SC 196*](para 15) : 1966 Crlj 465 .

18 *Gulati* *v.* *Lajya* *Ram,* [AIR 1966 SC 595 *LNIND 1965 SC 196*](para 15) : 1966 Crlj 465 .

19 Cf. *Harbhajan* *v.* *State,* [AIR 1966 SC 97 *LNIND 1965 SC 65*](para 5) : 1966 Crlj 82 .

20 41st Rep., para 18.31; Cf. *Muniswamy v. State of Karnataka,* (1976 Crlj 763 (Knt). Which explains the differences between the *old* and *new* Codes, on this point.

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 194
Additional and Assistant Sessions Judges to try cases made over to them.

An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try.

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1. Scope of s. 194.—

1. This has already been explained under s. 193,*ante.*
2. The change made by the *new* Code is that the State Government has been eliminated from the picture, as recommended by the Law Commission. [21]

2. Allotment by Sessions Judge.—

The first part of the section authorises the Sessions Judge of a Division to allot cases to be tried by an Additional or Assistant Sessions Judge, by a general or special order. [22]

3. Allotment by High Court.—

The latter part of the section authorises the High Court to allot, by special order, a particular case to be tried by an Additional or Assistant Sessions Judge. This power has been given to the High Court in view of the fact that (a) in certain cases the Sessions Judge may not like to allot and may report to the High Court; or (b) either of the parties may move an application for transfer; and under these circumstances it may become necessary for the High Court to allot a particular case to a particular Judge. [23]

4. Trial by Additional or Assistant Session Judge on being committed to him by the Magistrate directly.—

The word 'order' in s. 193 of the Old Code has been omitted in *Code of Criminal Procedure, 1973* . The Court of Sessions mentioned in s. 193 also includes Additional or Assistant Session Judge. In view of this position though ordinarily the Additional or Assistant Sessions Judges do not try a Sessions case unless transferred to him either by the Sessions Judge or by the High Court by general or special order, yet if the Magistrate commits a Sessions case to an Additional or Assistant Sessions Judge directly the trial by the Additional or Assistant Judge shall not be void *ab initio* . Such committal might be an irregularity but would not be interfered with in appeal or revision unless such error or irregularity occasioned failure of justice. [24]

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21 41st Rep., para 15.85 [As to power of the High Court under the *new* section, see *Rahul v. State of Rajasthan,* (1978) Crlj 1276 (Raj) DB].

22 *Kehar Singh v. State,* AIR 1988 SC 1883 [*LNIND 1988 SC 887*](para 20) : 1989 Crlj 1 : (1988) 3 SCC 609 [*LNIND 1988 SC 887*].

23 *Kehar Singh v. State,* AIR 1988 SC 1883 [*LNIND 1988 SC 887*](para 20) : 1989 Crlj 1 : (1988) 3 SCC 609 [*LNIND 1988 SC 887*].

24 *Bhuban v. State of Meghalaya,* 2007 Crlj 3315 Gau .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 195
Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(1) No Court shall take cognizance—

(a)

(i) of any offence punishable under Sections 172 to 188 (both inclusive) of the *Indian Penal Code (45 of 1860)* , or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b)

(i) of any offence punishable under any of the following section of the *Indian Penal Code (45 of 1860)* , namely, Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in Section 463, or punishable under Section 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

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[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.]

(2) Where a complaint has been made by a public servant under Clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint :

Provided **that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.**

(3) In Clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of Clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate :

Provided **that—**

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

1. Scope of s. 195.—

1. This section corresponds to *old* s. 195, with the following changes:

   (a) *Old* Cl. (1)(a) has been made Cl. (1)(a)(i) and *old* Cls. (b)-(c) have been made Cl. (1)(b)(i)-(ii).

   (b) *Old* sub-sec.(5) is now sub-sec. (2), with the addition of the Proviso.

   (c) *Old* sub-sec. (2) is now sub-sec. (3), with substantial changes at the end to eliminate doubts as to the meaning of 'Court'.

   (d) *Old* sub-sec.(3) is now sub-sec. (4).

   (e) Other changes, indicated by italics, will be explained in their proper places.

   (f) The last portion of Clause (b) of s. 195(1) being 'expect on the complaint in writing of that Court or of some other Court to which that Court is subordinate' has been substituted by the *Criminal Law (Amendment) Act, 2005* (2 of 2006) which now may be filed by that Court or by any officer of that Court as may be authorised by that Court or by the Court to which that Court is subordinate. This has come into force with effect from 16.04.2006. Therefore, after the amendment a complaint can be filed not only by the concerned Court but also by any officer of that Court duly authorized in this behalf by that Court or by the Court to which that Court is subordinate.

2. An offence being a *public* wrong, anybody would be entitled to make a complaint of it to the Court. [26] To this general rule contained in s. 190(1)(a), exceptions are provided in s s. 195-199.

3. It constitutes one of the limitations on the power of the Court to take cognizance under s. 190,[27] of offences which are specified in s. 195,*viz.* ,—

   A. Complaint of *public servant* required :

      (i) Offences under ss. 172-188, [28] I.P.C. and abetment of an attempt to commit such offence [these are offences against the lawful authority of public servants].

      (ii) Criminal conspiracy to commit any of the foregoing offences.

   B. Complaint of the relevant *Court* or a Court superior to it required:

      (i) Offences against public justice—s s. 193-196,[29] 199, 200, 205-211, I.P.C.

      (ii) Offences relating to documents used in Court—s s. 463, 471, 475-476.

4. Under either Cl. (a) or (b) of s. 195(1), there must be a formal complaint in writing. Otherwise, the taking of cognizance by the Court shall be without jurisdiction, rendering the proceedings including conviction (if any), a nullity. [30]

For prosecution of lawful authority of a public servant punishable under Sections 193, 211 and 182 I.P.C. a regular complaint is required to be filed before the appropriate Court. The act ion of the C.J.M. who was the complainant to lodge the complaint in his own Court is not proper and complaint should have been filed to some other Court to which the Court of C.J.M. was subordinate. So, the conviction by the Additional Sessions Judge on the basis of the said complaint being illegal is liable to be set aside. [31]

5. Conversely, a Court cannot make a complaint under this Code unless the offence complained of is one which is specified in CI. (b)(i)-(iii). Any complaint made by a Court in any case not coming under s. 195(1)(b) shall be without jurisdiction and such complaint cannot be treated as an 'information' under s. 190(1)(c). [32]

6. Since s. 195 constitutes a limitation upon the power to take cognizance under s. 190, the question whether the conditions for the application of any of the clauses of s. 195 are applicable to the facts of the case should be determined by the Court with reference to the facts existing at the time when it seeks to take cognizance. [33]

7. He should examine the facts of the complaint before him for this purpose, when the Magistrate seeks to take action under s. 190. [34]

2. Section 195 not attracted at the stage of investigation.—

As *s. 195 Cr.P.C.* is a limited in the matter of filing the complaint either by public servant or by Court, at the stage of investigation, *s. 195 Cr.P.C.* has no application.[35]

3. S s. 195-199.—

These sections provide exceptions to the general rule that any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence.

4. Ss.195 and 340-341.—

1. Section 195 is to be read with ss. 340-341.
2. Section 195 lays down on whose complaint, a Court may take cognizance of the offences specified therein. Those specified in s. 195(1)(b) can be taken cognizance of only if a *Court* mentioned therein makes the complaint. But the procedure to be followed by such Court for making the complaint is prescribed, not in s. 195, but in s. 340 No complaint under s. 195 can be made without making the minority prescribed by s. 340 [*old* s. 476], [36] in relation to the proceeding in relation to which the offence was committed. [37] The two provisions must be read together. [38]

Section 340 Cr.P.C. is invoked to get over the bar imposed under

s. 195 Cr.P.C. In ordinary cases not adverted to under *s. 195 Cr.P.C.* if in respect of any offence, law can be set in motion by any citizen in this country, there is no reason why any citizen cannot approach even under *s. 340 Cr.P.C.* For that matter, the wordings of *s. 340 Cr.P.C.* are significant. The Court will have to act in the interest of justice on a complaint or otherwise. Assuming that the complaint may have to be made at the instance of a party having an interest in the matter, still the court can take action in the matter otherwise than on a complaint, that is, when it has received information as to a crime having been committed conversed by that provision.[39]

When the offences were committed for which the complaint of the Court is required to be filed by the Court on holding an enquiry under *s. 340 Cr.P.C.* but when such offences had been committed in respect of the proceedings before the L.A. Judge, the complaint has to be filed by the L.A. Judge and the District Judge has no jurisdiction to hold any enquiry under *s. 340 Cr.P.C.* for the purpose of making the complaint.[40]

3. Section 340 has, however, no application to cases of complaint by a *public servant,* coming under s. 195(1)(a). [41]

4. Section 341 [*old* s. 476B] gives a right of appeal from an order of a Court making a complaint or refusing to make a complaint under s. 340, read with s. 195; [42] and the forum of such appeal is to be determined by the provisions of s. 341, read with s. 195(4). [43]

5. Object behind s. 195.—

1. The underlying purpose of this provision is to control the temptation on the part of private parties to start criminal prosecution on frivolous or insufficient grounds, inspired by a revengeful desire to harass their opponents. [44]

2. Where the conditions for the applicability of s. 195 are satisfied, the bar against the Court taking cognizance except as provided in s. 195 shall be *absolute,* [45] and non-compliance will render the proceedings without jurisdiction. [46]

6. Sub-sec. (1) : 'No Court shall take cognizance'.—

The bar is against taking cognizance and not against an investigation made by a Magistrate under s. 156(3). [47]

7. Scope of Cl. (1)(a).—

1. This clause provides that if the offence be one against the lawful authority of a *public servant,* as specified, no cognizance can be taken of that offence except on the complaint in writing of the public servant concerned, or some other public servant to whom he is *administratively* subordinate, [48] *e.g.* , cognizance of an offence under s. 182. [49]

2. The bar in such cases is not only against a private complaint but police prosecution as well. [50]

3. The foregoing bar cannot be evaded by resorting to devices or camouflages. [51] The test for application of the bar is whether the facts in the complaint disclose *primarily* and *essentially* an offence specified in s. 195, for which a complaint of the public servant or the court is required. [52] The bar cannot be avoided by putting a wrong label on it. [53] It follows that the bar cannot be evaded by the device of charging a person with an offence to which s. 195 does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is *minor offence* of the same character, or by describing the offence as being one punishable under some other section of the I.P.C., though in truth and substance the offence falls under the category of sections mentioned in *s. 195, Cr. P.C.* [54]

4. But s. 195(1)(a) would not stand in the way of private complaint in respect of an offence which is *not* [55] specified in this Clause and is also *distinct* from those which are so enumerated:

(i) Where the same facts rise to two offences,—one against a public servant, and another against a private individual, the latter is not debarred by s. 195 from seeking redress for the offence committed against him. [56] Thus, the offence under s. 297, I.P.C. is distinct from that under s. 182, I.P.C. though they way may arise out of the same facts. [57]

(ii) All offences against public servants are not included in s. 195(1)(a). Hence, if any such offence is not enumerated in s. 195(1)(a) and is distinct from those which are included, no complaint from the public servant concerned would be required by s. 195. [58] Thus,

> Private complaint or prosecution without complaint of the public servant concerned is maintainable in respect of the offence under s. 353, I.P.C. (assault or criminal force to deter public servant from discharge of his duty), though it may arise out of facts which constitute an offence under s. 186, I.P.C. (obstructing public servant in discharge of his duty.), because the two are distinct offences. [59] Section 188, which is specified in s. 195(1)(a)(i), is an offence of *contempt* of the lawful authority of a public servant, while s. 353 is an offence affecting the human body, of which assault is an essential ingredient. [60]

(iii) Where upon the facts, commission of several offences is disclosed, some of which require sanction and others do not, it is open to the complainant to proceed against these offences only which do not require sanction. [61]

(iv) This is because *s. 195 Cr.P.C.* does not bar trial of accused of the distinct offence disclosed by the same facts and which is not included in s. 195(1)(a) *Cr.P.C.* However, the provisions of s. 195(1)(a) cannot be evaded by resorting to devices or camouflages. The test to decide whether there is evasion or not, is to see if the facts disclosed primarily and essentially an offence for which complaint is required to be made by the pubic servant.[62]

8. 'Public servant'.—

1. Orders under ss. 144-145 are made by an Executive Magistrate as a public servant. Hence, private complaint of an offence under s. 188, I.P.C. for violation of such order is barred by s. 195(1)(a); and for

the same reason, the Magistrate who issued the order cannot try that offence but has to make a complaint under s. 195(1)(a). [63]

2. As to 'public servant', see s. 21, I.P.C. It includes his successor-in-office. [64]

3. If the public servant does not complain, his administrative superior, may, but in any case, the Court *cannot* entertain a private complaint. [65]

9. Complaint by the public servant.—

Complaint must be in writing by the public servant. [66]

No private individual can make a complaint in respect of offence specified in s. 195(1)(a) *Cr.P.C.* [67]

When the Tahsildar having been obstructed in his official duty did not file complaint to the Magistrate concerned, an FIR was lodged to the police and the police on investigation submitted a charge sheet against the accused under s. 186 I.P.C. The prosecution on the basis of the charge sheet cannot stand as it is a case in which the Magistrate can take cognizance on the basis of the complaint by the Tahsildar in view of s. 195(1)(a) *Cr.P.C.* [68]

For offence under s. 188 I.P.C. the complaint by the concerned public servant is necessary. The cognizance of offence on police challan is illegal. [69]

Even if the offence under *s. 182 Cr.P.C.* is clubbed together with other offences which are not required to be filed by the public servant concerned, s. 195(10)(a) *Cr.P.C.* cannot be evaded.[70]

However, when the charge sheet is filed in respect of offences including one which requires compliance of *s. 195 Cr.P.C.* , the prosecution in respect of other offences not requiring complaint to be filed by the public servant concerned may be proceeded with if the said complaint can be prosecuted with prosecution of that offence for which the complaint is required to be made by the concerned public servant. Doctrine of severalty applies to such cases.[71]

There is no provision for delegation of the power to make the complaint against the complainant for making false complaint of trade mark and copyrights violation against the respondent No. 2. When SSP enquired into the complaint and found to be false and directed that the complaint under s. 182 I.P.C. be filed. He has to file the complaint himself SHO of the police station on being directed by the SSP cannot make such a complaint. [72]

10. Scope of Cl. (1)(b): Complaint by Court.—

1. This Clause says that in certain specified cases a Criminal Court can take cognizance only upon a written complaint from a Court, [73] so that no private individual can be a complainant in these cases:

   (a) The offence is one punishable under any of the following section of the I.P.C.—193-196; 199, 200, 205-211; 228; 463, 471, 475, 476 or criminal conspiracy to commit or the abetment of any of these offences;

   (b) Such offence has been committed in relation to any proceeding in Court or in respect of a document produced [74] or given in evidence therein.

If the above conditions are satisfied, the complaint has to be filed either by that Court [75] in relation to which the offence was committed or a superior Court to which that Court is subordinate [see, further, under sub-sec. (4), *post*]. [76] , [77]

But no complaint by the Court would be necessary if the offence under s. 471, I.P.C., was committed before the start of the proceedings before the Court concerned. [78]

So, when forgery was committed in respect of a document prior to that document being produced or given in evidence in Court, s. 195(1)(b)(ii) *Cr.P.C.* would not be attracted.[79]

2. The complaint may be filed also by the successor-in-office of such Judge or Magistrate, by virtue of s. 35(1) [*old* s. 559(1)]. [80]

3. The offences specified in Cl. (b) have been kept under the control of the Court because of their direct impact on the judicial process. [81] As the purity of proceedings of the Court is directly supplied by the crime, the Court is considered to be the only party entitled to consider the desirability of complaining against the guilty party. [82] In such cases. the private party can, of course, persuade the Court to file complaint. [83]

4. Private prosecution would not, however, be barred for any *distinct* offence which is not included in s. 195, though it arises out of the same facts which constitute an offence which is specified in s. 195(1)(b), [84] provided there is no camouflage. [85] Hence, private complaint would be lawful in the following cases, *inter alia* :

   (i) Offences under s. 218, I.P.C.—public servant making incorrect record with intent to save a person from punishment.—because this is not mentioned in s. 195(1), and is an offence distinct from the offence under s. 193, I.P.C. which is mentioned. While s. 193 deals with false evidence intended to be used in *judicial proceeding,* the offence under s. 193 deals with *public servants* and need not have any relation to a judicial proceeding. [86] Section 218 is *not* a minor offence included within s.192. [87]

   (ii) Similarly, the offence under s. 167, I.P.C., is distinct from that under s. 193, I.P.C. [88]

5. But it would not be permissible for a complainant to drop a serious charge which is covered by s. 195 and select one which does not require the complaint by Court under s. 195(1)(b), thereby bypassing the Court which, under s. 195 were to consider whether it was expedient, in the interest of justice, to orders a prosecution. [89] In short, where two offences (one coming under s. 195 and the other out of its reach) arise out of the same facts, and they are inseparable, the bar under s. 195 cannot be avoided. [90]

11. Cl. (b)(i) : Offences coming under.—

1. The offences which are mentioned in this sub-clause are :

S s. 193-196,[91] , [92] I.P.C.—relating to giving false evidence. S s. 199-200, I.P.C.—relating to false declaration.

S. 205, I.P.C.—false personation.

S. 206, I.P.C.—Fraudulent concealment of property to prevent seizure in execution.

S. 207,[93] I.P.C.—Fraudulently claim to property to prevent seizure in execution.

S. 208, I.P.C.—Fraudulently suffering decree to be passed against himself.

S. 209, I.P.C.—Dishonestly making false claim in Court.

S. 210, I.P.C.—Fraudulently obtaining decree for sum not due.

S. 211, I.P.C.—False charge of offence.

S. 228, I.P.C.—International insult or interruption to public servant [1] sitting in judicial proceeding.

2. This clause cannot apply where the complaint is against the presiding officer of a Court himself that he has committed an offence (say, under s. 193, I.P.C.) in respect of the records of the case before him, because it would be absurd to require that a person cannot be prosecuted except on a complaint made by himself. [2]

12. Offence under s. 211.—

A Criminal Court cannot take cognizance of an offence punishable under s. 211, I.P.C. without the complaint in writing of that Court in or in relation to the proceeding in which Court the Offence is alleged to have been committed.

13. Offence under s. 228, I.P.C.—

Sections 195(1)(b)(i), 345 [*old* s. 480] and [*old* s. 482] are not exclusive but alternative remedies for an offence under s. 228, I.P.C. In such a case, the Court has the choice of summarily sentencing the offender under s. 345; or sending him to a Magistrate under s. 346 for a heavier punishment; or make a complaint under s. 340, read with s. 195. [3]

14. 'In or in relation to...Court'.—

1. The expression 'in or in relation to' leads to the result that the bar under the present sub-clause would operate in any of the following cases: [4]

As to s. 211, I.P.C.:

(a) Where there is a proceeding *pending* before that other Court (at the time when cognizance is sought to be taken under s. 190) in which the offence under s. 211 is alleged to have been committed. [5]

(b) Though there may not be any such proceeding pending before that other Court at the date of taking cognizance, but there was a proceeding which had been *concluded* before that date, and the offence under s. 211 may be alleged to have been committed in or in relation to that proceeding. [6] In this case, the fact that the said proceeding was no longer pending would be immaterial because s. 195(b)(i) does not require that the proceeding must be act ually pending at the time when the question of applying the bar arises, but only requires that there was a proceeding out of which the offence under s. 211 arises. [7]

2. But the bar cannot extend to a proceeding which never came into existence prior to the material date, *i.e.* , the date of cognizance; in short, it cannot apply to a case where there can, *in future* , be a proceeding in any Court in relation to which an offence under s. 211*may be* alleged to have been committed. [8] "A proceeding in contemplation cannot be said to be a 'proceeding in Court'." [9]

3. Consequently, it would not be correct to say that s. 195(1)(b) bars private prosecution *absolutely* in respect of offences mentioned therein. It would be barred only if the offence is alleged to have been committed in or in relation to a proceeding in Court. [10] Investigation before the Police is not a proceeding in a *Court.* [11] Hence, while Police investigation on the basis of a F.I.R. is going on, the accused may file a complaint under s. 211 against the person who lodged the report, for making a false report. [12] s. 195(1)(b) cannot be applied to bar such a complaint on the ground that a proceeding in Court on the basis of the F.I.R. was *in contemplation.* [13]

4. No complaint of Court would be required for taking cognizance of an offence which is *distinct* from the offence under s. 211, I.P.C., though both may arise from the same statement, for instance, offence under s. 499, I.P.C. [14] , [15]

15. Offence under s. 193, I.P.C.—

Section 195 (1)(b)(i) cannot apply in a case where the forged deed was *not produced* in evidence in the suit or proceeding; hence, cognizance of the offence under s. 193 I.P.C. could not be taken by the Magistrate upon the complaint of the Court in that suit or proceeding, where only a copy of the forged document was produced. [16]

16. ' Any proceeding in any Court'.—

1. These words are couched in the widest possible language. It would include an offence of the nature specified if committed in bail proceedings. [17]

2. It is also not confined to the very proceeding where the truthfulness or otherwise of the charge arose. [18]

3. But this section shall have no application if the offence took place before some authority other than a Court, *e.g.* , the police, [19] unless it is followed by a complaint or other proceeding in Court on the same allegation. [20]

A complaint was filed by the appellant alleging mutation of the names of the respondents in record. Land in question has been purchased by the appellant by registered deed. It is alleged that the respondents mutated their name in the record in respect of the said property in collusion with Area Lekhpal behind the back of the appellant. Such a complaint is not in relation of Court proceedings. So, such a complaint cannot be quashed by the High Court by applying s. 195(1)(b)(ii). [21]

17. Cl. (b)(ii) : Offences coming under.—

1. The offences which will come under CI. (b)(ii) are—

Offence described in s. 463, I.P.C., *i.e.,* forgery. This will include a charge under s. 465,[22] which provides punishment for forgery, *i.e.* , making a false documents with intent to commit fraud *etc.*

Offence punishable under s. 471, I.P.C., *i.e.* , *using* as genuine a forged document. [23]

Offence punishable under ss. 475-476,—relating to counterfeiting device or mark.

2. If the facts alleged involve any of the foregoing offences, the complainant cannot avoid the bar under s. 195(1)(b), by choosing a lesser offence in respect of which no complaint of Court is necessary. [24]

18. Difference between sub-Cls. (i) and (ii) of Cl. (b).—

1. There is substantive difference between the scope of the two groups of sections of the I.P.C. s s. 193-196 and s s. 463, 471. [25]

2. The other difference as between the two sub-CIs. (i)-(ii) is that sub-CI. (i) applies if any of the enumerated offences has been committed 'in, or in relation to' a proceeding in a Court; but sub-CI. (ii) will apply only if the document in question has been 'produced or given in evidence' in such proceeding.

3. Another distinction which existed under the *old* section by use of the words 'party to the proceeding' have been omitted by the *new* section (see *below*).

19. Offence committed by whom?.—

1. In the *old* s. 195(1)(c), the scope of the bar was limited by the word 'committed by a party to any proceeding in court', with the result that the bar against private prosecution against offences for forgery, *etc.* , applied only when it had been committed by a *party* to a proceeding before a court. [26] These words have been *omitted* recommended by the law Commission. [27]

2. Under the *new* sub-Cls. (ii)-(iii) the bar will apply also where the offence of the category of forgery is alleged to have been committed by witnesses, *e.g.* , an expert, [28] or Magistrate, [29] who were *not* parties to the proceeding in question, including abetment of or attempt to commit such offence, by *any* person.

3. As a result of the omission of the words 'party to any proceeding', the further question which arose under the *old* section would no longer arise under the *new* section, namely, what would happen where the offence is alleged to have been committed by several persons, some of whom were parties to the proceeding, while others were not.

4. Because of the words 'party to any proceeding', in the *old* section, it was held by the Supreme Court [30] that the bar against private prosecution would apply only where the alleged offence of forgery had been committed by a party to the proceeding before the court *in his character as party,* and would not, therefore, apply in respect of any such offence committed by that person *before* he became a party to the proceeding before the Court. [31] This decision will *no longer hold good* under the *new* section. If the document which had been forged prior to coming to Court but it is produced or given in evidence by

him in the proceeding in Court, private prosecution will not lie against him for such offence; only the Court would be competent to complain.

20. 'In respect of document produced .... in any Court.'—

1. This is an essential condition for the application of the bar under Cl. (b)(ii), as distinguished from Cl. (1)(b)(i): [32]

   (a) It must have been actually produced in a proceeding before a Court, whether it is eventually tendered or not or it is returned to the party. [33]

   (b) What was produced must be the document in original and not a mere copy of it [34] where only a copy of the forged document was produced, Cl. (b)(ii) will *not* be attracted and private complaint for prosecution under s. 471, I.P.C will be valid. [35]

   (c) Nor will the bar under s. 195 be attracted where the document was not *produced* or *given in evidence* in the proceeding before the Court by or on behalf of the accused but was seized from his custody by some investigating officer. [36]

2. It follows that no complaint of the Court under s. 195(1)(b)(ii) will be required—

   (a) Where the document was filed not before the Court but before the Investigating Police Officer, though the investigation was being held under order of Court under s. 156(3). [37]

   (b) Where the offence of forgery under s. 471, I.P.C., was against a Magistrate himself, not in respect of anything produced before him, but in respect of his own order-sheet or records of the Court. [38]

   (c) Where the offence of forgery was committed *before* the forged document was produced in pending suit before the Civil Court so that no complaint to the Civil Court for taking cognizance of the offence was necessary. [39]

   (d) When the document was forged and then produced in the Court or given in evidence in suit, such a complaint regarding the offence of forgery is maintainable in the Court and no complaint by the Court under *s. 340 Cr.P.C.* necessary.[40]

   (e) When the allegation of offence of fabrication of document is made in a petition under *s. 340 Cr.P.C.*, such complaint can only be filed when the document was tampered or forged after it was filed in the Court.[41]

21. Offences not mentioned in s. 195(1)(b)(ii).—

Trial without complaint of the relevant Court is *not* barred in respect of the following offences, which are not mentioned in s. 195(1)(b)(ii);

Ss. 418; [42] 466; [43] 477A, [44] I.P.C.

22. Cl. (b)(iii): Criminal conspiracy to commit, etc.—

1. This clause extends the scope of sub-Cls. (i) and (ii) of Cl.(b),by providing that not only the offences specified in sub-Cls. (i)-(ii) require complaint of Court and bar private complaint, but also cognate offences of (a) criminal conspiracy to commit; (b) attempt to commit; (c) abetment, of any of the offences so specified.
2. Instances where private complaint would thus be barred under Cl. (b)(iii) are—

   (i) Abetment of offence under s. 192, I.P.C. [45]

   (ii) Conspiracy [s. 120B] to commit offence under s. 193, I.P.C. [46]

3. On the other hand, s. 195(1)(b)(ii) will not bar private prosecution for the following offences which are not mentioned therein:

   Under s. 466, I.P.C. (forgery of record of court or of public register). [47] , [48]

23. Where only some of the offences committed by an accused are covered by Art. 195.—

1. Where the offence alleged in a complaint include some which are covered by s. 195 but others are not, and the complaint has not been made by the authority specified in s. 195, the question arises whether the proceeding against the accused will fail in toto or will be maintainable as regards those offences for which a private complaint could be made. In such a case, the doctrine of severability has been applied. [49]

   (a) If the offences not included in s. 195 are distinct and separate offences, the proceeding will continue in respect of those other offences. [50] In this case the doctrine of severability shall apply.

   (b) If, on the other hand, such other offences form an *integral* part of all the offences committed as a part of the same transaction, such other offences also will fall within the ambit of s. 195, and the entire proceeding will fail and be quashed. [51] In this case, the doctrine of ‘commonflage’ will apply. [52] , [53]

24. Clause (b) of s. 195(1) when attracted, when not.—

1. When a forged document has not been produced in the Court but only a copy has been produced, bar of s. 195(1)(b)(ii) *Cr.P.C.* is not attracted.[54]

2. Section 195(1)(b)(ii) is not attracted in which the documents has been fabricated prior to its production in the Court. [55]

3. The offences enunciated in s. 195(1)(a)(ii) have been committed in respect of a document after it has been produced or given in evidence in a proceeding in any Court *i.e.* during the time the document was in *custodial egis.* But if such offence was committed prior to its production before the Court, no complaint by the Court is necessary. [56]

4. When the allegation in the FIR is to the effect that the petitioner prepared forged agreement and receipt in his name and are trying to swallow the hotel is a complaint which does not attract s. 195(1)(b)(ii) *Cr.P.C.* and the order taking cognizance by the Magistrate on such private complaint is proper.[57]

5. But when it is alleged that the accused impersonated and made forged statement before the Court, the private complaint is barred. [58]

6. When the allegation is that the public prosecution is making contradictory statements in the Court at a subsequent stage in order to defeat the claim of the petitioner's client he does not fabricate false evidence and the complaint cannot be made by the Court and a stranger to the proceedings cannot file a petition under *s. 340 Cr.P.C.* with a prayer to the Court to make a complaint under s. 195(1)(a)(ii) *Cr.P.C.* [59]

7. When it is established that the Respondent filed forged documents in the Court and the same has been established by the report of the District Judge, the Supreme Court setting aside the order of the High Court directed the Registrar General of the High Court to lodge a complaint before the competent Magistrate against the respondent. [60]

8. When the provision of *s. 195 Cr.P.C.* are mandatory, no Court has the jurisdiction to take cognizance of the offences enunciated in s. 195(1) *Cr.P.C.* unless a complaint in writing is filed and if necessary by holding an enquiry under *s. 340 Cr.P.C.* But a complaint outside the provision of *s. 340 Cr.P.C.* cannot be filed by any civil, revision or criminal Court under its inherent jurisdiction.[61]

9. The allegation that the will produced before the Court was false and fabricated. But execution and registration of such will was prior to filing in the Court for obtaining probate. Complaint by the Court is not necessary and private complainant is not barred. [62]

25. Sub-sec. (3) : 'Court'.—

1. This sub-section gives an artificial definition of the word 'Court' as used in sub-sec. (1)(b), above. Under the corresponding provision in sub-sec. (2) of the *old* section, only civil, revenue [63] or criminal courts were included, while tribunals and the Registrar under the *Registration Act* were excluded.

2. The foregoing deficiency has been removed as recommended by the Law Commission, [64] by adding the italicised words at the end of sub-sec. (3), and by omitting the words 'but does not include Registrar ...' (as unnecessary). Under the *new* section, the words 'court' would include any statutory tribunal *if it is declared* [65] by the relevant statute that such tribunal shall be a 'court' *for the purposes of the present section* of the Code. If there is no such declaration in the statute creating the tribunal, the mere fact that a tribunal has some of the trappings of a court or is

treated as a court for *other* purposes, will no longer be a good test for holding that such tribunal is a 'court' for purpose of s. 195(1)(b) of the Code. [66]

3. It is, therefore, clear that the following authorities are *not* 'court' for the purpose of s. 195(2) :

(i) A Sales Tax Officer. [67]

(ii) A Commissioner under the Public Inquiries Act, 1950. [68]

(iii) Assistant Register under the *Cooperative Societies Act* . [69]

(iv) Returning officer under the *Representation of the People Act* .[70]

(v) Registrar or Sub-Registrar under the *Registration Act* . [71]

(vi) A Commission under the *Commissions of Inquiry Act, 1952* .[72]

(vii) The Registrar of Firms. [73]

(viii) The Authorities constituted under the Delhi Development Authority. [74]

(ix) Arbitral Tribunal under *Arbitration and Conciliation Act, 1996* . [75]

4. On the other hand, the following authorities have been held to be 'Court' within the purview of the present section:

(i) Income-tax Officer. [76]

(ii) The District Magistrate under s. 34(2) of the U.P. Rent Act . [77]

(iii) Election Commissioner. [78]

5. Where the proceeding in relation to which the offence was committed was not in a 'Court', the bar under s. 195(1)(b) will not apply. [79] , [80]

26. Sub-sec. (4) : Subordination.—

1. This sub-section, corresponding to *old* sub-sec. (3), gives an artificial meaning to the word 'subordinate', at the end of sub-sec. (1). It is not that any Court superior to that Court in relation to which the offence had been committed which is authorised to make the complaint; it can have that jurisdiction only, if it satisfies the tests laid down in s. 195(4). [81] Even the High Court cannot make the complaint under s. 340 [*old* s. 476] is respect of a proceeding before a Subordinate Judge, because it is the District Court, and not the High Court, to which appeals from the Subordinate Judge 'ordinarily' lie, under s. 195(4). [82]
2. The tests laid down in s. 195(3) to determine subordination are :

A. As regards a *civil* court [83] —

(i) The first question to be asked is whether any decrees or orders of the original court are appealable at all.

(a) If they are *not* , the appeal against the order making or refusing to make a complaint will be to the principal Court of ordinary original civil jurisdiction [vide s. 2(4),C.P. Code].

(b) If, however, appeals from its various decrees and orders lie to different courts, then we have to see to which of them they 'ordinarily' lie, and then select the one of the lowest grade from among them [Prov. (a)]. Thus, where appeals from a subordinate Judge ordinarily lie either to the District Court or the High Court, the Court competent to make the complaint (besides the original Court) shall be the District Court [84]

(c) In determining the Court or Courts to which an appeal will ordinarily lie, we have to see which Court or Courts entertain appeals from that class of courts in the ordinary way apart form special notifications or laws that take the matter out of the general class [85]

'Ordinarily' does not mean 'in the majority of cases',—it means under the general law, [86] apart from any 'special' jurisdiction, [87] —applicable to a special case. [88] Nor does it mean the Court to which appeal would lie from the *particular* case under consideration. [89]

Nor does the word 'ordinarily' mean that s. 195(4) will not be applicable where the right of appeal to the superior Court is limited by restrictions. [90] It will be the Court to which appeals ordinarily lie from the lower court if there is a class of decrees, orders or sentences of the lower court which are at all open to appeal.

(d) Proviso (b) looks to the nature of the proceeding before the original court in order to determine to which Court it shall be deemed to be subordinate for purpose of s. 195(1)(b), (4). [91] In other words, it has first to be determined whether the original proceeding was a civil or revenue proceeding from which appeals lie both to a Civil as well as a Revenue Court, the hierarchy of superior Courts for the purposes of s. 195 shall be determined first by the rules that apply in their special cases, and next by the rule in s. 195(4),*i.e.* , by the test of 'ordinarily'. [92]

3. Applying the foregoing tests, it has been held that the following Courts are subordinate to the Court shown in the right column, for purposes of s. 195(3) :

Division Bench of High Court	...	Supreme Court. 93

		Sheriff v. State of Madras, overruling AIR 1951 Mad 1060 [LNIND 1951 MAD 162](1061).
Single Judge of High Court appellate	...	Division Bench of High Court on side, 1 *Narain Das v. State of U.P.,* (1954) SCR 676 (679). under the Letters Patent.
Subordinate Judge	...	District Judge. 2 *Kuldip v. State of Punjab,* (1956) SCR 125 [LNIND 1956 SC 14] (129) : AIR 1956 SC 391 [LNIND 1956 SC 14]: 1956 Crlj 781 .

B. As regards *Criminal* Court,—the same principles are to be followed. [3]

27. Offence committed in a proceeding before Land Acquisition Judge.—

When offences were committed in the proceedings before the land Acquisition Judge under the *Land Acquisition Act* , it is the Land Acquisition Judge who is to hold the enquiry under *s. 340 Cr.P.C.* and to lodge a complaint before the competent Court and the District Judge has no jurisdiction to hold an enquiry under *s. 340 Cr.P.C.* for the purpose of making the complaint.[4]

28. Appeal from order making or refusing to make complaint, under s. 195.—

1. No appeal lies in a case coming under Cl. (a) of s. 195(1), when a *public servant* makes a complaint or refuses to complain [5] because the Code regards such act of a public servant as an *administrative* act; but though there is no right of appeal to the Courts, sub-sec. (2) of s. 195 empowers the administrative superior to withdraw the complaint where such public servant does make a complaint under s. 195(1)(a). [6] But there is no such provision where he refuses to complain. [7]

2. Where a *Court* makes a complaint or refuses to make a complaint under s. 195(1)(b), read with s. 340, there is a right of appeal to that Court to which it is subordinate within the meaning of s. 195(4), under s. 341 [*old* s. 476B].

The appellate Court could not, however, interfere lightly with the discretion of the sub-ordinate Court, in the matter. [8] See, further, under ss. 340-341, *post* .

29. Revision. —

Though the making of a complaint would be an interlocutory order, revision would lie where the order is without jurisdiction, [9] *e.g.* , where the complaint of the Court relates to an offence which is not mentioned in s. 195(1)(b); [10] or where a private complaint is made in respect of an offence mentioned under s. 195(1)(b), for which complaint of Court is necessary. [11]

30. Petition under Art. 32 or 226. —

Also lies. [12]

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25 Substituted by the *Criminal Law (Amendment) Act, 2005* (Act No. 2 of 2006), S. 3, for the words "except on the complaint

in writing of that Court, or of some other Court to which that Court is subordinate". Enforced w.e.f. 16-4-2006 *vide* Notification No. S.O. 523(E), dt. 12-4-2006.

26 *Rama* *v.* *Narayan,*
(1969) 1 SCC 167
LNIND 1968 SC 389
AIR 1969 SC 724
LNIND 1968 SC 389
1969 Crlj 1064
.

27 *Sethi* *v.* *Kanpur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
.

28 *Daulat* *v.* *State of Punjab,*
AIR 1962 SC 1206
LNIND 1962 SC 28
AIR 1956 SC 153
LNIND 1955 SC 105
1956 Crlj 326
(1955) 2 SCR 1013
LNIND 1955 SC 105
].](para 4); Cf. *Virendar v. State of Punjab,*

29 Cf. *Narain* *v.* *State of U.P.,*
(1961) 1 SCR 676
LNIND 1960 SC 206
AIR 1961 SC 181
LNIND 1960 SC 206
(1961) 1 Crlj 317
.] (677)

30 *Daulat* *v.* *State of Punjab,*
AIR 1962 SC 1206
LNIND 1962 SC 28
](para 4).

31 *Rit Lal Khatway* *v.* *State of Bihar,*
2007 Crlj 593
Pat .

32 *Mulchand* *v.* *Kamla,*
AIR 1967 Pat 166
(para 8).

33 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
.](para 10)

34 *Govind* *v.* *State of Bihar,*
AIR 1971 SC 1708
LNIND 1971 SC 295
(1971) 3 SCC 329
](para 12)

LNIND 1971 SC 295] :
1971 Crlj 1266 .

35 *M. Narayandas v. State of Karanataka,*
AIR 2004 SC 555 [
LNIND 2003 SC 817]:
2004 Crlj 822 :
(2003) 11 SCC 251 [
LNIND 2003 SC 817].

36 *Qadir Bakhsh,* (1924) 6 Lah 34 (39).

37 Cf. *Narain v. State of U.P.,*
(1961) 1 SCR 676 [
LNIND 1960 SC 206] (677) :
AIR 1961 SC 181 [
LNIND 1960 SC 206]:
(1961) 1 Crlj 317 .

38 *Gupta v. State,*
(1974) Crlj 945 (All) .

39 *N. Natarajan v. B.K. Subba Rao,*
AIR 2003 SC 541 [
LNIND 2002 SC 761]:
(2003) 2 SCC 76 [
LNIND 2002 SC 761] :
2003 Crlj 820 .

40 *State of Andhra Pradesh v. Sarma Rao,*
AIR 2007 SC 137 [
LNIND 2006 SC 951]:
(2007) 2 SCC 159 [
LNIND 2006 SC 951] :
(2007) 1 SCC 535 (Cri) :
2007 Crlj 289 .

41 *Bit Lal Khatway v. State of Bihar,* 2007 Crlj (Pat).

42 Cf. *Narain v. State of U.P.,*
(1961) 1 SCR 676 [
LNIND 1960 SC 206] (677) :
AIR 1961 SC 181 [
LNIND 1960 SC 206]:
(1961) 1 Crlj 317 .

43 Cf. *Narain v. State of U.P.,*
(1961) 1 SCR 676 [
LNIND 1960 SC 206] (677) :
AIR 1961 SC 181 [
LNIND 1960 SC 206]:
(1961) 1 Crlj 317 .

44 *Patel v. State of Gujarat,* [
(1971) 2 SCC 376
LNIND 1971 SC 301
AIR 1971 SC 1935
LNIND 1971 SC 301
1971 Crlj 1437
] (para 6) : [ ]: .

45 *Daulat v. State of Punjab,* [
AIR 1962 SC 1206
LNIND 1962 SC 28
](para 4).

46 *Govind v. State of Bihar,* [
AIR 1971 SC 1708
LNIND 1971 SC 295
(1971) 3 SCC 329
LNIND 1971 SC 295
1971 Crlj 1266
](para 12) : [ ] : .

47 *Ramnarain v. State of Rajasthan,*
(1989) Crlj 760
(para 9) Raj.

48 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

49 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

50 *Tej Singh v. State,*
(1976) Crlj 922
(para 5) J&K.

51 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

52 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

53 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

54 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

55 *Basir-ul-Huq v. State of W.B.,* [
(1953) SCR 836
LNIND 1953 SC 44
] (842-46).

56 *Durgacharan Naik v. State of Orrisa,*
AIR 1966 SCC 1775 (para 5) :
(1966) 3 SCR 636 [
LNIND 1966 SC 59] :
1966 Crlj 1491 .

57 *Basir-ul-Huq v. State of W.B.,*
(1953) SCR 836 [
LNIND 1953 SC 44] (842-46).

58 *Tej Singh v. State,*
(1976) Crlj 922 (para 5) J&K.

59 *Durgacharan Naik v. State of Orrisa,*
AIR 1966 SCC 1775 (para 5) :
(1966) 3 SCR 636 [
LNIND 1966 SC 59] :
1966 Crlj 1491 .

60 *Durgacharan Naik v. State of Orrisa,*
AIR 1966 SCC 1775 (para 5) :
(1966) 3 SCR 636 [
LNIND 1966 SC 59] :
1966 Crlj 1491 .

61 *Nanjegowda v. State of Karnataka,*
(1988) Crlj 807 (para 7) Knt.

62 *State v. Suresh,*
1984 Crlj 926 :
AIR 1984 SC 1108 [
LNIND 1984 SC 575]:
(1984) 3 SCC 92 [
LNIND 1984 SC 575].

63 *Mahendra v. State,*
AIR 1970 Pat 102 .

64 *State of U.P.* v. *Mata Bhikh,*
(1994) 4 SCC 95 (97) :
(1994) 1 Crimes 945 : 1994 SCC (Cr) 831.

65 *State of U.P.* v. *Mata Bhikh,* (1994) 4 SCC 95 (97) :
(1994) 1 Crimes 945 : 1994 SCC (Cr) 831.

66 *Daulat Ram v. State of Punjab,*
AIR 1962 SC 1206 [
LNIND 1962 SC 28]:
(1962) 2 SCC 812 :
(1962) 2 Crlj 286 .

67 *Vishnu v. State of A.P.,* 1980 Crlj 1361 Mad .

68 *Sudalaimadam v. State of Madras,* 1985 Crlj 1310 Mad .

69 *Tej Singh v. State of Jammu & Kashmir,* 1976 Crlj 922 (J & K).

70 *Murugashan v. State of Tamil Nadu,* 1989 Crlj 1833 Mad .

71 *State of U.P. v. Suresh,* AIR 1984 SC 1108 [LNIND 1984 SC 575]: 1984 Crlj 926 : (1984) 3 SCC 92 [LNIND 1984 SC 575].

72 *P.D. Lakahani v. State of Punjab,* (2008) 5 SCC 150 [LNIND 2008 SC 939] : (2008) 2 SCC 553 (Cri) : (2008) 2 KLT 575 .

73 *Nirmaljit v. State of W.B.,* AIR 1972 SC 2639 (para 35) : (1973) 3 SCC 753 : 1973 Crlr (SC) 237.

74 *Nirmaljit v. State of W.B.,* AIR 1972 SC 2639 (para 35) : (1973) 3 SCC 753 : 1973 Crlr (SC) 237.

75 As to the meaning of the word ‘Court’, see under sub-sec. (3), *below* .

76 *Nirmaljit v. State of W.B.,* AIR 1972 SC 2639 (para 35) : (1973) 3 SCC 753 : 1973 Crlr (SC) 237.

77 *Kuldip v. State of Punjab,* AIR 1956 SC 391 [LNIND 1956 SC 14]: 1956 Crlj 781 .

78 *Mahadev Bapuji Mahajan v. State of Maharashtra,* (1994) Supp (3) SCC 748 (para 3) : 1994 Crlj 1389 : 1995 SCC Cr 198.

79 *P. Swaroopa Rani v. M. Hari Narayana,* AIR 2008 SC 1884 [LNIND 2008 SC 563]: (2008) 5 SCC 765 [

LNIND 2008 SC 563] :
(2008) 3 SCC 79 (Cri) :
(2008) 3 CHN 95 (SC) : (2008) 106 Cut LT 539.

80 *Ajaib* *v.* *Joginder,*
AIR 1968 SC 1422 [
LNIND 1968 SC 139]:
1969 Crlj 4 :
(1969) 1 SCR 145 [
LNIND 1968 SC 139].

81 *Patel* *v.* *State* *of* *Gujarat,*
(1971) 2 SCC 376 [
LNIND 1971 SC 301] (para 6) :
AIR 1971 SC 1935 [
LNIND 1971 SC 301]:
1971 Crlj 1437 .

82 *Patel* *v.* *State* *of* *Gujarat,*
(1971) 2 SCC 376 [
LNIND 1971 SC 301] (para 6) :
AIR 1971 SC 1935 [
LNIND 1971 SC 301]:
1971 Crlj 1437 .

83 *Patel* *v.* *State* *of* *Gujarat,*
(1971) 2 SCC 376 [
LNIND 1971 SC 301] (para 6) :
AIR 1971 SC 1935 [
LNIND 1971 SC 301]:
1971 Crlj 1437 .

84 *Basir-ul-Huq* *v.* *State* *of* *W.B.,*
(1953) SCR 336 (346).

85 *Basir-ul-Huq* *v.* *State* *of* *W.B.,*
(1953) SCR 336 (346); *Durgacharan v. State of Orissa,* AIR,
1966 SC 1775 (para 8) :
1966 Crlj 1419 :
(1966) 3 SCR 636 [
LNIND 1966 SC 59].

86 *Kamla* *Prasad* *v.* *Hari,*
AIR 1968 SC 19 [
LNIND 1967 SC 170](paras 4, 7) :
1967 3 SCR 828 [
LNIND 1967 SC 170] :
1968 Crlj 86 .

87 *Kamla* *Prasad* *v.* *Hari,*
AIR 1968 SC 19 [
LNIND 1967 SC 170](paras 4, 7) :
1967 3 SCR 828 [
LNIND 1967 SC 170] :
1968 Crlj 86 .

88 *Govind v. State of Bihar,* AIR 1971 SC 1708 [LNIND 1971 SC 295](paras 15) : (1971) 3 SCC 329 [LNIND 1971 SC 295] : 1971 Crlj 1266 .

89 *Dutt v. State of U.P.,* AIR 1966 SC 523 [LNIND 1965 SC 195](para 16) : 1966 Crlj 459 .

90 *Basappa v. Ninangouda,* (1978) Crlj 460 (Knt) .

91 *Durgacharan v. State of Orissa,* AIR, 1966 SC 1775 (para 8) : 1966 Crlj 1419 : (1966) 3 SCR 636 [LNIND 1966 SC 59]; *Kamla Prasad v. Hari,* AIR 1968 SC 19 [LNIND 1967 SC 170](paras 4, 7) : 1967 3 SCR 828 [LNIND 1967 SC 170] : 1968 Crlj 86 .

92 *Dutt v. State of U.P.,* AIR 1966 SC 523 [LNIND 1965 SC 195](para 16) : 1966 Crlj 459 .

93 *Nadeem v. State,* (1977) Crlj 1329 (para 9) AP.

1 If the public servant is not a 'Court' within the purview of sub-sec. (3), the bar will not operate [Cf. *Lalji v. State of Maharashtra,* AIR 1964 SC 1154 [LNIND 1964 SC 34]: 1964 Crimes 249 : (1964) 6 SCR 700 [LNIND 1964 SC 34]; *Virindar v. State of Punjab,* AIR 1956 SC 153 [LNIND 1955 SC 105]: 1956 Crlj 326 : (1955) 2 SCR 1013 [LNIND 1955 SC 105]].

2 *Tirlok v. State,* AIR 1959 All 512 [LNIND 1958 ALL 208].

3 *Bachai v. State,* AIR 1959 All 693 [LNIND 1958 ALL 213].

4 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

5 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

6 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

7 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

8 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

9 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

10 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

11 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] :
.

12 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] : .

13 *Sethi* *v.* *Kapur,*
AIR 1967 SC 528
LNIND 1966 SC 208
(1967) 1 SCR 520
LNIND 1966 SC 208
1967 Crlj 528
[ ](532-33) : [ ] : .

14 *Basir-ul-Huq* *v.* *State of W.B.,*
(1953) SCR 336 (346).

15 *Satis* *v.* *Ram,*
AIR 1921 Cal 1 .

16 *State of Karnataka* *v.* *Hemareddy,*
AIR 1981 SC 1417
LNIND 1981 SC 44
(1981) 2 SCC 185
LNIND 1981 SC 44
1981 Crlj 1019
[ ](para 15) : [ ] : .

17 *Gupta* *v.* *State,*
(1974) Crlj 945 (para 6) (All) FB.

18 *Gupta* *v.* *State,*
(1974) Crlj 945 (para 6) (All) FB.

19 *Satkari,*
AIR 1947 Cal 439 .

20 *Satkari,*
AIR 1947 Cal 439 .

21 *Mahesh Chand Sharma* *v.* *State of U.P.,*
AIR 2010 SC 812
LNIND 2009 SC 1740
(2009) 15 SCC 519
LNIND 2009 SC 1740
[ ]: [ ].

22 Cf. *Dutt* *v.* *State of U.P.,*
AIR 1966 SC 523
LNIND 1965 SC 195
1966 Crlj 459
(1969) 1 SCC 167
LNIND 1968 SC 389
[ ](paras 8, 16) : ; *Rama v. Narayan,* [ ].

23 Cf. *Dutt v. State of U.P.,* [AIR 1966 SC 523 : *LNIND 1965 SC 195* : 1966 Crlj 459](paras 8, 16) ; *Rama v. Narayan,* [(1969) 1 SCC 167 : *LNIND 1968 SC 389*].

24 Cf. *Dutt v. State of U.P.,* [AIR 1966 SC 523 : *LNIND 1965 SC 195* : 1966 Crlj 459](paras 8, 16) ; *Rama v. Narayan,* [(1969) 1 SCC 167 : *LNIND 1968 SC 389*].

25 Difference explained in *Dutt v. State of U.P.,* [AIR 1966 SC 523 : *LNIND 1965 SC 195* : 1966 Crlj 459](para 10) .

26 Cf. *Dutt v. State of U.P.,* [AIR 1966 SC 523 : *LNIND 1965 SC 195* : 1966 Crlj 459](paras 4-5) ; *Patel v. State of Gujarat,* [AIR 1971 SC 1935 : *LNIND 1971 SC 301*][no longer good law].

27 41st Rep., para 15.93

28 Cf. *Dutt v. State of U.P.,* [AIR 1966 SC 523 : *LNIND 1965 SC 195* : 1966 Crlj 459](paras 4-5) ; *Patel v. State of Gujarat,* [AIR 1971 SC 1935 : *LNIND 1971 SC 301*][no longer good law].

29 Cf. *Govind v. State of Bihar,* [AIR 1971 SC 1708 : *LNIND 1971 SC 295*]: [(1971) 3 SCC 329 : *LNIND 1971 SC 295*] : 1971 Crlj 1266 . [The actual decision in this case my still be good because the forgery charged was not in respect of anything produced before the Magistrate, but realated to the Court records.]

30 *Patel v. State of Gujarat,* [(1971) 2 SCC 376 : *LNIND 1971 SC 301*] (para 6) : [(1971) 3 SCC 329 : *LNIND 1971 SC 295*] : 1971 Crlj 1266 ; *L.R* . v. *Haridas,* (1976) U.J.S.C. 133 (para 4).

31 *Patel v. State of Gujarat,* [(1971) 2 SCC 376 : *LNIND 1971 SC 301*] (para 6) : [(1971) 3 SCC 329

LNIND 1971 SC 295] :
1971 Crlj 1266 ; *L.R* . v. *Haridas,* (1976) U.J.S.C. 133 (para 4).

32 *Nirmaljit v. State of W.B.,*
AIR 1972 SC 2639 : (1973) 2 SCR 66 :
(1973) 3 SCC 753 ; *Sanmukhsing,*
(1949) 77 IA 7 .

33 *Nirmaljit v. State of W.B.,*
AIR 1972 SC 2639 : (1973) 2 SCR 66 :
(1973) 3 SCC 753 ; *Sanmukhsing,*
(1949) 77 IA 7 .

34 *Nirmaljit v. State of W.B.,*
AIR 1972 SC 2639 : (1973) 2 SCR 66 :
(1973) 3 SCC 753 ; *Sanmukhsing,*
(1949) 77 IA 7 ; *Budhu Ram,*
(1963) 3 SCR 376 [
LNIND 1962 SC 241] :
(1963) 2 Crlj 698 ; *Sushil v. State of Haryana,*
(1988) Crlj 427 (SC) .

35 *Budhu Ram,*
(1963) 3 SCR 376 [
LNIND 1962 SC 241] :
(1963) 2 Crlj 698 ; *Sushil v. State of Haryana,*
(1988) Crlj 427 (SC) .

36 *Cf, L.R. v. Haridas,* (1976) UJSC 133 (para 4).

37 *Nirmaljit v. State of W.B.,*
AIR 1972 SC 2639 : (1973) 2 SCR 66 :
(1973) 3 SCC 753 ; *Sanmukhsing,*
(1949) 77 IA 7 .

38 Cf. *Govind v. State of Bihar,*
AIR 1971 SC 1708 [
LNIND 1971 SC 295]:
(1971) 3 SCC 329 [
LNIND 1971 SC 295] :
1971 Crlj 1266 . [The actual decision in this case my still be good because the forgery charged was not in respect of anything produced before the Magistrate, but realated to the Court records.]

39 *Govindaraju v. State of Karnataka,*
(1995) Crlj 1491 (para 9) Knt; *Harbans v. State of Punjab,*
(1986) Crlj 1834 (P&H) FB.

40 *Makka Das v. Aftab,*
AIR 2008 Crlj 835 ; *Ram Naresh v. Mahila,*
2008 Crlj 85 .

41 *Nand Kishore v. Dwarka Das,*
2008 Crlj 990 .

42 Cf. *L.R. v. Haridas,* (1976) UJSC 133 (para 4).

43 *Yellappa v. State of Karnataka,* (1977) Crlj 154 (NOC) (Knt) .

44 Cf. *L.R. v. Haridas,* (1976) UJSC 133 (para 4).

45 *Kamla Prasad v. Hari,* AIR 1968 SC 19 [*LNIND 1967 SC 170*](para 6) : 1968 Crlj 86 : (1967) 3 SCR 828 [*LNIND 1967 SC 170*].

46 *Mathura,* AIR 1932 Cal 850 .

47 Cf. *Govind v. State of Bihar,* AIR 1971 SC 1708 [*LNIND 1971 SC 295*]: (1971) 3 SCC 329 [*LNIND 1971 SC 295*] : 1971 Crlj 1266 . [The actual decision in this case my still be good because the forgery charged was not in respect of anything produced before the Magistrate, but realated to the Court records.]

48 But the mention of *s. 463, IPC*, will include *s. 465, IPC*, which merely prescribes the punishment for the offence under s. 463, I.P.C.

49 *State of U.P. v. Suresh,* AIR 1984 SC 1108 [*LNIND 1984 SC 575*](paras 6, 9) : (1984) 3 SCC 92 [*LNIND 1984 SC 575*] : 1984 Crlj 926 ; *Anil Kumar Sinha v. State,* 2007 Crlj 1231 Pat ; *K. Ramanna v. S.H.O.,* 1992 Crlj 680 .

50 *State of U.P. v. Suresh,* AIR 1984 SC 1108 [*LNIND 1984 SC 575*](paras 6, 9) : (1984) 3 SCC 92 [*LNIND 1984 SC 575*] : 1984 Crlj 926 ; *Anil Kumar Sinha v. State,* 2007 Crlj 1231 Pat ; *K. Ramanna v. S.H.O.,* 1992 Crlj 680 .

51 *State of U.P. v. Suresh,* AIR 1984 SC 1108 [*LNIND 1984 SC 575*](paras 6, 9) : (1984) 3 SCC 92 [*LNIND 1984 SC 575*] : 1984 Crlj 926 ; *Anil Kumar Sinha v. State,*

2007 Crlj 1231 Pat ; *K. Ramanna v. S.H.O.,* 1992 Crlj 680 ; *State of Karnataka v. Hemareddy,* AIR 1981 SC 1417 [*LNIND 1981 SC 44*] : 1981 Crlj 1019 : (1981) 2 SCC 185 [*LNIND 1981 SC 44*].

52 *Basir-ul-Huq v. State of W.B.,* (1953 SCR 836 [*LNIND 1953 SC 44*]) (842-46).

53 *State of Karnataka v. Hemareddy,* AIR 1981 SC 1417 [*LNIND 1981 SC 44*] : 1981 Crlj 1019 : (1981) 2 SCC 185 [*LNIND 1981 SC 44*].

54 *Sushil Kumar v. State of Haryana,* AIR 1988 SC 419 [*LNIND 1987 SC 826*] : 1988 Crlj 427 ; *Ram Narayan v. State,* 1989 Crlj 76 Raj .

55 *Harbans Singh v. State of Punjab,* AIR 1987 P&H 19 : 1986 Crlj 1834 FB ; *Ramanand v. Kailash,* 2007 Crlj NOC 774Bom .

56 *Iqbal Singh Marwah v. Meenakshi Marwah,* AIR 2005 SC 2119 [*LNIND 2005 SC 261*] : (2005) 4 SCC 370 [*LNIND 2005 SC 261*] : 2005 Crlj 2161 ; *K. Vengadachalam v. K.C. Palaniswamy,* (2005) 7 SCC 352 : 2005 SCC (Cri) 1673 .

57 *Munshi Ram v. State of Rajasthan,* 2005 Crlj 2932 Raj .

58 *Sardul Singh v. State of Haryana,* 1992 Crlj 354 (P&H) .

59 *M.S. Ahlawat v. State of Haryana,* (2000) 1 SCC 278 [*LNIND 1999 SC 1395*] : AIR 2000 SC 168 [*LNIND 1999 SC 1395*] : 2000 Crlj 388 .

60 *Ram Naresh Singh v. Mahila Sanawati,* 2008 Crlj 65 MP .

61 *N. Natarajan v. B.K. Subba Rao,* AIR 2003 SC 541 [*LNIND 2002 SC 761*]: (2003) 2 SCC 76 [*LNIND 2002 SC 761*] : 2003 Crlj 820 (2003) 1 Crimes 235 .

62 *Punjab State Co-op. Supply and Marketing Federation Ltd. v. B.S. Aulakh,* AIR 1997 SC 2001 [*LNIND 1997 SC 658*]: (1997) 4 SCC 756 [*LNIND 1997 SC 658*].

63 Cf. *Raghunath v. State of U.P.,* (1973) UJSC 88n.

64 41st Rep., paras 15, 97-98.

65 Such declaration has been made by Parliament in a number of Act s, *e.g.* , s. 20(6) of the Aluminium Corpn. of India Ltd. (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 (vide para 23 of AIR 1988 SC 2267 [*LNIND 1988 SC 442*]: (1988) 4 SCC 419 [*LNIND 1988 SC 442*] : 1989 Crlj 306 .

66 This change in the *new* Code thus supersedes the following decisions, *inter alia: Lalji v. State of Maharashtra,* AIR 1964 SC 1154 [*LNIND 1964 SC 34*]; *Chandra v. State of Bihar,* (1975) Crlj 1939 (para 16).

67 *Jagannath v. State of U.P.,* AIR 1963 SC 416 [*LNIND 1962 SC 223*](para 6) : (1963) 2 SCR 850 [*LNIND 1962 SC 223*] : (1963) 1 Crimes 330 .

68 *Jagannath v. State of U.P.,* AIR 1963 SC 416 [*LNIND 1962 SC 223*](para 6) : (1963) 2 SCR 850 [*LNIND 1962 SC 223*] : (1963) 1 Crimes 330 .

69 *Raghunath v. Satyabadi,* (1988) CrLJ 1554 (1557) Or.

70 *Virindar v. State of Punjab,* (1955) 2 SCR 1013 [*LNIND 1955 SC 105*] : AIR 1956 SC 153 [*LNIND 1955 SC 105*]: 1956 Crlj 326 .

71 *Rafeeq* *v.* *Istiaq,*
(1975) Crlj 1470 (para 5) Mad.

72 *Baliram* *v.* *Justice* *Lentin,*
AIR 1988 SC 2267 [
LNIND 1988 SC 442](para 36) :
(1988) 4 SCC 419 [
LNIND 1988 SC 442] :
1989 Crlj 306 .

73 *Kanaklata* *v.* *Nani,*
(1984) Crlj 1534 (para 3) Cal.

74 *Misri* *Lal* *v.* *Tota,*
(1984) Crlj 1338 (para 4) Del.

75 *Manohar* *Lal* *v.* *Vinesh* *Anand,*
AIR 2001 SC 1820 [
LNIND 2001 SC 913]:
(2001) 5 SCC 407 [
LNIND 2001 SC 913] :
2001 Crlj 2044 .

76 *Latje* *v.* *State* *of* *Maharashtra,*
AIR 1964 SC 1154 1159 .

77 *Chandrapal* *v.* *Maharay,*
AIR 1982 SC 1238 : (1982) 1 SCC 466 : 1982 Crlj. 1731.

78 *Satyadev* *v.* *Ghanashyam*
AIR 1953 HP 117 .

79 *Kanaklata* *v.* *Nani,*
(1984) Crlj 1534 (para 3) Cal.

80 *Nadeem* *v.* *State,*
(1977) Crlj 1329 (paras 9-10) AP.

81 *Kuldip* *v.* *State* *of* *Punjab,*
(1956) SCR 125 [
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

82 *Kuldip* *v.* *State* *of* *Punjab,*
(1956) SCR 125 [
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [

LNIND 1956 SC 14]:
1956 Crlj 781 .

83 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

84 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

85 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

86 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

87 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

88 *Anant,* (1886) 11 Bom 438.

89 *Anant,* (1886) 11 Bom 438.

90 *Sheriff v. State of Madras,* overruling
AIR 1951 Mad 1060 1061 [
LNIND 1951 MAD 162].

91 *Kuldip v. State of Punjab,* [
(1956) SCR 125
LNIND 1956 SC 14] (129) :
AIR 1956 SC 391 [
LNIND 1956 SC 14]:
1956 Crlj 781 .

92 *Kuldip* *v.* *State* *of* *Punjab,*
(1956) SCR 125
LNIND 1956 SC 14
AIR 1956 SC 391
LNIND 1956 SC 14
1956 Crlj 781
[ ] (129) : [ ]: .

3 Cf. *Chando,*
AIR 1946 Pat 435 .

4 *State of Andhra Pradesh v. Sarma Rao,*
AIR 2007 SC 137
LNIND 2006 SC 951
(2007) 2 SCC 159
LNIND 2006 SC 951
2007 Crlj 289
[ ]: [ ] : .

5 *Virindar* *v.* *State* *of* *Punjab,*
AIR 1956 SC 153
LNIND 1955 SC 105
(1955) 2 SCR 1013
LNIND 1955 SC 105
1956 Crlj 326
[ ]: [ ] : .

6 *Buttan* *v.* *Mani,*
AIR 1967 Pat 95 .

7 *Buttan* *v.* *Mani,*
AIR 1967 Pat 95 .

8 *Virindar* *v.* *State* *of* *Punjab,*
AIR 1956 SC 153
LNIND 1955 SC 105
(1955) 2 SCR 1013
LNIND 1955 SC 105
1956 Crlj 326
[ ]: [ ] : .

9 *Mulchand* *v.* *Kamla,*
AIR 1967 Pat 166
AIR 1967 Pat 264
(para 12); *Anuplal v. Dayanath,* .

10 *Mulchand* *v.* *Kamla,*
AIR 1967 Pat 166
AIR 1967 Pat 264
(para 12); *Anuplal v. Dayanath,* .

11 *Kamla* *v.* *Hari,*
AIR 1968 SC 19
LNIND 1967 SC 170
(1967) 3 SCR 828
LNIND 1967 SC 170
1968 Crlj 86
AIR 1964 SC 1154
LNIND 1964 SC 34
(1964) 6 SCC 700
(1964) 2 Crimes 249
[ ](para 6) : [ ] : ; *Haridas v. State of Maharashtra,* [ ]: : .

12 *Kiran Bedi v. Committee of Inquiry,* AIR 1988 SC 2252 [*LNIND 1988 SC 399*](para 3) : (1988) 4 SCC 49 [*LNIND 1988 SC 399*] : 1989 Crlj 303 ; *Baliram v. Justice Lentin,* AIR 1988 SC 2267 [*LNIND 1988 SC 442*]: (1988) 4 SCC 419 [*LNIND 1988 SC 442*] : 1989 Crlj 306 .

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

[13] [S. 195A. Procedure for witnesses in case of threatening etc.

A witness or any other person may file a complaint in relation to an offence under *Section 195A of the Indian Penal Code (45 of 1860)* .]

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1. Section 195A : Scope.—

Section 195A Cr.P.C. has been incorporated in the Code by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009) which has come into force with effect from 31-12-2009. This new section makes provision for any witness or any other person on his behalf to file complaint in relation to an offence under s. 195A I.P.C.

Section 195A of the Indian Penal Code has been inserted in the *Indian Penal Code* to protect the witness of a criminal case from threat by any accused person or on his behalf so that he may refrain from giving evidence against such accused person. Section 195A I.P.C. has been inserted with effect from 16-04-2006. Section 195A I.P.C. reads as follows :

"195A. Whenever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested with intent to cause such person to give false evidence shall be punished with imprisonment of either discipline for a term which may extend to seven years or with fine or with both, and if

innocent person is convicted and sentenced in consequence of such false evidence with death of imprisonment for more than seven years, the person who threatens be punished with the same imprisonment and sentence in the same manner and to the same extent such innocent person is punished and sentenced."

Section 195A Cr.P.C. now specifically provides that such witness who is threatened and forced to give evidence against any innocent person, so that such innocent has undergone punishment under the *Indian Penal Code* shall himself complain against the person so threatening or any person can file such complaint on his behalf.

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13 New S. 95A inserted by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 17 (w.e.f. 31-12-2009).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 196
Prosecution for offences against the State and for criminal conspiracy to commit such offence.

(1) No Court shall take cognizance of—

(a) any offence punishable under Chapter VI or under Section 153A,[14] [Section 295A or sub-section (1) of Section 505] of the *Indian Penal Code (45 of 1860)* , or

(b) a criminal conspiracy to commit such offence, or

(c) any such abetment, as is described in *Section 108A of the Indian Penal Code (45 of 1860)* ,

except with the previous sanction of the Central Government or of the State Government.

15

[(1A) No Court shall take cognizance of—

(a) any offence punishable under Section 153B or sub-section (2) or sub-section (3) of *Section 505 of the Indian Penal Code (45 of 1860)* , or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate.]

(2) No Court shall take cognizance of the offence of any criminal conspiracy punishable under *Section 120B of the Indian Penal Code (45 of 1860)* , other than a criminal conspiracy to commit[16] [an offence] punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings :

Provided **that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.**

(3) The Central Government or the State Government may, before according sanction [17] [under sub-section (1) or sub-section (1A) and the District Magistrate may, before according sanction under sub-section (1A)] and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155.

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1. Amendment by Act 45 of 1978.—

The scope of sub-sec. (2), where consent of the State Government or District Magistrate, was necessary was confined to offences punishable with death, imprisonment for life or rigorous imprisonment for 2 years or above, provided such offence was ‘cognizable’. It has now been extended to such serious offences even if they are non-cognizable, according to the First Schedule.

2. Amendment made by Act 63 of 1980.—

By this Act of 1980, the following changes have been made :

i For offences under s. 153B or sub-secs. (2)-(3) of s. 505 of the I.P.C., or a criminal conspiracy to commit such offence, sanction of the District Magistrate has been added as alternative to sanction of Central or State Government.

ii In sub-sec. (3), consequential change has been made, enabling the District Magistrate to made a preliminary investigation before giving this consent under sub sec.(1A) or (2).

3. Scope of s. 196.—

1. This section combines *old* ss. 196, 196A and 196B, with drafting changes, as recommended by the Law Commission. These changes will be explained in their respective places.
2. The offences for which sanction of the Central or State Government will be necessary under the *new* sub-sec. (1) are:

   (a) All offences against the State under Chap. VI of the I.P.C. (ss. 121-130, I.P.C., including s. 127 which was excluded under *old* s. 196). [18]

   (b) Offences under ss. 153A, 153B, 295A, 505, I.P.C.

   (c) Any abetment of extra-territorial offence which comes under s. 108A, I.P.C.

3. While *old* s. 196 required a complaint, s. 196(1) would now require a ' *previous sanction'* in the same manner as under s. 197 (*below*). Hence, the law relating to such conditions precedent will be the same under both s s. 196(1) and 197 (*new*).
4. No sanction will be required, under the *new* Code for the following offences:

   (a) Election offences (s. 171F, I.P.C.). [19]

   (b) S. 294A (keeping lottery). [20]

4. Object of s. 196.—

1. The object of s s. 196-197 is to protect public servants from harassment, in the discharge of their official duties. [21]
2. But it is equally important to emphasise that right of citizens should be protected and no excesses should be permitted. [22]
3. The two interests of protection of public officials and of private citizens are to be balanced *viz.* , to what extent and how far the public servant was working in the discharge or purported discharge of his official duties, and whether he had exceeded his limit. [23]

5. Sub-sec. (1) : "No Court shall take cognizance".—

1. This means that no cognizance can be taken with the sanction and that even after taking cognizance having been taken, if facts come to light that the acts complained of were done in the discharge of official duties, the trial may have to be stayed unless sanction is obtained. [24]
2. This does not mean that in every case, the proceedings should be stayed to obtain evidence on the foregoing questions. Ordinarily, the applicability of s. 196 is to be determined upon an examination of the facts stated in the complaint or the Police report when the Magistrate seeks to take cognizance under s. 190. [25] But there may be cases where the Court may find it difficult [26] to determine the question of the need for sanction without gathering *some* evidence whether the accused, while acting in the discharge of his duties as a Police-officer, exceeded the limit of his official capacity. [27]

3. When sanction is mandatory for cognizance of offence under s. 153A or s. 295A I.P.C., the proceeding is to be quashed when the Magistrate takes cognizance without sanction. [28]

4. Even if a private complaint made under s. 295 I.P.C. is filed it must be proceeded by obtaining a sanction. [29]

6. Sanction (or consent of Government) when necessary for charge of criminal conspiracy.—

1. The object of the Law Commission, in making the drafting changes was to simplify the law. But even after such changes in the *new* Code, various categories have to be borne in mind:

I. Firstly, a distinction has to be made between *new* s. 195(a)(iii), b(iii) and s. 196. The former requires the complaint to be made by a specified authority, in respect of the offences mentioned therein, but no sanction is required. Section 196, on the other hand, requires the sanction of the Central or State Government or written consent of the State Government or the District Magistrate, as a condition precedent to the taking cognizance of the offences mentioned therein, in addition to other conditions (if any), relating to the complaint *etc.*

II. In respect of criminal conspiracy, sanction under s. 196 will be required in the following cases:

(i)	Criminal conspiracy to commit any of the offences specified in Chap. VI of the I.P.C., *i.e.* , offences against the State [ss. 121-130]. Section 127, which was excluded by the *old* s. 196, has also been *included.* 30 *State of A.P. v. Subbaiah,* AIR 1961 SC 1241 [*LNIND 1961 SC 95*](para 13)	Previous sanction of Central or State Government.
(ii)	Criminal conspiracy to commit offences against public tranquility, viz ss. 153A.	—do—
(iii)	Criminal conspiracy to commit the offence under s. 295A (relating to religion).	—do—
(iv)	Criminal conspiracy to commit offence under s. 505, I.P.C. (public mischief).	—do—
(v)	Criminal conspiracy punishable under s. 120B other than a conspiracy to commit	Written consent of State Government District Magistrate.

	any offence or which is *not* punishable with death, imprisonment for life or rigorous imprisonment for 2 years or upwards, excepting cases coming under s. 195.	
(vi)	Criminal conspiracy to commit offence under Previous sanction of s. 153B or s. 505(2)- (3).	Previous sanction Central or State Government or District Magistrate.
(vii)	Criminal conspiracy under s. 120B, to Commit a non-cognizable offence, *e.g.* , under s. 466 or 467. I.P.C. 31 *State of A.P. v. Subbaiah,* AIR 1961 SC 1241 [*LNIND 1961 SC 95*](para 13); *Bhanwar v. State of Rajasthan,* AIR 1968 SC 709 [LNINDU 2016 RAJ 30182](paras 9, 13) : 1968 Crlj 867 ; *Gurbachan Singh* v. *State,* AIR 1970 Del 102 [*LNIND 1969 DEL 53*]: 1970 Crlj 674 .	—do—

7. Offence of criminal conspiracy under s. 120B.—

1. Section 196(2) requires written consent of State Government or District Magistrate for taking cognizance of the substantive offence of criminal conspiracy under s. 120B, I.P.C., subject to the conditions laid down therein.

2. At the outset we should distinguish the offence under s. 120B, I.P.C. from the analogous offence of abetment by engaging in a conspiracy to commit the abetted offence, which is punishable under s. 107, I.P.C., *secondly,* because no sanction is required for taking cognizance of the offence under s. 107. [32] The broad distinction between s s. 107 and 120B is that under s. 120B, the very agreement to do an illegal act or an act which is not illegal, by illegal means, constitutes the offence. [33] But a mere agreement is not enough to constitute an offence under s. 107,—an act or illegal omission must take place in pursuance of the conspiracy and in order to the doing of thing conspired for. [34] The distinction is to be drawn form the facts stated in the petition of complaint, subject to this that the mandatory requirement of s. 196(2) cannot be avoided by any device or camouflage in drafting the complaint. [35]

The Court is to examine the allegations in the complaint and determine which of the two offences is *essentially* by those allegations. [36]

3. For the same reason, no consent is required for a charge of abetment under s. 109, I.P.C. [37] (where the act abetted has been committed in consequence thereof). Where, therefore, the Magistrate had already taken cognizance of the offences under ss. 419/109, 471 and 468, I.P.C., on the basis of a Police charge-sheet, consent under s. 196(2) cannot be required if subsequently in course of the proceedings, he substitutes a charge under s. 120B, in lieu of s. 109, I.P.C., on the basis of the evidence before him. [38]

There is an element of abetment in conspiracy, but conspiracy is something more than an abetment and constitutes an offence in itself for which a person can be separately charged. [39] Offences created by ss. 109 and 120B are thus distinct offences, and there is no warrant for limiting the prosecution to only one element of conspiracy, *i.e.* , abetment, when the allegation is that what the accused did was something over and above that. [40]

To determine whether the allegation is a petition of complaint was one of criminal conspiracy [s. 120B] or abetment by conspiracy [s. 109, I.P.C.], the Magistrate should not be led by the heading or the expressions used in the complaint but should examine the facts stated therein to see which offence was 'primarily and essentially' disclosed by those facts. [41]

4. Another distinction to be made is between the offence of criminal conspiracy,—which is a separate offence under s. 120B by itself,—and the offence to do which the conspiracy was entered into. If the latter offence is act ually committed, it would be the subject-matter of a separate charge (commonly known as the substantive charge). [42]

It follows that if, in a case like above, the substantive charge, say, for the offence under s. 409, I.P.C.(criminal breach of trust), does not require sanction under s. 196 while the charge under s. 120B required such sanction, which was not obtained, though the charge for criminal conspiracy under s. 120B fails for want of sanction, the Court may still proceed with the trial on the substantive charge (*e.g.* , s. 409, I.P.C.) [43] The fact that the cognizance of the offence under s. 120B was illegal for want of sanction, would *not* vitiate the trail for the charge under s. 409,[44] or s. 404; or s. 467/109, [45] or s. 466/109. [46]

5. No such consent would be required where—

(a) The object of the conspiracy was to commit a serious offence, namely, a cognizable offence which is punishable with death, imprisonment for life, or rigorous imprisonment for a term of 2 years or upwards; [47]

(b) The *object* of the conspiracy [s. 120B] is to commit the offence of cheating [s. 420, I.P.C.]—punishable with imprisonment. over 2 years,—for which no consent under s. 196(2) would be necessary, but when forgery [s. 467, I.P.C.] or similar non-cognizable offences are committed as merely *steps* taken, by one or other of the accused, for the purpose of the *main* object of the conspiracy, a trial for offences under s. 120B read with s s. 467/471 and 420, I.P.C., without obtaining the consent under s. 196(2), would not be illegal or void. [48]

In this context, the *object* of a conspiracy is to be distinguished form the *means* adopted for realising that *object* ; and the object is to be determined from a reading of the charges, together with the penal sections. [49]

8. Conditions of a valid sanction.—

1. The object of the section being to ensure prosecution by the appropriate authority after due consideration so that frivolous or needless prosecutions may be avoided, the sanction of the appropriate Government, in order to be valid, must comply with the following conditions :

   (a) It should appear from the order of sanction that the authority applied its mind to the facts constituting the offence. [50]

   (b) It must indicate with sufficient particulars the matter which is to be the subject of the proceeding. [51]

2. If the facts constituting the offence are mentioned in the sanction order, the prosecution need not produce extraneous evidence that the facts were placed before the sanctioning authority [52] But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. [53]

3. On the other hand, in according or withholding sanction, Government acts in an executive, not judicial capacity. [54] Hence, the sanction need not give reasons nor be based on legal evidence. [55]

4. Whether sanction is to be accorded or not in a particular case, is a matter entirely for consideration of the Governments. [56] If the Government has applied its mind, the Court has no say in the matter. [57] Where the order of sanction stated that the Police Report and Case Diary had been taken into consideration, the police investigation having already been completed, it could not be held that the sanctioning authority had not applied his mind. [58]

5. However, grant of sanction is an executive act and validity thereof cannot be tested in the light of the principles applied to *quasi* -judicial act. Only application of mind by the sanctioning authority is necessary to be proved to establish that sanction is valid. [59]

6. Simply because the word ‘cognizance’ is not incorporated in the sanction order, it cannot vitiate the trial on the ground that there was no valid sanction. Since sanction has been granted for proceeding with the trial of the case, it necessarily means that the appropriate authority granted the sanction for the Magistrate to take cognizance and proceed with the trial subsequently on the basis of the said cognizance. [60]

9. Proof of sanction.—

1. While sub-sec.(1) of *new* s. 196 requires ‘sanction’, sub-sec.(2) requires ‘consent in writing’. Though the section does not lay down the mode of proof of such sanction or written consent, one would expect that the original document or its copy (where admissible) should be produced to prove the fact of sanction or consent.

2. But the Supreme Court has held [61] that where instead of the order of sanction or consent, a letter from the Under Secretary of the State Government to the District Magistrate is produced, which recites the fact that the Governor has been pleased to sanction prosecution, a presumption of official act shall arise, namely, that the Governor has in fact accorded the sanction. [62] It would then be for the defence to rebut the presumption.

10. Bar under s. 196 (1A)Cr.P.C.—

The bar under sub-section (1A) of s. 196 is against taking of cognizance enumerated thereon except with prior sanction of the Central Government, State Government or the District Magistrate, as the case may be. The said bar is against taking cognizance by the Court and not against the registration of the criminal case or investigation of the case by the police or submission of report by police under *s. 173 Cr.P.C.* on the completion of the investigation. If the said acts are done without any prior sanction of the Central Government, State Government or the District Magistrate, as the case may be, there will be no violation of s. 196 (1A) *Cr.P.C.* [63]

As there is no legal bar for taking cognizance for the offence under s. 504 I.P.C., no sanction under s. 196(1A) *Cr.P.C.* is required.[64]

11. Sanction order if to be produced before the Magistrate committing the case to the Court of Session.—

The sanction order is required to be produced before the Magistrate before he committed the accused to the Court of Session. However, the sanction order was produced before the Court of Session while he was considering the framing of the charge. When at a late stage before the Court of Revision against the order framing of the charge by the Sessions Judge said irregularity was taken by the accused, the Supreme Court has held that it would have been proper that sanction order should have been filed before the Magistrate before he committed the case to the Court of Session. But when the objection was raised at a very late stage in revision before the High Court, the said objection has not been accepted as it would only delay the trial because the commitment proceeding was required to be taken again. [65]

12. Consent under s. 196(2), when necessary and when not.—

1. Sub-section (2) of *s. 196 Cr.P.C.* requires written consent of the State Government or the District Magistrate for taking cognizance of the substantive offence of conspiracy punishable under s. 120B I.P.C. But no sanction is necessary for abetment of an offence punishable under s. 107 or s. 109 I.P.C.[66]

2. Similarly when there is no charge of conspiracy but only the substantive charge under s. 409 I.P.C., no written consent under s. 196(2) *Cr.P.C.* is necessary.[67]

3. However, when the accused persons have been charged under s s. 500, 501 and 502 I.P.C. read with s. 120B I.P.C. and for want of written consent, the accused persons cannot be charged under s. 120B I.P.C. but there is no bar to the Magistrate from proceeding with the trial against them for the substantive charges under s s. 500, 501 and 502 I.P.C. [68]

4. The previous consent is necessary only when the condition laid down in sub-section (2) of s. 196 are fulfilled. So, when there is conspiracy to commit a serious offence punishable with death, imprisonment for life or for rigorous imprisonment for a term of two years or more, no consent is necessary. [69]

13. When the question of absence of sanction is to be raised.—

Whether a sanction has been granted or not is a question of fact and cannot, therefore, be raised for the first time before the Supreme Court. [70]

14. Effect of absence of sanction.—

1. The statutory sanction being a condition precedent to prosecution, [71] want of sanction will render the proceedings without jurisdiction and nullity. [72]
2. Once the conditions for application of the section are satisfied, the bar against taking cognizance without sanction would be *absolute.* [73]
3. Revision would accordingly lie against such proceedings [see under s. 197,*post*].

15. Sanction invalid.—

Sanctioning authority, if on materials produced before him, was satisfied *prima facie* about the commission of an offence under s. 295A I.P.C., he can accord sanction. But when on awarding sanction he directed further investigation, it indicated that the case required further probe for the trial of the accused. Such a sanction order being contradictory in nature, was invalid and prosecution was liable to be quashed on the basis of such invalid sanction order. [74]

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14 Substituted by Act No. 63 of 1980, S. 3(a) (w.e.f. 23-9-1980).

15 Sub-s. (1A), inserted by Act No. 63 of 1980, S. 3 (b) (w.e.f. 23-9-1980).

16 Subs. by Act No. 45 of 1978, S. 16 (w.e.f. 18-12-1978).

17 Subs. by Act No. 63 of 1980, S. 3(c) (w.e.f. 23-9-1980).

18 41st Rep., paras 15, 102-114.

19 41st Rep., paras 15, 102-114.

20 41st Rep., paras 15, 102-114.

21 *Bakshish* *v.* *Gurmej,*
AIR 1988 SC 257 [
LNIND 1987 SC 690](para 6) : (1987) 4 SSC 663 : 1988 Crlj 419.

22 *Bakshish* *v.* *Gurmej,*
AIR 1988 SC 257 [
LNIND 1987 SC 690](para 6) : (1987) 4 SSC 663 : 1988 Crlj 419.

23 *Bakshish* *v.* *Gurmej,*
AIR 1988 SC 257 [
LNIND 1987 SC 690](para 6) : (1987) 4 SSC 663 : 1988 Crlj 419.

24 *Bakshish* *v.* *Gurmej,*
AIR 1988 SC 257 [
LNIND 1987 SC 690](para 6) : (1987) 4 SSC 663 : 1988 Crlj 419.

25 *Darshan* *v.* *State* *of* *Maharashtra,*
AIR 1971 SC 2372 [
LNIND 1971 SC 436](para 8) :
(1971) 2 SCC 654 [
LNIND 1971 SC 436] : 1971 Crlj

26 Cf. *Pukhraj* *v.* *State* *of* *Rajasthan,*
AIR 1973 SC 2591 [
LNIND 1973 SC 255]:
(1973) 2 SCC 701 [
LNIND 1973 SC 255] :
1973 Crlj 1795 .

27 *Bakshish* *v.* *Gurmej,*
AIR 1988 SC 257 [
LNIND 1987 SC 690](para 6) : (1987) 4 SSC 663 : 1988 Crlj 419.

28 *Vishwanath* *v.* *Jogendra,*
(1986) 2 Crimes 413 [
LNIND 1986 ALL 21](All) .

29 *Acharya* *v.* *Naval,*
1990 Crlj 2511 HP .

32 *Pramatha* *v.* *Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](885-86) : 1962 Supp (2) SCR 297 :
(1962) 1 Crimes 770 .

33 *Pramatha* *v.* *Saroj,*
AIR 1962 SC 876 [
LNIND 1961 SC 400](885-86) : 1962 Supp (2) SCR 297 :
(1962) 1 Crimes 770 .

34 *Darshan* *v.* *State* *of* *Maharashtra,*
AIR 1971 SC 2372 [

LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
](para 8) : [ ] :

35 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

36 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

37 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

38 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

39 *State of A.P. v. Subbaiah,*
AIR 1961 SC 1241
LNIND 1961 SC 95
[ ](para 13).

40 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

41 *Darshan v. State of Maharashtra,*
AIR 1971 SC 2372
LNIND 1971 SC 436
(1971) 2 SCC 654
LNIND 1971 SC 436
1971 Crlj 1697
[ ](para 8) : [ ] :

42 *Madan Lal v. State of Punjab,*
AIR 1967 SC 1590
LNIND 1967 SC 116
(1967) 3 SCR 439
[ ](para 10) : [

LNIND 1967 SC 116] :
1967 Crlj 1401 .

43 *Madan Lal v. State of Punjab,*
AIR 1967 SC 1590 [
LNIND 1967 SC 116](para 10) :
(1967) 3 SCR 439 [
LNIND 1967 SC 116] :
1967 Crlj 1401 .

44 *Madan Lal v. State of Punjab,*
AIR 1967 SC 1590 [
LNIND 1967 SC 116](para 10) :
(1967) 3 SCR 439 [
LNIND 1967 SC 116] :
1967 Crlj 1401 .

45 *Madan Lal v. State of Punjab,*
AIR 1967 SC 1590 [
LNIND 1967 SC 116](para 10) :
(1967) 3 SCR 439 [
LNIND 1967 SC 116] :
1967 Crlj 1401 ; *Sukumar v. Mofizuddin,*
AIR 1961 Cal 56 ; *Syed v. Emp.*
AIR 1940 Cal 277 .

46 *Hiralal v. State of Bihar,*
(1977) Crlj 36 (para 4).

47 *Bhanwar v. State of Rajasthan,*
AIR 1968 SC 709 [
LNINDU 2016 RAJ 30182](paras 9, 13) :
1968 Crlj 867 ; *Gurbachan Singh v. State,*
AIR 1970 Del 102 [
LNIND 1969 DEL 53]:
1970 Crlj 674 .

48 *Bhanwar v. State of Rajasthan,*
AIR 1968 SC 709 [
LNINDU 2016 RAJ 30182](paras 9, 13) :
1968 Crlj 867 ; *Gurbachan Singh v. State,*
AIR 1970 Del 102 [
LNIND 1969 DEL 53]:
1970 Crlj 674 .

49 *Bhanwar v. State of Rajasthan,*
AIR 1968 SC 709 [
LNINDU 2016 RAJ 30182](paras 9, 13) :
1968 Crlj 867 ; *Gurbachan Singh v. State,*
AIR 1970 Del 102 [
LNIND 1969 DEL 53]:
1970 Crlj 674 .

50 Cf. *Gokulchand v. R.,*
(1948) 75 IA 30 ; *Jaswant Singh v. State of Punjab,*
AIR 1958 SC 124 [

LNIND 1957 SC 109](para 4) :
1958 Crlj 265 :
1958 SCR 762 [
LNIND 1957 SC 109].

51 Cf. *Gokulchand v. R.,*
(1948) 75 IA 30 ; *Jaswant Singh v. State of Punjab,*
AIR 1958 SC 124 [
LNIND 1957 SC 109](para 4) : 1958 Crlj 265 :
1958 SCR 762 [
LNIND 1957 SC 109].

52 *Bhandari v. State of Rajasthan,*
(1974) Crlj 1130 (para 6) Raj.; Cf. *Joshi v. State of U.P.,*
AIR 1961 SC 387 [
LNIND 1960 SC 243].

53 Cf. *Gokulchand v. R.,*
(1948) 75 IA 30 ; *Jaswant Singh v. State of Punjab,*
AIR 1958 SC 124 [
LNIND 1957 SC 109](para 4) : 1958 Crlj 265 :
1958 SCR 762 [
LNIND 1957 SC 109].

54 *Mallikarjuna v. State of A.P.,*
(1978) Crlj 329 (AP), para 5.

55 *Mallikarjuna v. State of A.P.,*
(1978) Crlj 329 (AP), para 5.

56 Cf. *Matajog v. Bhari,*
AIR 1956 SC 44 [
LNIND 1955 SC 89]:
1954 SCR 310 [
LNIND 1953 SC 101].

57 Cf. *Matajog v. Bhari,*
AIR 1956 SC 44 [
LNIND 1955 SC 89]:
1954 SCR 310 [
LNIND 1953 SC 101].

58 *State of Bihar v. Sharma,*
(1991) Crlj 1438 (para 28) : 1992 Supp (1) SCC 222 :
AIR 1991 SC 1260 [
LNIND 1991 SC 184].

59 *State v. Navjot Sandhu,*
(2005) 11 SCC 600 [
LNIND 2005 SC 580] :
2005 SCC (Cri) 1715 :
2005 Crlj 3950 :
AIR 2005 SC 3820 [
LNIND 2005 SC 580].

60 *Abdulla Salafi v. State of West Bengal,*
2007 Crlj 2029 Cal .

61 *Tulsi v. State of U.P.,*
AIR 1963 SC 666 [
LNIND 1962 SC 318](para 12) : 1963 Supp (1) SCR 382 :
(1963) 1 Crimes 623 .

62 *Tulsi v. State of U.P.,*
AIR 1963 SC 666 [
LNIND 1962 SC 318](para 12) : 1963 Supp (1) SCR 382 :
(1963) 1 Crimes 623 .

63 *State of Karnataka v. Pastor P. Raju,*
AIR 2006 SC 2825 [
LNIND 2006 SC 584]:
(2006) 6 SCC 728 [
LNIND 2006 SC 584] :
(2006) 3 SCC 179 (Cri) :
2006 Crlj 4045 .

64 *Swaraj Thackeray v. State of Jharkhand,*
2008 Crlj 378 (3785) (Jhar).

65 *Dharmesh v. State of Gujrat,*
AIR 2002 SC 2784 : (2002) 6 SCC 370 :
2002 SCC (Cri) 1327 :
2002 Crlj 3573 .

66 *Darshan v. State,*
AIR 1971 SC 2372 [
LNIND 1971 SC 436]:
(1971) 2 SCC 654 [
LNIND 1971 SC 436] :
1971 Crlj 1697 .

67 *Madanlal v. State,*
AIR 1967 SC 1590 [
LNIND 1967 SC 116]:
(1967) 3 SCR 439 [
LNIND 1967 SC 116] :
1967 Crlj 1401 .

68 *K.M. Mathew v. P.K. Thangon,*
1990 Crlj 2214 Gau .

69 *Bhanwar v. State of Rajasthan,*
AIR 1968 SC 709 [
LNINDU 2016 RAJ 30182]:
(1968) 2 SCR 528 [
LNIND 1967 SC 359] :
1968 Crlj 867 .

70 *Kanta Prasad v. Delhi Administration,* AIR 1958 SC 350 [LNIND 1958 SC 3]: 1958 SCR 1218 [LNIND 1958 SC 3] : 1958 Crlj 698 .

71 Cf. *Gokulchand v. R.,* (1948) 75 IA 30 ; *Jaswant Singh v. State of Punjab,* AIR 1958 SC 124 [LNIND 1957 SC 109](para 4) : 1958 Crlj 265 : 1958 SCR 762 [LNIND 1957 SC 109].

72 *Yusofalli v. King,* AIR 1949 PC 264 .

73 *Daulatram,* AIR 1962 SC 206 .

74 *Vali Siddappa v. State of Karnataka,* 1998 Crlj 1879 Kant .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 197
Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction [75] [save as otherwise provided in the *Lokpal and Lokayuktas Act, 2013*]—

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

[76] [*Provided* that where the alleged offence was committed by a person referred to in Clause (b) during the period while a Proclamation issued under Clause (1) of *Article 356 of the Constitution* was in force in a State, Clause (b) will apply as if for the expression "State Government" occuring therein, the expression "Central Government" were substituted;]

[77] [*Explanation.—* For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370,

section 375, section 376, section 376A, section 376C, *section 376D* or *section 509* of the *Indian Penal Code (45 of 1860)* .]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

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[(3-A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under Clause (1) of *Article 356 of the Constitution* was in force therein, except with the previous sanction of the Central Government.

(3-B)

Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the *Code of Criminal Procedure* (Amendment) Act, 1991, receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under Clause (1) of *Article 356 of the Constitution* was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

STATE AMENDMENTS

Assam. — *The following amendments were made by Assam (Presi.) Act 3 of 1980, S. 3 (w.e.f. 5-6-1980)* .

S. 197. —In its application to State of Assam for S. 197(3) substitute the following:—

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply,—

(4) to such class or category of the members of the forces charged with the maintenance of public order, or

(5) to such class or category of other public servants (not being persons to whom the provisions of sub-section (1) or sub-section (2) apply) charge with the maintenance of public order,

as may be specified in the notification, wherever they may be serving, and thereupon the provisions of sub-section (2) shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" was substituted.

Maharashtra. — *The following amendments were made by Mah. Act 60 of 1981, S. 2 (w.e.f. 5-10-1981)* .

S. 197-A. —In its application to the State of Maharashtra after S. 197,S. 197-A inserted:—

S. 197-A. — **Prosecution of Commissioner or Receiver appointed by Civil Court.** —When any person who is a Commissioner or Receiver appointed by a Court under the provisions of the *Code of Civil Procedure, 1908* , is accused at any offence alleged to have been committed by him while acting or purporting to act in the discharge of his functions as Commissioner or Receiver, no Court shall take cognizance of such offence, except with the previous sanction of the Court, which appointed such person as Commissioner or Receiver as the case may be.

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1. Changes made by the new Code.—

This section corresponds to *old* s. 197 with the addition of sub-secs. (2)-(3), in order to give similar protection to members of the Armed Forces. The other changes have been indicated by italics.

i In sub-sec. (1), the insertion of the words ‘or was’ would require sanction even where a public servant has ceased to be a public servant since the commission of the offence.

ii The above conclusion is affirmed by corresponding changes in Cls. (a) and (b) of sub-sec. (1).

iii Sub-sections (2) and (3) are *new* , introduced for the purpose of locating the sanctioning authority in cases of complaints against members of the Armed Forces.

2. Amendment.—

The Proviso to sub-sec. (1)(b) and sub-secs. (3A) and (3B) have been inserted by Act 43 of 1991. The *Criminal Law (Amendment) Act, 2013* has added an ‘explanation’ after sub-s. (1) of s. 197 to do away with the requirement of sanction for prosecuting a public servant for offences alleged to have been committed by him under the sections enumerated in the explanation. Thus, a public servant who commits sexual offences or offences under ss. 166A and 166B cannot claim the protection of sanction.

3. Object of Amendment.—

The amendment provide that the previous sanction of the Centre, instead of the State Government, is necessary for any court to take cognizance of any offence alleged to have been committed by a public servant of a State Government, during *President’s rule* in that State, while acting or purporting to act in the discharge of

his official duty.

A similar provision has been made for members of the forces responsible for the maintenance of public order in a State under President's rule.

4. Object of s. 197.—

1. This section is designed to facilitate an effective and unhampered performance of their official duty by public servants, by providing for scrutiny into the allegations against them by their superior authorities and prior sanction for their prosecution as a condition precedent to the cognizance of the cases against them by the Courts, [79] so that they may be protected from frivolous, vexatious or false prosecutions for offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duty. [80]

2. The section is to be construed neither too narrowly nor too widely, because in a strict sense, the commission of an offence can never be a part of one's official duty. [81]

3. The section does not offer a complete exemption form prosecution. [82] Government can exercise this power to bar prosecution only if the conditions of the section are satisfied. [83] On the other hand, if a complaint has been taken cognizance of without sanction, the accused officer may make an application to the Criminal Court for dropping the proceedings on the ground that he is protected by the section and that the taking of cognizance without sanction was without jurisdiction. [84]

4. Sanction does not extend its protective cover to every act or omission done by a public servant, but restricting in scope of operation to only those act s or omissions which are done by a public servant in discharge of the official duties. [85]

5. The use of the word 'was' after the word 'is' is to make the action applicable even in case when a retired public servant is sought to be prosecuted. [86]

6. However, use of the words 'so' and 'shall' in *s. 197 Cr.P.C.* makes it abundantly clear that the bar in the exercise of power by the Court to take cognizance of any offence is absolute and complete. Very cognizance is barred, that is, the complaint cannot be taken notice of.[87]

5. Sub-sec. (1) : Conditions for application of the section.—

In order to apply the provisions of *s. 197,Cr.P.C.*, two conditions must be fulfilled; one is that (a) the offence mentioned therein must be committed by a *public servant* and (b) the other is that the public servant employed in connection with the affairs of the Union or a State is not removable from his office save by or with the sanction of the Central Government or the State Government, as the case may be. [88]

If on the date of the complaint itself it is incumbent upon the Court to take cognizance of such offence only when there is a *previous* sanction then unless the sanction to prosecute is produced the Court cannot take cognizance of the offence. Naturally at that stage, the Court taking cognizance has to examine the act s complained of and see whether the provisions of *s. 197,Cr.P.C.*, are attracted.

If the above two conditions are satisfied then the further enquiry would be whether the alleged offences have been committed by the public servant while acting or purporting to act in discharge of his officials duties.

If this requirement also is satisfied then no Court shall take cognizance of such offences except with the previous sanction. For this purpose, the allegations made in the complaint are very much relevant to appreciate whether the acts complained of are *directly* concerned or *reasonably* connected with official duties so that if questioned the public servant could claim to have done these act s by virtue of his office, that is to say, there must be a *reasonable connection* between the *act* and the *discharge* of official duties. [89]

The public servant can only be said to act or purporting to act in the discharge of his official duties if his act is such as to lie *within the scope of his official duties.* [90]

For invoking *s. 197 Cr.P.C.* the two conditions indicated in the above must co-exist, namely, (1) that the accused is a public servant removable from office only with the sanction of the Central Government or the State Government, and (2) he must be accused of an offence alleged to have been committed by him in discharge of official duty.[91]

Necessity for sanction can be decided on the mere allegation in the complaint in the initial stage of proceedings and detailed investigation into the allegations is not necessary. [92] Sanction for prosecution is not necessary for an offence of a criminal breach of trust by the public servant punishable under s. 409 I.P.C. [93]

The protection is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing an objectionable act. But if the public servant act ed in excess of his duty if there exists reasonable connection with the discharge of official duty, then such excess would not deprive him of the protection. [94]

When it is no part of the official duty of a public servant to commit the offence under s s. 467, 468 and 471 I.P.C. Want of Sanction under *s. 197 Cr.P.C.* is no bar to prosecute him for the above offences.[95]

6. Necessity for sanction.—

1. The question of necessity for sanction depends upon the facts and circumstances of each case. [1]
2. The question is to be decided from stage to stage as the case progresses. Not only the allegation in the complaint but also all the materials on record are to be considered by the Court to decide whether the sanction under *s. 197 Cr.P.C.* is necessary to prosecute a public servant.[2]
3. However, necessity for sanction is determinable before issue of process if a clear case of necessity is spelt out in the complaint itself. [3]

4. Absence of sanction can be agitated in enquiry under *s. 202 Cr.P.C.* [4]

5. The committing Magistrate cannot commit an accused to the Court of Sessions when for his prosecution sanction under *s. 197 Cr.P.C.* is mentioned but is not forthcoming.[5]

6. When the public servant is alleged to have committed the offence under ss. 166 and 167, I.P.C. sanction is necessary to be obtained under *s. 197 Cr.P.C.* [6]

The criminal offence of cheating and forgery had no co-relation direct or indirect with the functioning as public servants. Therefore, they cannot be acquitted on the ground that sanction under *s. 197 Cr.P.C.* was not obtained.[7]

7. For whose prosecution is sanction required.—

Prosecution without sanction under s. 197 shall be bad and taking cognizance will be without jurisdiction in case the person accused belongs to the following categories :

(a) A Judge [s. 19, I.P.C.] or a Magistrate, even when exercising non-judicial functions.

(b) An ex Judge or an ex-Magistrate. This category has been included by the *new* Code by inserting the words ‘was’ in s. 197(1), to override the Supreme Court decision [8] under the *old* Code that a public servant was not entitled to the protection of s. 197 if the complaint against him was brought after he had left service. The *new* Code has accepted the view of the Law Commission [9] that the need for the protection of the public servant for acts done in the discharge of the official duties is as much after retirement as before.

(c) A public servant who is not removable from his office save by or with the sanction of the Government. [10]

(d) A person who was *such* public servant at the time when the Court took cognizance of the offence. [11] The word ‘was ‘ in *new* s. 197(1) governs all the categories,—Judge, Magistrate and other public servants. [12]

The change in the law has been effected by the Code of 1973, by inserting the word ‘was’ after the words ‘who is’, in sub-sec. (1). [13]

8. Public servant A.—

1. There being no definition of the expression in the *Cr.P.C.* , the definition given in s. 21 of the I.P.C. is usually

resorted to for determining its meaning under the present section. But definition in s. 21 of the I.P.C. does not explain the meaning of the expression but merely enumerates certain classes of employees as public servants, 'whether appointed by the Government or not'. In this category would thus fall—a Member of Municipal Board[14] or Councillor. [15]

2. The scope of the expression in s. 197(1), however, does not seem to be as wide as that under s. 21, I.P.C., because under s. 197(1), the sanction will be required only if the public servant was, at the time of commission of the offence, "employed in connection of the *affairs of the Union or of a State* "; and he was ' *not* removable save by or with the sanction of Government', These two conditions are satisfied where Government runs a Government undertaking or enterprise, such as an Electric Co. [16] But when the business is run through a statutory corporation, having a separate legal entity, it cannot be said that its employees are employed in connection with the *affairs* of the Government. [17]

3. The following have been held to be public servants, for purposes of s. 197 :

(i) Officers of the Central and State Governments or a Minister: [18]

(ii) A retired member of the Indian Air Force, who is, at the time of taking cognizance of the offence, re-employed as a member of the Auxiliary Air Force. [19]

(iii) Sub-Registrar of the Registration Department. [20]

(iv) Assistant Surgeon of a Government Hospital. [21]

(v) Commercial Tax Officer. [22]

On the other hand, the following are not public servants within the purview of *s. 197 Cr.P.C.*

(a) An independent contractor. [23]

(b) A government servant whose services are placed at the disposal of a co-operative society. [24]

(c) Officers of government company or public undertaking even when such public undertaking are State within the meaning of *Article 12 of the Constitution* . [25]

(d) A municipal employee working as a public analysist. [26]

(e) An officer of the nationalized bank. [27]

(f) However, the Chairman and Managing Director of the Nationalised bank is appointed and removed by the Reserve Bank of India under *Banking Regulation Act, 1949* and he cannot be treated as public servant for the purpose of *s. 197 Cr.P.C.* [28]

9. 'Removable by... Government'.—

1. The bar under s. 197 cannot be raised by a public servant if he is removable by some authority without the sanction of the Government, *e.g.* , a Railway servant who is removable by the Railway Board; [29] a Police officer who is removable by the Inspector-General; [30] Municipal Corporation. [31]

2. Once the Government has *delegated* its power to remove a public servant to another authority, such public servant ceases to be within the protection of s. 197, because he becomes removable by some authority other than the Government. [32] (See 'Prosecution of Police Officers', *below*).

3. So,
s. 197 Cr. P.C is attracted when the public servant concerned is not removable by the Government but by a specific authority under the Government. So, when an employee of Land Revenue Department committed an offence for realizing government revenue but not granting receipt therefor, he, not being removable by the Government but by an authority under the Government,
s. 197 Cr.P.C. is not attracted.[33]

4. An employee of a nationalized bank is not removable by the Government. So, no sanction is necessary for prosecuting him as s. 197 is not attracted. [34]

5. An employee of the Municipal Corporation deputed as Public Analyist under the *Prevention of Food Adulteration Act* is not removable by the Government.[35]

10. Prosecution of Police Officers.—

1. Excepting the superior officers, Police officers of inferior rank are removable by the head of the Police establishment, without any sanction of the State Government. Hence, *no* sanction under s. 197 is required for the prosecution of these officers, *e.g.* ,—Inspector, [36] Sub-Inspector, Assistant Sub-Inspector, Officer-in-charge of the Police Station; [37] Assistant Superintendent of Police. [38]

2. On the other hand, sanction under s. 197 would be required for superior officers who cannot be removed except by or with the sanction of the State Government, such as the Superintendent or Deputy Superintendent of Police; [39] , [40] Commissioner or Asstt. Commissioner of Police. [41]

3. But even where a superior officer is not removable except by or with the sanction of the State Government, no sanction for his prosecution under s. 197 would be required where the act s complained of, if the allegations made in the complaint were true, were no part of his duty as a Police-officer, [42] *e.g.* , to take sides in a civil dispute, in the absence of any apprehension of any breach of the peace [43] or of any order of Court to be executed; [44] or to offer threats to the complainant or to slap him, [45] in the absence of his duty to quell a breach of the peace; [46] beating or wrongful confinement [47] because it cannot be the duty of any public servant to beat or abuse or assault [48] any person; a police officer, above all, being the custodian of law and order, cannot be allowed to indulge in lawlessness in the name of discharging his official duty. [49]

4. Once the complaint is properly entertained, Police Officers, as such, are not entitled to any special treatment apart from ordinary accused persons. [50]

5. Where a State Government has issued a notification under sub-sec. (3), extending the provisions of sub-sec. (2) to member of the Police-Force, sanction would be required for prosecuting them, whether they were removable with or without the sanction of the State Government. [51]

But before applying sub-sec. (2), it is incumbent upon the Court to decide whether the alleged acts were

committed by the Police officer in the discharge or purported discharge of their official duties. [52]

When the complaint against the senior Police Officer including the Superintendent of Police was made and the said Senior Police Officer had gone to the house of the complainant with the warrant of arrest even if they are alleged to have committed some excess in discharge of the official duty, sanction is necessary to prosecute them and quashing the complaint without such sanction has to be upheld. [53]

When the accused is of the rank of sub-divisional Police Office and he is being prosecuted under ss. 436, 427 and 323 I.P.C. while entering to the complainant's house in connection with the official duty as a police officer sanction under *s. 197 Cr.P.C.* and s. 6 of the Assam Disturbed Areas Act, 1955 are necessary.[54]

11. Application of Police Rules.—

Rules 16.38 of the Punjab Rules, 1934, provides that no punishment can be awarded against a Police officer unless the proceeding had been instituted without the previous sanction of the District Magistrate, It has been held that this Rule is mandatory, but is confined to departmental proceedings but shall not apply to *criminal prosecution* for offences, because these Rules cannot override that provisions of the *Cr.P.C.* [55]

12. 'Previous sanction'.—

The taking of sanction being a condition precedent to taking cognizance, if cognizance has been taken without the sanction in a case where s. 197 was attracted, the proceeding shall be without jurisdiction, so that the production of the sanction at any later stage would not cure the absence of jurisdiction and the accused would be entitled to be acquitted on that ground alone; [56] of the process or other order which has been issued in the proceeding is liable to be quashed. [57]

13. Application for sanction.—

1. The complainant has to make an application to the appropriate Government for the requisite sanction :
2. In case the Government sits on the application and fails to dispose of it within reasonable time, the application can move the High Court for *mandamus* to compel the Government to dispose of the application, though the Court cannot direct the Government to dispose of it in a particular manner. [58]

14. Remedy if application for sanction is arbitrarily refused.—

A Division Bench of the Gujarat High Court has opined [59] that where the Government has refused to grant the sanction arbitrarily, and without regard to the policy underlying the sanction, the order of the Government can be challenged in an appropriate proceeding.

15. Conditions for the grant of a valid sanction. —

1. See under s. 196*ante.*

2. It must appear that the sanctioning authority has applied its mind and considered all relevant facts. It is not an empty formality. [60] The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the investigating officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or for bidden. To comply with the provisions of s. 197, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction. [61]

3. But —

(a) The sanction is not required to be in any particular form.

If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the Court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution. [62] Where the superior Court is satisfied on this point, it could set aside the order of acquittal made by the trial Court. [63]

(b) When the investigation was complete on the date of the sanction, the police report was filed before the Magistrate and the sanctioning authority considered the case diary before the grant of sanction, it cannot be said that there was non-application of mind on the part of the sanctioning authority. [64]

16. Cl. (a) : 'Employed in connection with the affairs of the Union'. —

The following persons will *not* come within the purview or this expression: A Government servant working on deputation to a co-operative society. [65]

17. When is the question of sanction to be determined and on what basis.—

1. The question whether sanction is necessary for prosecution, in a particular case, is to be determined at the time of *taking cognizance.* [66], [67] and on the basis of the allegations made in the complaint, [68] and not on the basis of what is alleged by the accused. [69]

In determining whether the offence was such as required sanction under s. 197, the criminal acts attributed to the accused in the complaint are to be taken as alleged; whether such allegation is true or false cannot be considered at this stage, [70] but must be kept for the trial.

In other words, at the time of taking cognizance, if the allegations in the complaint do not attract the protection of s. 197 or *s. 132 of the Cr.P.C.* ., the Court cannot throw out the

complaint for want of sanction merely because the accused public servant might possibly successfully establish at the trial that he had done the act complained of in the discharge or purported discharge of his official duty.[71]

'Allegations' in the complaint mean the substantial allegations, and in order to find the substance, the Court may look beyond the form in which the allegations have been made [72]

2. Nevertheless, it would still be open to the accused to show at the trial, [73] from the evidence recorded, that the act complained of was done by him in the discharge of his official duty, so that the proceedings were bad for want of sanction. [74] In short, the necessity of sanction may reveal itself in course of the progress of a case; [75] and may have to be determined by the Court from stage to stage, upon a consideration of *all* the materials which are on the record at the time the question is raised. [76]

3. If the trial Court takes the view that the question whether the accused, while act ing in the discharge of his duties as a Police Officer exceeded the limit of his official capacity in inflicting grave injuries on the complainant, could be property determined only after taking some evidence, the High Court should not interfere with that order. [77]

4. On the other hand, where a person who was once a public servant, is sought to be prosecuted without sanction, it is for the prosecution to prove that at the time when cognizance of the offence was taken, he had ceased to be a public servant. [78]

5. Since want of sanction goes to the roof of the proceedings, the plea of want of sanction can be raised by the accused 'at any stage of the proceedings'. [79] Hence, even though at the stage of inquiry under s. 202, the accused is entitled only to watch the proceedings and not to put any question to the witnesses, [80] it would be open to the accused to raise the plea of want of sanction even at the stage of inquiry under s. 202,[81] even though process had not yet been issued against him.

18. 'Acting or purporting to act in the discharge of official duty'.—

There has been a mass of case-law under this expression, from which the following propositions may be gathered;

I. It is not possible to lay down tests of universal application to find out in which cases sanction under s. 197 would be required. It will depend on the facts of each case. [82] , [83]

II. A public servant may be said to act or purport to act in the discharge of his official duty only when—

(a) the act is such as to lie within the scope of his official duty; [84] or

(b) the act complained of is so integrally connected with the duties attached to the office as to be inseparable from them; [85] or is in respect of an act done or purported to be done in the discharge of an official duty, [86] the connection not being fanciful. [87]

The Supreme Court has held that the expression 'official duty' within the meaning of *s. 197 Cr.P.C.* extends only to those acts or omission done by a public

servant in discharge of his official duty. So, if on fact, it is *prima facie* proved that act or omission for which the accused was charged has reasonable connection with the discharge of his duty it must be held to be an official duty to which the applicability of *s. 197 Cr.P.C.* cannot be disputed.[88]

It is made clear that offence of cheating under s. 420 or for that other offences relatable to s s. 467, 468, 471 and 120B I.P.C. can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of his official duty. In such a case, the official status only provides an opportunity for commission of the offences. [89]

The prosecution was initiated against the doctors and technicians of the blood bank of the Government Hospital for supplying HIV contaminated blood as a result of which some patients were given blood transfusion testing HIV positive. The allegee offences had no connection with their official duties. So, for prosecution under the provisions of *Indian Penal Code* , no sanction under *s. 197 Cr.P.C.* is necessary.[90]

19. Act lying within the scope of official duty.—

1. In a narrow sense, the committing of an offence can never be the part of an official's duty. If it were so construed, there would be no scope of applying s. 197 in any case. [91] What is to be determined is what were the duties of his office, and, further, whether the offence was committed while performing these duties or was committed by the accused in abuse of his official status. [92]

2. The 'time factor' may have some significance, but is not a proper test for answering this question. [93] Thus, the official duty of a medical officer is to examine a patient and not to pick his pocket or to commit rape on her. [94] Hence, no sanction would be required for prosecution of the medical officer on the latter charges. [95] It being no part of the official duty of a public servant to witness a search, no sanction is required for prosecuting him for theft which he committed taking advantage of his presence at such search. [1]

3. In other words. where there is no *necessary connection* between the act and the performance of the duties of a public servant, Art. 197 would not be attracted by the mere fact that the official duties furnished the *occasion* or *opportunity* for the commission of the offence; [2] for instance, when a Law Minister, not being in charge of the Police portfolio manages to send a police force to help the commission of an offence against the complainant. [3]

4. If, on the other hand, the act complained of falls *within the scope* and range of his official duties, [4] he would be entitled to the protection of s. 197, irrespective of whether it was in fact a proper discharge of his duties, because the latter question is one of merit to be determined on evidence at the trial, and which could not arise at the stage of the grant of sanction. [5] For instance, where the official duty of a public servant is to certify a claim, he cannot be prosecuted for giving a false certificate without sanction under s. 197, because when he gave a false certificate, he was *purporting* to act in the discharge of his official duty; [6] similar was the case of Jail Superintendent who did not release a detenue immediately after receipt of High Court order; [7] or where an Accountant falsified the accounts and was charged under s. 471A, I.P.C.; [8] or where the submission of a bill was within the duties of Government servant, but he submitted a false bill and was accordingly charged under s. 420, I.P.C. [9]

Following the foregoing reasoning, it has been held that the following offences are such by their very nature that they cannot be regarded as having been committed by a public servant within the scope of his official duties;

Bribery; [10], [11] cheating; [12], [13] or abetment thereof; [14] criminal conspiracy; [15] selling adulterated food; [16] abuse; [17] criminal misappropriation; [18] defamation. [19]

20. Act integrally connected with official duties.—

1. Under this head would come act s which by themselves cannot be said to form part of official duties of a public servant, but are so *reasonably* [20], [21] or *inseparably* connected with those duties, that is may be said that is was done 'purporting to act in the discharge of his official duties', under the colour of his office and not in abuse of it; [22] or that he could not have properly discharged his official duty without doing the act complained of. [23] For instance—

   While exercising his discretionary power to grant bail, a Police officer refused to grant it unless the accused settled a matter with the complainant. Sanction would be required for complaint against the Police officer under s. 348, I.P.C. [24]

2. This test would *not* be satisfied where there is no reasonable connection between the act complaint of and the official duty, *e.g.* , the offences of beating [25] or torture [26] by a Police officer while discharging his duty of investigation; or embezzlement [s. 409] or conspiracy to embezzle; [27] abusing [28] or defaming a subordinate [29] on the part of a public servant.

   As regards misappropriation, the view was expressed in *Amrik Singh's case* [30] that there may be circumstances where it can be said that misappropriation was done in the course of the official duty of an officer. But this view has been rejected by the majority in *Baijnath's* case, [31] and this view has been followed in all subsequent cases, namely, that embezzlement and misappropriation are such act s as can never be supposed to be a part of one's official duty or reasonably connected with it. [32]

3. Even though defamation of a subordinate cannot be held to be a part of one's official duties, it cannot be said that no sanction for defaming a third party would be necessary when the alleged defamatory statement occurred in a handout to public which was the duty of the Information Officer of the Government, as a medium of publicity for the activities of the Government. [33]

4. Once the nexus between the duties of the public servant and the act complained of is established, the motive or intention [34] with which the act was done becomes immaterial for purposes of applying s. 197. [35]

5. Where the act complained of is *entirely* unconnected with the official duty, or the connection is pretended or fanciful, [36], [37] there will be no protection under s. 197. [38]

6. On the other hand, where the act and the official duty were so inter-related that one could postulate *reasonably* that it was done by the accused in the performance of the official duty, sanction would be required even though the act done was possibly in *excess* of the needs and requirements of the situation. [39]

21. Tests for determining whether the act complained of was done in the 'purported' discharge of official duty. —

1. Though the principles relating to this question have been well-settled by a number of Supreme Court decisions, difficulty remains in the application of these principles in the facts and circumstances of a particular case before the Court.
2. From the leading decisions it would appear that the following tests are to be applied in finding answer to the present question :

I. Whether the public servant, when challenged, can reasonably claim that, what he does, he does in virtue of his office. [40]

II. There must be reasonable relation between the act and the official duty, even though it may be in excess of the requirements of the situation. [41]

If either of the two foregoing tests are satisfied, sanction would be required, irrespective of whether the act done was, in fact, a *proper* discharge of his duty. [42]

Thus,

i. It being the duty of a Civil Surgeon to give a certificate, sanction would be required for prosecuting him for the offence of giving a false certificate [43] but not for the offence of abusing his subordinate because such act cannot be reasonably connected with the duty of the Civil Surgeon to carry on operation in course of which the abuse took place. [44]

ii. On the other hand, no sanction would be required for prosecuting a medical man for picking the pocket of a patient whom he is examining, [45] for, he cannot claim that picking the pocket of the patient lay within the scope of his duty to examine the patient; [46] similarly, the duty of a Judge is to deliver judgment and not take bribe. [47]

iii. Sanction would be required for complaining against a superior officer for sending a false report about the conduct or attendance of his subordinate, because the superior officer was charged with the duty of maintaining discipline over his subordinates with which the offence was reasonably connected. [48]

iv. As regards the offence of criminal breach of trust in respect of property committed to the custody or management of a public servant, it was held in a 1955-case [49] that the offence, having been committed in dereliction of his duty to manage the property, sanction would be required. But this view appears to have been superseded by a number of later cases; [50] where it has been held that the offence of *criminal breach of trust* or misappropriation [51] has no *direct* or *integral* connection with the duties of a public servant and that his official status only furnished him "with an occasion or *opportunity* of committing the offence.

But mere dishonest disposal of such property [52] by the public servant, without involving misappropriation or conversion, may come under *s. 197,Cr.P.C.*

v. No sanction would be required for prosecuting a Police officer for the alleged act of tampering with the Search Memo while in the custody of the Court. [53]

III. No sanction is necessary where the act had no direct connection with his official duties but his official *status* only furnished him an occasion or opportunity of committing the Offence. [54]

In the other words, 'every act done by a public servant while he is 'engaged' in the performance of his official duties' is not protected by s. 197. [55]

IV. The test is not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. [56]

V. The expression 'purporting to act in the discharge of his official duty' does not restrict the operation of the section only to cases of anything purported to be done *in good faith* by a person who ostensibly act s in execution of his duty. [57] It may also have been committed when the official *purports* to do it in execution of his duty. [58]

VI. When the State's officers were required to take decisions in matters placed before them by their subordinates or were required to apply their mind or were required to take decision in supervision and completion of the Government project or having regard to the rules of execution of business were required to take decisions for and on behalf of the Government or were required to by their superiors to render their individual opinions or were members of a Committee constituted by the authorities which assignment they could not decline or were under obligation to render their opinion being such a member, each of them was performing the official duties. So, sanction under *s. 197 Cr.P.C.* is necessary even if after the retirement no sanction is necessary under *Section 19 of the Prevention of Corruption Act, 1988* .[59]

22. While acting or purporting to act any discharge of the official duty, meaning.—

The sanction for prosecution is necessary when offence is alleged to have been committed by him while acting or purporting to act any discharge of official duty. There can be two categories of cases which fall under the protection of *s. 197 Cr.P.C.* They are, namely.—

(i) the act complained of is authorized by the statute or law but became questionable on account of the fact that it was done with fraudulent or dishonest intention; and

(ii) the act complained of though not authorized by the statute or law which intimately and integrally connected with the official or statutory duties and has thus reasonable nexus to the discharge of duties. [60]

When the police officer of Delhi Police Force tampers with papers kept in the custody of the Court his act is not

one committed while acting or purporting to act in discharging of his official duty. [61]

When the Minister of Electricity entered into a criminal conspiracy with the co-accused and had been illegally selling electricity, it is held that the act alleged is directly or reasonably connected with the official duty of the Minister and, therefore, attracts protection of *s. 197 Cr.P.C.* [62]

But when a public servant is alleged to have committed offence of fabrication of record or misappropriation of public fund, it cannot be said that he act ed in discharge of his official duty because it is not his official duty to fabricate false records and misappropriation of fund in furtherance of discharge of his official duty. [63]

For embezzlement and defalcation of public money by public servant while working in that capacity, sanction for prosecution under s. 197(1) *Cr.P.C.* would not be necessary.[64]

It is not part of the public servant to enter into a criminal conspiracy punishable under s. 120B and s. 409 I.P.C. [65]

The allegations in the complaint are that the accused police officer raided the house of the complainant without warrant, assaulted and abused his wife and others and take away certain articles belonging to him but materials on records show that the complainant has suppressed some of the incidents or some of the allegations are false. So, the alleged act should be treated to be an act in discharge of his official duties to search the house of the complainant after obtaining proper search warrant. [66]

The District Collector by order accompanying the revenue collection certificate required the Tahsildar to recover certain some of money from the complainant. The Tahsildar registered the case and got a demand notice issued and served on the complainant. The complainant did not make the payment after service of notice. Subsequently, the complainant came to the Tahsildar's office with his scooter. Tahsildar got the said scooter seized and got the same auctioned. It is held that such an act of the Tahsildar was a *bona fide* act in purported exercise of the power in M.P. Land Revenue Code . [67]

The Sub-divisional Magistrate went to the place of the complainant in his official capacity for the purpose of removal of encroachment made by him. It is alleged by the complainant that S.D.M. entered his chamber used filthy language and dragged him out of the chamber. It is held by the Supreme Court that the act alleged has reasonable nexus with the official duty of S.D.M. [68]

The entry of the accused into the premises in question was on the basis of the order passed by the C.J.M. and this is intrinsically connected with the discharge of the official duty. Therefore, *s. 197 Cr.P.C.* is attracted even if the alleged act was in excess of his official duty.[69]

When the police officer kept a person arrested, suspect of having committed an offence more than twenty-four

hours, though it was his duty to produce him before the Magistrate within twenty four hours, the detention beyond the period of twenty four hours is illegal. But for prosecuting him for such illegal act ion, sanction under *s. 197 Cr.P.C.* is necessary because the arrest and keeping him in the custody for twenty four hours was legal, though it was illegal beyond the said period.[70]

Therefore, if, however, the public servant acted in excess of his authority but the said act has reasonable connection with the official duty, he gets the protection under *s. 197 Cr.P.C.* [71]

Section 197 Cr.P.C. does not get immediately attract on institution of a complaint case. The test is whether the omission or neglect to do that act would have brought against the public servant, the charge of dereliction of official duty. If it is so, then he is entitled to protection under *s. 197 Cr.P.C.* But the accused sub-Inspector of Police alleged to have assaulted an old man and caused his death and by intermediating his sons got their signatures in blank paper. Such act is not deemed to have been done in discharge of his official duty. Therefore, no sanction is necessary to prosecute him.[72]

It was alleged that the respondent police officers had gone to the house of the petitioner, used criminal forces, gave blows with danda, abused and threatened to kill her besides committing theft. However, the respondent had gone to the petitioner's house as police officers in performance of his official duty to arrest the petitioner and not in individual capacity. Their acts are well connected with their official duty. As such, sanction under *s. 197 Cr.P.C.* is needed for their prosecution.[73]

The complaint was filed against the petitioner who are the officers of the Income Tax Department alleging offences punishable under Sections 504 and 506 I.P.C. But in view of the allegations made in the complaint, sanction was required to be obtained by the complainant before the Court could take cognizance of the alleged offence. [74]

The accused who was the Deputy Secretary of Bidhan Sahba allegedly abused the informant by calling him Harizon and Chamar dushad and is trying to pollute the environment of the Assembly on the issue of reservation. The alleged act s did not come within the purview of the discharge of his official duty as the Deputy Secretary. So, the sanction is not necessary. [75]

The petitioner, Municipal Commissioner is alleged to have mis-appropriated public money and caused loss to the municipality. Sanction of the State Government was necessary. When it was not obtained prosecution proceedings against him is liable to be quashed. [76]

The allegations against the Naib Tahsildar is that he issued false Caste Certificate. Issuance of Caste Certificate is in exercise of his official duty. So, with a view to prosecuting him on the above allegations, sanction under *s. 197 Cr.P.C.* is necessary.[77]

When the complaint case against the police personnel for offence punishable under ss. 302, 307, 34, 147, 148,

149, 120B and 427 I.P.C. was filed and was ordered under *s. 202 Cr.P.C.* it is not proper to quash the proceedings at this stage for want of sanction, because at this stage, there was no worth-while and reliable materials to believe that the alleged acts of violence were committed by the police personnel while act ing in discharge of his official duty.[78]

While investigating a cognizable offence, it is no part of the duty of police officer to threaten the complainant or her husband to withdraw the complaint, that act is no part of the official duty of a police officer investigating a cognizable offence. [79]

23. Plea as to want of sanction.—

1. It is open to the accused to make an application to the Criminal Court, at any stage of the proceedings, that the proceedings be quashed for want of sanction on the ground that the taking of cognizance without sanction was without jurisdiction. [80]
2. If such application is dismissed, he may move the High Court under Art. 482 and from there to the Supreme Court. [81]
3. But the accused public servant has no *locus standi* to take this plea at any stage prior to the issue of process against him, [82] even though he may appear personally or through counsel to watch the proceedings. [83]
4. The plea that sanction is required to be taken under *s. 197 Cr.P.C.* before cognizance is not considered even by raised at any stage of the proceedings and need not be raised only when the Court reaches the stage of framing of the charge.[84]
5. The plea can be taken even at the conclusion or trial or after conviction. [85]
6. However, when the plea of want of sanction has been raised at the initial stage, the Court cannot postpone the hearing at a late date. [86]

24. Onus.—

1. The public servant who pleads that the prosecution should fail for want of sanction is to place materials to show what were his official duties and how the act s complained of were inter-related with such duties; [87] and also that he was at the material time acting in his capacity as public servant. [88]
2. If the prosecution contends that the accused *ceased* to be a public servant at the time when cognizance of the offence was taken, the onus is upon the prosecution to prove that fact. [89]
3. It should be clear from the order of sanction that the authority sanctioned the prosecution after considering the relevant materials placed before it. [90]

25. Public servant ceases to be public servant when cognizance taken.—

When the offence was committed, the accused was a public servant. So, even if he ceases to be public servant when cognizance was taken, then

s. 197 Cr.P.C. is attracted.[91]

Even if the Government servant has retired sanction would be necessary in respect of act which was purported to have been done as part of official duty but if the act alleged offence is not related to his official duties, sanction is not required to be taken under *s. 197 Cr.P.C.*[92]

26. Hearing of the accused before granting sanction, not necessary.—

Hearing of the delinquent public servant before granting sanction order was not necessary. [93]

27. Whose sanction?—

1. To determine whether it is the sanction of the Central Government or the State Government which is required in given case, the question to be asked is "where was the public servant employed at the relevant time (which means the date of commission of the alleged offence"). [1] Hence, when the employee of a State Government commits an offence which on deputation to the Government of India, it was the sanction of the Central Government which was required under s. 197. [2]

2. As to who should give the sanction in the case of the Central or State Government, see the under-noted cases. [3]

28. Head Clerk in the office of the Executive Engineer.—

When the accused is working as head clerk in the office of the Executive Engineer, sanction accorded by the Chief Project Manager under whose administrative control, the appellant was serving, was competent to grant sanction under *s. 197 Cr.P.C.*[4]

29. Sanctioning authority in the case of a superseded Municipal Corporation.—

When a Special Officer is appointed by the Government after superseding the Corporation, not only the Special Officer, but the Government itself is competent to grant sanction under s. 197. But it would be bad if it is granted by some authority subordinate of the Special Officer. [5]

30. Sanction to prosecute a High Court Judge.—

The Government competent to accord sanction for prosecution of Judge or public servant under s. 197(1) *Cr.P.C.* is the Government which has power to remove him from service. A High Court Judge cannot be removed by the Central Government for the obvious reason that the procedure for his removal is specified in Arts. 124(4) and (5) of the Constitutions under which the Central Government has no part to play. Hence, s. 197 is inapplicable as against a High Court Judge.

The inapplicability of

s. 197 Cr.P.C. should not, however, lead to the absurd result of there being no safeguard for the Judge of a High Court from being harassed by dissatisfied and disgruntled litigants. The safeguard is embodied in *Art. 215 of the Constitution* ,[6] *viz.* that the actions of any member for the superior judiciary *qua* judge cannot be called in question before any forum except by way of impeachment as provided by the *Constitution* . [7]

31. Sub-sec. (2). 'Armed Forces of the Union'.—

This expression is to be interpreted so as not to be confined to the members of the naval, military and Air Forces of the Union as defined in s. 132(3)(a),*ante,* but in the wider sense as used in Entry 2 of List of the 7 the Sch. to the *Constitution* , so as to include any other armed force of the Union, such as (a) the Central Reserve Police Force; [8] (b) the Air Force Reserve or Auxiliary Reserve Air Force. [9]

32. Sub-sec. (3).—

This sub-section empowers the State Government to extend, by a notification, the provisions of sub-sec. (2) to any class or category of its Police Force, who are 'charged with the maintenance of public order', whereupon, sub-sec. (2) and not sub-sec. (1) shall be applicable in the case of such Police-Officers as are specified in the notification. [10]

33. Duty of sanctioning authority.—

The sanctioning authority has to apply its mind to the facts of the case before it accords sanction. When the prosecuting agency sent the draft sanction order to the sanctioning authority which adopted it after proper scrutiny, it cannot be said that the sanction order suffers from non-application of mind. [11]

When the sanctioning authority has made specific averments in the sanction order that considering relevant documents were perused by him, it cannot be said that the sanction order is vitiated by non-application of the mind. [12]

Independent application of the mind to the facts of the case as also the relevant materials and evidence collected during the investigation is necessary. But when the sanctioning authority issued the sanction order on the direction of the High Court, it cannot be held that there was independent application of mind by the authority. [13]

When the appellant Executive Engineer was to be prosecuted for paying the Rs.2750/- in excess of the dues of the contractor. When the matter was placed before the Minister-in-charge he refused to grant sanction. The appellant thereafter retired in 1994. But in 1997 the file was placed before the Chief Minister for sanctioning his prosecution and he granted the sanction. It is held that the Chief Minister on the same materials granted the sanction order and no new materials were perused. Moreover, only sanction by the Chief Minister was necessary if the amount of defalcation or misappropriation exceeds rupees two lakhs. So, the sanction order by the Chief Minister long after the retirement of the appellant was vitiated by non-application of mind. [14]

34. Government refused to accord sanction to prosecute the Heritage Corridor Scam.—

When the Government refused to accord sanction to prosecute the Chief Minister and another even if the C.B.I. on conclusion of investigation prayed for sanction, the Supreme Court in a P.I.L under Article 32 did not wish to interfere it and the said refusal can be agitated at the appropriate forum but not in P.I.L. [15]

35. Effect of want of sanction.—

1. See under s.196, *ante.* [16]
2. Since the existence of sanction is a condition precedent to taking cognizance of the offence, if cognizance is taken without sanction, this initial absence of jurisdiction cannot be cured by *subsequently* obtaining sanction. [17]
3. But if there is any technical lacuna in the sanction, it can be remedied by specific evidence in that behalf adduced in course of the trial. [18] When, however, the defect goes to the root of matter *e.g.* , where cognizance had been taken on the basis of sanction given by an incompetent authority, it cannot be cured subsequently. [19]
4. Where the cognizance, without sanction, was without jurisdiction, all subsequent proceedings must be quashed [20] because the requirement, of obtaining sanction for prosecution is mandatory and the bar of taking cognizance of offence in absence of sanction is *absolute.* [21]

36. Quashing complaint at initial stage not proper in all cases.—

Depending upon the nature of the act s, the complainant complained of proceedings cannot be quashed at the initial stage when the question of sanction can be raised at any time after the cognizance of the offence taken. Even that can be raised at the conclusion of trial, when the question whether the accused acted in course of performance of the official duties or not could be examined during course of trial after giving opportunity of both the parties to establish their respective case, the question in such a case should be kept open to be decided in the main judgment after conclusion of trial.

A complaint was lodged against the police officers for some cognizable offences. At this initial stage and even before examining the complainant and further examination of other witnesses the Magistrate cannot insist for obtaining sanction under *s. 197 Cr.P.C.* It is only after recording evidence, the Magistrate can decide as to whether the offence was committed during the course of discharge of duties or not.[22]

37. Void sanction, if case can be remitted back to the sanctioning authority for granting valid sanction.—

It is held by the Supreme Court that when the sanction given by the sanctioning authority was not valid, it would not be just and fair after expiry of fourteen years to remit the matter for the sanctioning authority for passing a valid sanction order. [23]

38. Want of valid sanction when affects conviction and when not.—

The condition precedent for reversal of the conviction of the accused on the ground of want of sanction by the High Court in appeal is based on the finding (1) whether the want of sanction has occasioned a failure of justice and (2) whether the validity of the sanction had taken at the earliest stage before the Trial Court. When the High Court has not considered the above two points before setting aside the conviction of the accused only on the ground of want of sanction, the said setting aside, conviction of the accused was not justified. [24]

39. Discharge of accused on the ground of want of prosecution after obtaining sanction order.—

When the plea is unchallenged and the accused is convicted, the question of sanction becomes meaningless.

When it is brought to the notice of the Court that no sanction has been obtained for prosecuting the accused when it is a case for obtaining a sanction under *s. 197 Cr.P.C.* before taking cognizance, the Court can discharge the accused. But this will not debar the prosecution filing a fresh case against the accused on obtaining valid sanction.[25]

40. Sanctions under s. 132 and s. 197.—

In a case against a member of the Armed Forces, sanction for prosecution is required both under s. 132 (*ante)* and *s. 197 Cr.P.C.* the two sanctions serve different purposes and the points of difference between them are as follows—

1. The two sanctions are addressed *to* altogether different persons. While sanction under s. 132 is addressed to the intending complainant, sanction under s. 197 is addressed to the Magistrate presiding over a Court.

2. While the sanction under s. 132 clothes the intending complainant with authority *to institute a complaint* and set the machinery of the criminal Court in motion, the sanction under s. 197 clothes the Court with the jurisdiction *to take cognizance* of the offence. Without the former, the intending complainant cannot trigger the proceeding, without the latter the Magistrate cannot have seisin over the matter or act in the matter.

3. The absence of sanction in each case visits different persons with different consequences. Absence of the former disables the intending *complainant* whereas absence of the latter disables the *Court.*

4. The disability operates in two different spheres. Want of sanction under s. 132 renders the complaint invalid. Want of sanction under s. 197 vitiates all the proceedings in the Court. For want of the former, the complainant cannot complain, for want of the latter the Court cannot try the case, as it lacks jurisdiction.

5. The sanctioning authority has to address itself to different questions. In regard to a sanction under *s. 132,Cr.P.C.* , the question to be answered is whether the intending complainant *is a suitable person* to be authorized for prosecuting the matter in good faith. In regard to the sanction under s. 197 the question to be answered is which particular Court should be empowered to try the case. So also in granting sanction under s. 197 the sanctioning authority has to consider whether *or not to exercise the powers* under s. 197(4) to specify "the person by whom, the manner in which, and the offence or offences for which" the concerned public servant should be tried and "the Court before which the trial is to be held". The authority seized of the matter in the context of

sanction under s. 132 does not have to address himself to these questions and in fact has no competence in this behalf.

6. One is an authority to an individual to ‘ *prosecute* ’ the alleged offender, the other is an authority to ‘ *try*’ the alleged offender.

7. Therefore, a sanction under s. 132 is no substitute for a sanction under s. 197. [26]

In the absence of a valid sanction under s. 197, the proceedings should be quashed. But fresh prosecution would lie after obtaining proper sanction.

41. Revision.—

1. Revision lies to the Sessions Court or the High Court [27] from order of Criminal Court dismissing a complaint for want of sanction. [28]

2. Revision also lies where the Magistrate dismisses a complaint for want of sanction, [29] contending that no sanction was required in the facts of the case. [30]

42. Moving High Court under s. 482.—

1. Though taking cognizance is an interlocutory order, the High Court may interfere, under its inherent power under s. 482, at the stage, on the ground of want of sanction where it is required because it renders the proceedings without jurisdiction, process, if issued, may be quashed. [31] , [32]

2. The High Court may also be moved from the revisional order of the Sessions Court, affirming the dismissal of a complaint for want of sanction. [33]

When the Chairman and Managing Director of a Bank alleged to have committed an offence under s. 120B read with s. 420 I.P.C. along with others and also under ss. 14, 12 and 13(2) of *Prevention of Corruption Act, 1988* , prayed for quashing the proceedings under *s. 482 Cr.P.C.* , the High Court rightly dismissed the petition as at that stage, no finding was made that the acts were done purported to have been done in official capacity.[34]

43. Application under Art. 227 of the Constitution.—

An application under Art. 227 has also been entertained against an order dropping complaint proceedings against a public servant for want of sanction under s. 197(2)- (3), without deciding the question whether the act s alleged were committed by him in the discharge or purported discharge of his official duties. [35]

44. Appeal to Supreme Court.—

1. Where the High Court, in revision, quashes the prosecution on the ground of want of sanction, appeal lies, Supreme Court under Art. 134(1)(c). [36]

2. Appeal would lie, by special leave under Art 136 where the appellant has been convicted, by the High Court, rejecting his plea that sanction under s. 197 was required, [37] or his application for quashing the proceedings under s. 482 has been dismissed. [38]

45. Sub-sec. (4).—

This sub-section corresponds to *old* sub-sec. (2) and empowers the sanctioning Government to specify the Court before which the trial of the offence so sanctioned shall take place. It is not violative of *Art. 14 of the Constitution* , because this power is to be exercised on relevant considerations, such as gravity of case, convenience of trial and the like. [39]

46. Special law. —

In view of s. 5 the Code (see *ante*), no sanction under s. 197 would be required for offences under a special Act which excludes its application, *e.g.* , *Section 6 of the Prevention of Corruption Act* .[40]

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75 Ins. by the *Lokpal and Lokayuktas Act, 2013* (1 of 2014), s. 58 & Sch. (w.e.f. 16-1-2014).

76 Inserted by Act 43 of 1991, S. 2 (w.e.f. 2-5-1991).

77 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), S. 18 (w.e.f. 3-2-2013).

78 Inserted by Act 43 of 1991, S. 2 (w.e.f. 2-5-1991).

79 *Srivastava v. Misra,* AIR 1970 SC 1661 [*LNIND 1970 SC 218*](para 4) : (1970) 2 SCC 56 [*LNIND 1970 SC 218*] : 1970 Cr1_J 1401; *Director of Inspection and Audit v. Subramaniam,* (1994) Supp (3) SCC 615 : AIR 1995 SC 866 : 1995 SCC (Cr) 121.

80 *Srivastava v. Misra,* AIR 1970 SC 1661 [*LNIND 1970 SC 218*](para 4) : (1970) 2 SCC 56 [

LNIND 1970 SC 218] : 1970 Cr1_J 1401; *Director of Inspection and Audit v. Subramaniam,* (1994) Supp (3) SCC 615 AIR 1995 SC 866 : 1995 SCC (Cr) 121.

81 *Srivastava v. Misra,* AIR 1970 SC 1661 [LNIND 1970 SC 218](para 4) : (1970) 2 SCC 56 [LNIND 1970 SC 218] : 1970 Cr1_J 1401; *Director of Inspection and Audit v. Subramaniam,* (1994) Supp (3) SCC 615 AIR 1995 SC 866 : 1995 SCC (Cr) 121; *Shreekantiah v. State of Bombay,* AIR 1955 SC 287 [LNIND 1954 SC 180]: (1955) 1 SCR 1177 [LNIND 1954 SC 180] : 1955 Cr1_J 857.

82 *State v. Kailash,* AIR 1980 SC 522 [LNIND 1979 SC 504](paras 3, 6) : (1980) 1 SCC 667 [LNIND 1979 SC 504] : 1980 Cr1_J 393.

83 *State v. Kailash,* AIR 1980 SC 522 [LNIND 1979 SC 504](paras 3, 6) : (1980) 1 SCC 667 [LNIND 1979 SC 504] : 1980 Cr1_J 393.

84 *State v. Kailash,* AIR 1980 SC 522 [LNIND 1979 SC 504](paras 3, 6) : (1980) 1 SCC 667 [LNIND 1979 SC 504] : 1980 Cr1_J 393.

85 *State of Orissa v. Ganesh Chandra Jew,* AIR 2004 SC 2179 [LNIND 2004 SC 393]: 2004 SCC (Cri) 2104 : (2004) 8 SCC 40 [LNIND 2004 SC 393] : 2004 Cr1_J 2011.

86 *State of Orissa v. Ganesh Chandra Jew,* AIR 2004 SC 2179 [LNIND 2004 SC 393]: 2004 SCC (Cri) 2104 : (2004) 8 SCC 40 [LNIND 2004 SC 393] : 2004 Cr1_J 2011.

87 *State of Orissa v. Ganesh Chandra Jew,* AIR 2004 SC 2179 [LNIND 2004 SC 393]: 2004 SCC (Cri) 2104 : (2004) 8 SCC 40 [LNIND 2004 SC 393] : 2004 Cr1_J 2011.

88 *Dir. of Inspection & Audit v. Subramaniam,* (1994) Supp (3) SCC 615 : AIR 1995 SC 866 : 1995 SCC (Cr) 121.

89 *Dir. of Inspection & Audit v. Subramaniam,* (1994) Supp (3) SCC 615 : AIR 1995 SC 866 : 1995 SCC (Cr) 121.

90 *Dir. of Inspection & Audit v. Subramanian,* (1994) Supp (3) SCC 615 : AIR 1995 SC 866 : 1995 SCC (Cr) 121.

91 *Kailash Seth v. State of U.P.,* 1978 Crlj NOC 150All .

92 *Hardev v. State,* 1995 Crlj 2964 (P&H) .

93 *N. Bhargavan Pillai v. State of Kerala,* [AIR 2004 SC 2317 : *LNIND 2004 SC 520* : 2004 Crlj 2494 : (2004) 13 SCC 217 : *LNIND 2004 SC 520* : 2005 SCC (Cri) 142] .

94 *S.K. Zutshi v. Bimal Debnath,* [AIR 2004 SC 4174 : *LNIND 2004 SC 762* : (2004) 8 SCC 31 : *LNIND 2004 SC 762* : 2004 SCC (Cri) 2096] .

95 *State of H.P. v. M.P. Gupta,* [AIR 2004 SC 730 : *LNIND 2003 SC 1060* : (2004) 2 SCC 349 : *LNIND 2003 SC 1060* : 2004 SCC (Cri) 539 : *LNIND 2003 SC 1060* : (2004) 1 Crimes 132 : *LNIND 2003 SC 1060*] .

1 *Bhagwan Prosad v. N.P. Mishra,* [AIR 1970 SC 1661 : *LNIND 1970 SC 218* : 1973 Crlj 94]; *Birendra v. State of West Bengal,* .

2 *S.B. Saha v. M.S. Kochar,* [AIR 1979 SC 1841 : *LNIND 1979 SC 300* : (1979) 4 SCC 177 : *LNIND 1979 SC 300* : 1979 Crlj 1367] ; *Aiondesh v. U.T. of Mizoram,* AIR: 1981 SC 806 : (1981) 2 SCC 150 : *LNIND 1981 SC 73* : 1981 Crlj 407] .; *Prakash Singh Badal v. State of Punjab,* [AIR 2007 SC 1274

LNIND 2006 SC 1091]:
(2007) 1 SCC 1 [
LNIND 2006 SC 1091] :
(2006) 4 Crimes 388 [
LNIND 2006 SC 1091].

3 *Narayan Chandra v. Ananda Mondal,*
1984 Crlj 1334 : 88 CWN 750.

4 *Madan Singh v. P.K. Basak,*
1982 Crlj 1203 .

5 *P. Surya Rao Dr. v. H. Annapoornamma,*
1981 Crlj 1191 :
1981 MLJ (Cri) 300 .

6 *P.K. Chaudhury v. Commander,*
AIR 2008 SC 1937 [
LNIND 2008 SC 673]:
(2008) 13 SCC 229 [
LNIND 2008 SC 673].

7 *State of U.P. v. Jagal Ram,* 2008 Crlj (NOC) 192 (HP).

8 *Keshavlal v. State,*
AIR 1961 SC 1395 [
LNIND 1961 SC 119]:
1961 (2) Crlj 571 .

9 41st Rep., paras 15, 123.

10 Cf. *Baijnath v. State of MP,*
AIR 1966 SC 220 [
LNIND 1965 SC 168](para 2) :
(1966) 1 SCR 210 [
LNIND 1965 SC 168] :
1966 Crlj 179 .

11 *State v. Kailash,*
AIR 1980 SC 522 [
LNIND 1979 SC 504](para 5) :
(1980) 1 SCC 667 [
LNIND 1979 SC 504] :
1980 Crlj 393 ; *State of W.B. v. Manmal,*
AIR 1977 SC 1722 [contrary view taken in the following cases no longer good law];
Pradumna v. State of Maharashtra,
(1981) Crlj 1873 (para 10); *Bachan v. State of Punjab,*
(1981) Crlj 1471 (para 4).

12 41st Rep., paras 15, 123.

13 *Rajinder v. State of Punjab,* (1982) Crlj 1718 (para 14); *Rachpal v. State of Punjab,* (1979) Chand LR (Cr) 282.

14 *Maharudrappa v. State of Mysore,* AIR 1961 SC 785 [*LNIND 1961 SC 60*] 1961 Crlj 857 .

15 *Prem v. State of U.P.,* (1975) Crlj 1783 (para 4) All.

16 Cf. *Baijnath v. State of MP,* AIR 1966 SC 220 [*LNIND 1965 SC 168*] (para 2) : (1966) 1 SCR 210 [*LNIND 1965 SC 168*] : 1966 Crlj 179 .

17 Cf. *Sharma, v. Poddar,* (1974) Crlj. 959 (para 10) Pat.

18 Cf. *Shiv Bahadur v. State of U.P.,* AIR 1953 SC 394 [*LNIND 1953 SC 68*] (401); *R. Bala Krishna Pillai v. State of Kerala,* AIR 1996 1 SCC 901 : (1996) 1 SCC 478 : (1995) 4 Crimes 704 .

19 *State v. Kailash,* AIR 1980 SC 522 [*LNIND 1979 SC 504*] (paras 3, 6) : (1980) 1 SCC 667 [*LNIND 1979 SC 504*] : 1980 Crlj 393 .

20 *Tara Singh v. Sagar Co-operative Agri Services Society Ltd.,* 1994 Crlj 1465 .

21 *Avtar Singh v. State of MP.,* 1994 Crlj 1575 MP .

22 *Supriya Basu v. Babulal Agarwal,* 1994 Crlj 1015 Cal .

23 *Bakshish Singh v. State of Punjab,* AIR 1967 SC 752 [*LNIND 1966 SC 165*] (1967) 1 SCR 211 [*LNIND 1966 SC 165*] : 1967 Crlj 656 .

24 *Dhanoa v. Delhi Municipality,* AIR 1981 SC 1395 [*LNIND 1981 SC 282*]

(1981) 3 SCC 431 [
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1981 Crlj 871 .

25 *N.K. Sharma v. Abhimanyu,*
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LNIND 2005 SC 803]:
(2005) 13 SCC 213 [
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2005 Crlj 4529 :
(2005) 4 Crimes 153 ; *Mohammed Hadi Raja v. State of Bihar,*
AIR 1998 SC 1945 [
LNIND 1998 SC 497]:
(1998) 5 SCC 91 [
LNIND 1998 SC 497] :
1998 Crlj 2826 :
(1998) 2 Crimes 284 .

26 *Lakshman Singh v. Naresh Kumar,*
AIR 1990 SC 1976 [
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(1990) 4 SCC 169 [
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27 *K. Ch. Prasad v. J. Vanalatha,*
AIR 1987 SC 722 [
LNIND 1987 SC 157]:
(1987) 2 SCC 52 [
LNIND 1987 SC 157] :
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(1987) 1 Crimes 482 [
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28 *M. Gopalakrishnan v. State,*
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LNIND 2009 SC 308]:
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29 *K.N. Shukla v. Navnit,*
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LNIND 1966 SC 310](paras 3, 8, 9) :
1967 Crlj 1200 .

30 *Nagraj v. State of Mysore,*
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(1977) 3 SCC 440 [
LNIND 1977 SC 203] :
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31 *Lakshman* *v.* *Naresh,*
(1990) Crlj 1921 (para 7) SC.

32 *K.N.* *Shukla* *v.* *Navnit,*
AIR 1967 SC 1331 [
LNIND 1966 SC 310](paras 3, 8, 9) :
1967 Crlj 1200 .

33 *Maahesh* *Chandra* *v.* *Raghunandan,*
1991 Crlj 72 Pat .

34 *K.* *Prasad* *v.* *J.* *Vanalatha,*
AIR 1987 SC 722 [
LNIND 1987 SC 157]:
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35 *Lakshman* *Singh* *Dr.* *v.* *Naresh* *Kumar,*
AIR 1990 SC 1976 [
LNIND 1990 SC 370]:
1990 Crlj 1921 :
(1990) 4 SCC 169 [
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36 *Bhikhaji* *v.* *Barot,*
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37 *Mukunda* *v.* *Godavaris,*
(1980) Crlj 1215 (paras 1, 5) Or.

38 *Nagraj* *v.* *State* *of* *Mysore,*
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39 *Mukunda* *v.* *Godavaris,*
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40 *Prabhakar.* *v.* *Shankar,*
AIR 1969 SC 686 [
LNIND 1968 SC 367](para 7) :
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41 *Somchand* *v.* *Bibhuti,*
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LNIND 1964 SC 9
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42 *Prabhakar.* *v.* *Shankar,*
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43 *Prabhakar.* *v.* *Shankar,*
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(1969) 2 SCR 558
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44 *Prabhakar.* *v.* *Shankar,*
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46 *Prabhakar.* *v.* *Shankar,*
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47 *State of A.P.* *v.* *Venugopal,*
AIR 1964 SC 33 38
(1964) 1 Crimes 15
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48 *Budhi* *v.* *Sharma,*
(1981) Crlj 993
(para 18) (P&H).

49 *Budhi* *v.* *Sharma,*
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50 *Mukunda* *v.* *Godavaris,*
(1980) Crlj 1215
(paras 1, 5) Or.

51 *Bhikhaji* *v.* *Barot,* (1982) Crlj 2014 (para 5) Guj.

52 *Bhikhaji* *v.* *Barot,* (1982) Crlj 2014 (para 5) Guj.

53 *Sumitra Devi Dr. v. Manjit Singh,* 2007 Crlj 3827 (P&H).

54 *Rajen Singh v. State of Assam,* 2007 Crlj 621 Gau .

55 *State of Punjab v. Rajkumar,* AIR 1988 SC 805 [*LNIND 1988 SC 112*]: (1988) 1 SCC 701 [*LNIND 1988 SC 112*] : 1988 Crlj 914 .

56 *Bhuneswar v. State of Bihar,* (1981) Crlj 142 (para 5) Pat.

57 *Shailbhadra v. Swami,* (1981) Cr.LJ 113 (para 8) Guj.

58 Cf. *Samarth Transport, v. R.T.A.,* AIR 1961 SC 93 [*LNIND 1960 SC 383*](para 6) : (1961) 1 SCR 631 [*LNIND 1960 SC 383*]; *Everest Apartment v. State of Maharashtra,* AIR 1966 SC 1449 [*LNIND 1966 SC 24*](para 6) : (1966) 3 SCR 365 [*LNIND 1966 SC 24*].

59 *Shalibhadra v. Swami,* (1981) Crlj 113 (para 6) Guj.

60 *State of Bihar v. Sharma,* (1991) Crlj 1438 (para 27) : AIR 1991 SC 1260 [*LNIND 1991 SC 184*]: 1992 Supp (1) SCC 222.

61 *State of Bihar v. Sharma,* (1991) Crlj 1438 (para 27) : AIR 1991 SC 1260 [*LNIND 1991 SC 184*]: 1992 Supp (1) SCC 222.

62 *State of Bihar v. Sharma,* (1991) Crlj 1438 (para 27) : AIR 1991 SC 1260 [*LNIND 1991 SC 184*]: 1992 Supp (1) SCC 222.

63 *State of Tamil Nadu v. Haridasan,* (1992) Crlj 522 : 1993 Supp (1) SCC 221 : 1992 Crlj 522 ; *Raj Singh v. State,* (1995) Crlj 955 (para 7) Mad.

64 *State of Bihar v. Sharma,* (1991) Crlj 1438 (para 27) : AIR 1991 SC 1260 [*LNIND 1991 SC 184*]: 1992 Supp (1) SCC 222.

65 *Dhanoa v. Delhi Municipality,* AIR 1981 SC 1395 [*LNIND 1981 SC 282*](paras 6, 11) SC.

66 *State v. Kailash,* AIR 1980 SC 522 [*LNIND 1979 SC 504*](paras 3, 6) : (1980) 1 SCC 667 [*LNIND 1979 SC 504*] : 1980 Crlj 393 .

67 *Nagraj v. State of Mysore,* AIR 1964 SC 269 [*LNIND 1963 SC 153*]: (1964) 3 SCR 671 [*LNIND 1963 SC 153*] : (1964) 1 Crimes 161 ; *State of W.B. v. Manmal,* AIR 1977 SC 1772 [*LNIND 1977 SC 203*]: (1977) 3 SCC 440 [*LNIND 1977 SC 203*] : 1977 Crlj 1164 .

68 *K.N. Shukla v. Navnit,* AIR 1967 SC 1331 [*LNIND 1966 SC 310*](paras 3, 8, 9) : 1967 Crlj 1200 ,

69 *K.N. Shukla v. Navnit,* AIR 1967 SC 1331 [*LNIND 1966 SC 310*](paras 3, 8, 9) : 1967 Crlj 1200 ,

70 *Akhilesh v. Union Territory,* (1981) Crlj 407 (para 6) : (1981) 2 SCC 150 [*LNIND 1981 SC 73*] : 1981 Crlj 407 .

71 *Ajmer v. Ranjit,* AIR 1965 Punj 192 .

72 *Somchand* *v.* *Bibhuti,*
AIR 1965 SC 588
LNIND 1964 SC 9
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(1965) 1 Crimes 499
[
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[
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73 *Prabhakar* *v.* *Shankar,*
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LNIND 1968 SC 367
1969) 2 SCR 1013
LNIND 1968 SC 367
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[
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74 *Prabhakar* *v.* *Shankar,*
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LNIND 1968 SC 367
1969) 2 SCR 1013
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75 *Pukhraj* *v.* *State* *of* *Rajasthan,*
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1973 Crlj 1795
AIR 1970 SC 1661
LNIND 1970 SC 218
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76 *Saha* *v.* *Kochar,*
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LNIND 1979 SC 300
(1979) 4 SCC 177
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1979 Crlj 1367
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AIR 1988 SC 275
(para 6).

78 *State* *v.* *Kailash,*
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79 *Saha* *v.* *Kochar,*
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80 *Chandra* *Deo* v *Prokash,*
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LNIND 1963 SC 11
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(1964) 1 SCR 639 [
LNIND 1963 SC 11] :
(1963) 2 Crimes 397 .

81 *Madan v. Basuk,*
(1982) Crlj 1203 (paras 9-10) Pat; *Mangharam v. State*
AIR 1965 Raj 210 .

82 *Bhagwan v. Mishra,*
AIR 1970 SC 1661 [
LNIND 1970 SC 218].

83 *Amrik v. State of Pepsu,*
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1955 Crlj 865 .

84 *Gill v. R..,*
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85 *Bhagwan v. Mishra,*
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86 *Pukhraj v. State of Rajasthan,*
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87 *Satwant v. State of Punjab,*
AIR 1960 SC 266 [
LNIND 1959 SC 191](para 16) :
(1960) 2 SCR 89 [
LNIND 1959 SC 191] .

88 *Prakash Singh Badal v. State of Punjab,*
AIR 2007 SC 1274 [
LNIND 2006 SC 1091]:
(2007) 1 SCC 1 [
LNIND 2006 SC 1091] :
(2007) 1 SCC 1 [
LNIND 2006 SC 1091]93(Cri) .

89 *Prakash Singh Badal v. State of Punjab,*
AIR 2007 SC 1274 [
LNIND 2006 SC 1091]: (2007) 1 SCC 1 :
(2007) 1 SCC 193 (Cri) .

90 *State of Maharashtra v. Devahari Devasingh Pawar,*
AIR 2008 SC 1375 [
LNIND 2008 SC 103]:
(2008) 2 SCC 540 [
LNIND 2008 SC 103] :
(2008) 1 SCC 502 (Cri) : 2008 Cr1-J 1593.

91 *Shreekantiah v. State of Bombay,* [
AIR 1955 SC 287
LNIND 1954 SC 180](292-93) :
(1955) 1 SCR 1177 [
LNIND 1954 SC 180] : 1955 Cr1-J 857.

92 *Amrik v. State of Pepsu,*
AIR 1955 SC 309 312 : (1955) 1 SCR 1302 : 1955 Cr1-J 865.

93 *Hori Ram v. Emp.,*
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1 *Dhananjay v. Upadhyaya,*
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LNIND 1960 SC 75](paras 10-11) :
1960 Crlj 1153 :
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2 *Satwant v. State of Punjab,*
AIR 1960 SC 266 [
LNIND 1959 SC 191](para 16) :
(1960) 2 SCR 89 [
LNIND 1959 SC 191] :
1960 Crlj 910 ; *Arulswami v. State of Madras,*
AIR 1967 SC 776 [
LNIND 1966 SC 163].

3 *Chockalingam v. Kannappan,*
(1977) Crlj 1382 (para 21) Mad.

4 *Baijnath v. State of M.P.,*
(1966) 1 SCR 210 [
LNIND 1965 SC 168].

5 *Amrik v. State of Pepsu,*
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1955 Crlj 865 .

6 *Satwant v. State of Punjab,*
AIR 1960 SC 266 [
LNIND 1959 SC 191](para 16) :
(1960) 2 SCR 89 [
LNIND 1959 SC 191] :
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(1975) Crlj 1290 (AP) .

8 *Baijnath* *v.* *State* *of* *M.P.,*
(1966) 1 SCR 210 [
LNIND 1965 SC 168].

9 *Sunil* *v.* *State* *of* *W.B.,*
AIR 1965 SC 706 [
LNIND 1964 SC 63](para 11) :
(1964 7 SCR 70 [
LNIND 1964 SC 63] :
(1965) 1 Crimes 630 .

10 *Satwant* *v.* *State* *of* *Punjab,*
AIR 1960 SC 266 [
LNIND 1959 SC 191](para 16) :
(1960) 2 SCR 89 [
LNIND 1959 SC 191] :
1960 Crlj 910 .

11 *Bakhshish* *Singh* *v.* *State* *of* *Punjab,*
AIR 1967 SC 752 757 : 1967 Crlj 656 :
(1967) 1 SCR 211 [
LNIND 1966 SC 165].

12 *Satwant* *v.* *State* *of* *Punjab,*
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LNIND 1959 SC 191](para 16) :
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13 *Bakhshish* *Singh* *v.* *State* *of* *Punjab,*
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(1967) 1 SCR 211 [
LNIND 1966 SC 165].

14 *Bakhshish* *Singh* *v.* *State* *of* *Punjab,*
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(1967) 1 SCR 211 [
LNIND 1966 SC 165].

15 *Harihar* *v.* *State* *of* *Bihar,*
(1972) 3 SCC 89 (para 66); *Ronald v. State of W.B.,*
AIR 1955 SC 216 [
LNIND 1954 SC 171]:
(1955) 1 SCR 1083 [
LNIND 1954 SC 171] :
1955 Crlj 572 .

16 *Dhanna* *v.* *Delhi* *Municipality,*
(1976) Crlj 878 (para 10) Del.

17 *Pukhraj* *v.* *State* *of* *Rajasthan,*
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LNIND 1973 SC 255]:
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LNIND 1973 SC 255] :
1973 Crlj 1795 .

18 *Saha* *v.* *Kochar,*
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(1979) 4 SCC 177 [
LNIND 1979 SC 300] :
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19 *Sambhu* *v.* *Krishnaswamy,*
AIR 1983 SC 64 [
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20 *Prabhakar* *v.* *Shankar,*
AIR 1969 SC 686 [
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(1969) 2 SCR 1013 [
LNIND 1968 SC 367] :
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21 *Matajog* *v.* *Bhari,*
(1955) 2 SCR 925 [
LNIND 1955 SC 89] (934); *State of Maharashtra v. Narhari,*
AIR 1966 SC 1783 [
LNIND 1966 SC 85](*1785*).

22 *State* *of* *Maharashtra* *v.* *Narhari,*
AIR 1966 SC 1783 1785 : (1971) 1 SCR 317 :
(1970) 2 SCC 56 [
LNIND 1970 SC 218] :
1970 Crlj 1401 .

23 *Bhagwan* *v.* *Mishra,*
AIR 1970 SC 1661 [
LNIND 1970 SC 218](para 5) :
(1971) 1 SCR 317 [
LNIND 1970 SC 218] :
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LNIND 1970 SC 218] :
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LNIND 1964 SC 9](para 7) :
(1964) 6 SCR 275 [
LNIND 1964 SC 9] :
(1965) 1 Crimes 499 .

25 *State of Maharashtra v. Atma Ram,* AIR 1966 sc 1786 : 1966 Crlj 1498 .

26 *Lakshmana v. Sulochana,* (1978) Crlj 522 (para 16) Ker.

27 *Harihar v. State of Bihar,* (1972) 3 SCC 89 .

28 *Namdeo v. Vartak,* AIR 1970 Bom 385 [*LNIND 1969 BOM 20*].

29 *Bhagwan v. Mishra,* AIR 1970 SC 1661 [*LNIND 1970 SC 218*](para 5) : (1971) 1 SCR 317 [*LNIND 1970 SC 218*] : (1970) 2 SCC 56 [*LNIND 1970 SC 218*] : 1970 Crlj 1401 .

30 *Amrik v. State of Pepsue,* AIR 1955 SC 309 312 : (1955) 1 SCR 1302 : 1955 Crlj 865 .

31 *Baijnath v. State of M.P.,* AIR (1966) 1 SCR 210 .

32 *Harihar v. State of Bihar,* (1972) 3 SCC 89 .

33 *Ramnath v. Raji,* (1982) Crlj 1153 (paras9-10) Mad.

34 *Pukhraj v. State of Rajasthan,* AIR 1973 SC 2591 2592 : (1973) 2 SCC 701 : 1973 Crlj 1795 .

35 *Ramayya v. State of Bombay,* AIR 1955 SC 287 [*LNIND 1954 SC 180*]: (1955) 1 SCR 1177 [*LNIND 1954 SC 180*] : 1955 Crlj 857 .

36 *Matajog v. Bhari,* (1955) 2 SCR 925 [*LNIND 1955 SC 89*] (934).

37 *Satwant* *v.* *State* *of* *Punjab,*
AIR 1960 SC 266
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LNIND 1959 SC 191
1960 Crlj 410
[ ](para 16) : [ ] : .

38 *Arul* *v.* *State* *of* *Madras,*
AIR 1967 SC 776
LNIND 1966 SC 163
(1967) 1 SCR 201
LNIND 1966 SC 163
1967 Crlj 665
[ ]: [ ] : .

39 *Prabhakar* *v.* *Shankar,*
AIR 1969 SC 686
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[ ](para 7) : [ ] : .

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41 *Matajog* *v.* *Bhari,*
(1955) 2 SCR 925
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43 *Satwant* *v.* *State* *of* *Punjab,*
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48 *Satya* *Narayan* *v.* *Pillai,*
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(1955) SCA 283 [
LNIND 1954 SC 180] (291).

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LNIND 1966 SC 163](para 6) :
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AIR 1957 SC 458 [
LNIND 1957 SC 2]:
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51 *Baijnath* *v.* *State* *of* *MP,*
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LNIND 1965 SC 168](para 17) :
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(1966) 1 SCR 210 [
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LNIND 1979 SC 300](paras 23, 29); *Harihar v. State of of Bihar,*
(1972) 3 SCC 89 (para 66).

52 *Saha* *v.* *Kochar,*
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LNIND 1979 SC 300](para 26) :
(1979) 4 SCC 177 [
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53 *Balbir* *v.* *Kadiar,*
AIR 1986 SC 345 [
LNIND 1985 SC 356]:
(1986) 1 SCC 410 :
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54 *Baijnath* *v.* *State* *of* *M.P.,*
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LNIND 1965 SC 168](para 17) :
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57 *Pukhraj v. State of Rajasthan,*
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1973 Crlj 1795 .

58 *Pukhraj v. State of Rajasthan,*
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1973 Crlj 1795 .

59 *State of M.P. v. Sheetla Sahai,*
(2009) 8 SCC 617 :
(2009) 3 SCC 901 (Cri) .

60 *Director of Inspection & Audit v. C.L. Subramanium,*
1995 SCC (Cri) 121 :
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61 *Balbir Singh v. D.N. Kadian,*
AIR 1986 SC 345 [
LNIND 1985 SC 356]:
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62 *R. Balakrishna Pillai v. State of Kerala,*
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LNIND 1995 SC 1239]:
(1996) 1 SCC 478 [
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LNIND 1995 SC 1239] :
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63 *Shambhoo Nath Mishra v. State of U.P.,*
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64 *Vinay Krishna v. State,*
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65 *State of Kerala v. Padmanavan Nair,*
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(1999) 5 SCC 690 [
LNIND 1999 SC 585] :
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LNIND 1999 SC 585] :
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66 *State of Bihar v. Kamala Prasad Singh,*
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LNIND 1998 SC 551]:
(1998) 5 SCC 690 [
LNIND 1998 SC 551] :
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67 *N.K. Ogle v. Sanwal Das,*
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LNIND 1999 SC 266]:
(1999) 3 SCC 284 [
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1999 Crlj 2105 .

68 *Gauri Shankar Prasad v. State of Bihar,*
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LNIND 2000 SC 686] :
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69 *Surendra Pandey v. State of Bihar,*
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70 *Rizwan Ahmed Javed Shaikh v. Jammal Patel,*
(2001) 5 SCC 7 [
LNIND 2001 SC 1270] :
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71 *K. Malimuthu v. State of D.S.P.,*
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LNIND 2005 SC 311]:
(2005) 4 SCC 512 [
LNIND 2005 SC 311] :
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73 *Santra Devi Dr. v. Manjeet Singh,*
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74 *Sudesh Garg v. State of Gujarat,* 2007 Crlj NOC 259Guj .

75 *Vinodanand Jha v. State of Jharkhand,* 2007 Crlj 1979 Jhar .

76 *Chapala Vijaya Kumar v. State of Andhra Pradesh,* 2007 Crlj NOC 6AP .

77 *Kamala Kar v. State of Maharashtra,* 2007 Crlj NOC 587Bom .

78 *G. V. Chaudhary v. State of Gujrat,* 2007 Crlj 4481 Guj .

79 *Chaudhury Parveen Sultana v. State of West Bengal,* AIR 2009 SC 1404 [*LNIND 2009 SC 21*]: (2009) 3 SCC 398 [*LNIND 2009 SC 21*] : (2009) 2 SCC 122 (Cri) : 2009 Crlj 1318 .

80 *State v. Kailash,* AIR 1980 SC 522 [*LNIND 1979 SC 504*](para 3, 5, 6,) : (1980) 1 SCC 667 [*LNIND 1979 SC 504*] : 1980 Crlj 393 .

81 *Arulswami v. State of Madras,* AIR 1967 SC 776 [*LNIND 1966 SC 163*](para 6) : 1967 Crlj 665 ; *Saha v. State of M.P.,* AIR 1957 SC 458 [*LNIND 1957 SC 2*]: 1957 Crlj 575 .

82 *Budhi v. Sharma,* (1981) Crlj 993 (P&H) (para 7); *Chandra v. Prakash,* (1963) 2 Crlj 397 400SC .

83 *Chandra v. Prakash,* (1963) 2 Crlj 397 400SC .

84 *Abdul Wahab Ansari v. State of Bihar,* (2000) 8 SCC 500 [*LNIND 2000 SC 1351*] : 2000 Crlj 4431 : AIR 2000 SC 3187 [*LNIND 2000 SC 1351*].

85 *K. Malimuthu v. State of D.S.P.,* AIR 2005 SC 2257 [*LNIND 2005 SC 311*]: (2005) 4 SCC 512 [*LNIND 2005 SC 311*] : 2005 SCC (Cri) 1291 :

2005 Crlj 2190 ; *P.K. Pradhan v. State of Sikkim,*
AIR 2001 SC 2547 [
LNIND 2001 SC 1429]:
(2001) 6 SCC 704 [
LNIND 2001 SC 1429] :
2001 Crlj 3505 .

86 *Sankaran Moitra v. Sadhana Das,*
AIR 2006 SC 1599 [
LNIND 2006 SC 207]:
(2006) 4 SCC 584 [
LNIND 2006 SC 207] :
(2006) 2 SCC 358 (Cri) .

87 *Bhagwan v. Mishra,*
AIR 1970 SC 1661 [
LNIND 1970 SC 218](para 5) :
(1971) 1 SCR 317 [
LNIND 1970 SC 218] :
(1970) 2 SCC 56 [
LNIND 1970 SC 218] :
1970 Crlj 1401 .

88 *Prabhakar v. Shankar,*
AIR 1969 SC 686 [
LNIND 1968 SC 367](para 7).

89 *State v. Kailash,*
AIR 1980 SC 522 [
LNIND 1979 SC 504](paras 3, 5, 6) :
(1980) 1 SCC 667 [
LNIND 1979 SC 504] :
1980 Crlj 393 .

90 *State of Bihar v. Sharma,*
(1991) Crlj 1438 (para.27) : 1992 Supp (1) SCC 222 :
AIR 1991 SC 1260 [
LNIND 1991 SC 184].

91 *R. Balakrishna Pillar v. State of Kerala,*
AIR 1996 SC 901 [
LNIND 1995 SC 1239]:
(1996) 1 SCC 478 [
LNIND 1995 SC 1239] :
1996 SCC (Cri) 1423 .

92 *Raghunath Anant Govilkar v. State of Maharashtra,*
(2008) 11 SCC 289 [
LNIND 2008 SC 281] :
2008 Crlj 3054 .

93 *State of Maharashtra v. I.P. Kalpatri,*
AIR 1996 SC 722 [
LNIND 1995 SC 1213]:
(1996) 1 SCC 542 [
LNIND 1995 SC 1213] :

1996 SCC (Cri) 150 [
LNIND 1995 SC 1213] :
(1995) 4 Crimes 769 .

1 *Chari v. State of U.P.,*
AIR 1962 SC 1573 [
LNIND 1962 SC 137]:
(1963) 1 SCR 121 [
LNIND 1962 SC 137] :
(1962) 2 Crimes 510 .

2 *Chari v. State of U.P.,*
AIR 1962 SC 1573 [
LNIND 1962 SC 137]: (1963) 1 SCR 121 :
(1962) 2 Crimes 510 .

3 *State of Punjab v. Puri.*
AIR 1975 SC 1633 [
LNIND 1975 PNH 4]:
(1975) 4 SCC 112 : 1975 SCC (Cr) 366; *Shamser Singh v. State of Punjab,*
AIR 1974 SC 2192 [
LNIND 1974 SC 246]:
(1974) 2 SCC 831 [
LNIND 1974 SC 246].

4 *R.P. Singh v. Superintendent of Police,*
2007 Crlj 977 Uttaranchal .

5 *State of T.N. v. Thalasingam,* (1994) Supp (2) SCC 405 (443) :
AIR 1995 SC 1314 [
LNIND 2011 SC 542]: 1994 Supp (2) SCC 405.

6 *Advocate-General v. Subba Rao,*
(1991) Crlj 613 (AP) (FB) .

7 *Advocate-General v. Subba Rao,*
(1991) Crlj 613 (AP) (FB) .

8 *Akhilesh v. Union Territory,*
AIR 1981 SC 806 [
LNIND 1981 SC 73](para 5) :
(1981) 2 SCC 150 [
LNIND 1981 SC 73] :
1981 Crlj 407 .

9 *State v. Kailash,*
AIR 1980 SC 522 [
LNIND 1979 SC 504](paras 3, 5, 6) :
(1980) 1 SCC 667 [
LNIND 1979 SC 504] :
1980 Crlj 393 .

10 E.g., Guj. Govt. Notn. G/G/74/103(A) 2974/1844/15-05-1974 [*Bhikhaji v. Barot,* (1982) Crlj 2014 (paras 6, 11)].

11 *K. Nachimuther v. State,* 1994 Crlj 2760 Mad .

12 *Subhajeet Singh v. State of U.P.,* 1994 Crlj NOC 78All .

13 *Mansukhlal Vithaldas Chauhan v. State of Gujrat,* AIR 1997 SC 3400 [*LNIND 1997 SC 1158*]: (1997) 7 SCC 622 [*LNIND 1997 SC 1158*] : 1977 SCC (Cri) 1120 : 1997 Crlj 4059 .

14 *Gopikant Choudhary v. State of Bihar,* (2000) 9 SCC 53 : 2000 SCC (Cri) 1158 .

15 *M. C. Mehta v. Union of India,* 2008 Crlj 360 : AIR 2008 SC 180 [*LNIND 2007 SC 1191*]: (2008) 1 SCC 407 [*LNIND 2004 SC 367*].

16 *Kapur v. State of Punjab,* AIR 1960 SC 866 [*LNIND 1960 SC 96*](para 6) : (1966) 3 SCR 388 : 1960 Crlj 1239 .

17 *Baijnath v. State of M.P.,* AIR 1966 SC 220 [*LNIND 1965 SC 168*]: 1966 Crlj 179 : (1966) 1 SCR 210 [*LNIND 1965 SC 168*].

18 *Gopalan v. State of M.P.,* AIR 1954 SC 362 [*LNIND 1954 SC 59*]: 1954 Crlj 1012 : (1955) 1 SCR 168 [*LNIND 1954 SC 59*].

19 *Ramayya v. State of Bombay,* AIR 1955 SC 287 [*LNIND 1954 SC 180*]: (1955) 1 SCR 1177 [*LNIND 1954 SC 180*] : 1955 Crlj 857 .

20 *Surya* *v.* *Annapurna,*
(1981) Crlj 1191 (para 11) AP.

21 *State of Maharashtra v. Budhikota,*
(1993) 3 SCC 339 [
LNIND 1993 SC 211].

22 *M. Jeevanandhan v. Balaji,*
2007 Crlj 2621 .

23 *Mansukhlal Vithaldas Chauhan v. State of Gujrat,*
AIR 1997 SC 3400 [
LNIND 1997 SC 1158]:
(1997) 7 SCC 622 [
LNIND 1997 SC 1158] : 1977 SCC (Cri) 1120 :
1997 Crlj 4059 .

24 *State of Orissa v. Mrutynjay Panda,*
AIR 1998 SC 715 [
LNIND 1998 SC 41]:
(1998) 2 SCC 414 [
LNIND 1998 SC 41] :
1998 SCC (Cri) 644 :
1998 Crlj 782 .

25 *State v. B.L. Verma,*
(1997) 10 SCC 772 :
1997 SCC (Cri) 1037 .

26 *Ram Kumar v. State of Haryana,*
AIR 1987 SC 735 [
LNIND 1987 SC 40](paras 3-4) :
(1987) 1 SCC 476 [
LNIND 1987 SC 40] :
1987 Crlj 703 .

27 *Ramnath v. Raji,*
(1982) Crlj 1153 (Mad) .

28 *Budhi v. Sharma,*
(1981) Crlj 993 (P&H) (para 7).

29 *Budhi v. Sharma,*
(1981) Crlj 993 (P&H) (para 7).

30 *Budhi v. Sharma,*
(1981) Crlj 993 (P&H) (para 7).

31 *Kapur v. State of Punjab,*
AIR 1960 SC 866 [
LNIND 1960 SC 96](para 6) :

(1966) 3 SCR 388 :
1960 Crlj 1239 .

32 *Somchand* *v.* *Bibhuti,*
AIR 1965 SC 588 [
LNIND 1964 SC 9]:
(1964) 6 SCR 275 [
LNIND 1964 SC 9] :
(1965) 1 Crimes 499 .

33 *Satya* *v.* *Pillai,*
(1982) Crlj 478 (para 4).

34 *Nirmal Singh Kahlon v. State of Punjab,*
AIR 2009 SC 984 [
LNIND 2008 SC 2104]:
(2009) 1 SCC 441 [
LNIND 2008 SC 2104] :
(2009) 1 SCC 523 (Cri) :
2009 Crlj 958 .

35 *Bhikhaji* *v.* *Barot,*
(1982) Crlj 2014 (paras 13-15) Guj.

36 *State* *v.* *Kailash,*
AIR 1980 SC 522 [
LNIND 1979 SC 504]:
(1980) 1 SCC 667 [
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1980 Crlj 393 .

37 *Arulswami* *v.* *State of* *Madras,*
AIR 1967 SC 776 [
LNIND 1966 SC 163](paras 1, 9).

38 *Akhilesh* *v.* *Union Territory*
AIR 1981 SC 806 [
LNIND 1981 SC 73]:
(1981) 2 SCC 150 [
LNIND 1981 SC 73] :
1981 Crlj 407 .

39 *Baijnath* *v.* *State of* *M.P.,*
AIR 1966 SC 220 [
LNIND 1965 SC 168]:
1966 Crlj 179 :
(1966) 1 SCR 210 [
LNIND 1965 SC 168].

40 *Rajinder v. State of Punjab,* (1982) Crl-J 1718 (P&H) para 12; *Balakrishna v. State,* (1995 Crl-J 963 (para 12) Ker.

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 198
Prosecution for offences against marriage.

(1) No Court shall take cognizance of an offence punishable under Chapter XX of the *Indian Penal Code (45 of 1860)* , except upon a complaint made by some person aggrieved by the offence :

Provided **that—**

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf;

(b) where such person is the husband and he is serving in any of the Armed Forces of the Union under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under [41] [Section 494 or Section 495] of the *Indian Penal Code (45 of 1860)* , is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister[42] [or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

(2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code :

Provided **that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the Court, make a complaint on his behalf.**

(3) When in any case falling under Clause (a) of the proviso to sub-section (1), the complaint is sought to be made on behalf of a person under the age of eighteen years or of a lunatic by a person who has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the Court shall, before granting the application for leave, cause notice to be given to such guardian and give him a reasonable opportunity of being heard.

(4) The authorisation referred to in Clause (b) of the proviso to sub-section (1), shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by his Commanding Officer, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) No Court shall take cognizance of an offence under *Section 376 of the Indian Penal Code (45 of 1860)* , where such offence consists of sexual intercourse by a man with his own wife, the wife being under[43] [eighteen years of age], if more than one year has elapsed from the date of the commission of the offence.

(7) The provisions of this section apply to the abetment of, or attempt to commit, an offence as they apply to the offence.

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1. Amendments by Act 45 of 1978.—

The changes made in Cl. (c) of the proviso to sub-sec. (1) facilitate the prosecution for offences against women, by widening the category of persons who may be complainant—to include 'any person *related* to the woman by blood, marriage or adoption', provided leave of the Court is obtained. The Provision has also been extended to an offence under s. 495, I.P.C., which is only an aggravated form of the offence under s. 494.

2. Amendment by Act 5 of 2009.—

In *s. 198 Cr.P.C.* sub-section (6) of for the words "fifteen years of age", the words "eighteen years of age" by *Cr.P.C.* (Amendment) Act, 2008 (5 of 2009) have been substituted which has come into force with effect from 31-12-2009.

Notes on this clause reads as follows :

> Section 198 relates to prosecution for offence against marriage. Sub-section (6) has been amended to raise the age limit of the wife from fifteen years to eighteen years to provide that no Court shall take cognizance of the offence under *s. 376 of the Indian Penal Code* where such offence is alleged by a man's own wife being widow of eighteen years of age.

Sub-section (6) of *s. 198 Cr.P.C.* debars such a wife to file the complaint of commission of rape by her own husband being under eighteen years of age, if such complaint is more than an year after the commission of such offence.

3. Scope of s. 198.—

1. This section combines *old* ss. 198, 198A, 199, 199A, and 199B with changes and with the addition of sub-sec. (7), which is *new* .
2. The *new* s. 198 thus combines all the exceptions to the general proposition that any person may file a complaint excepting the offence of defamation, which is provided in the *new* s. 199.
3. Section 198 relates to the filing of the complaint, for taking cognizance of the offence under s. 190(1)(b). Where the complainant dies thereafter and the offence survives, the Magistrate may direct continuance of the prosecution by some other person, under s. 302 [*old* s. 495], *post.* [44]

4. Sub-sec. (1) : Person aggrieved.—

1. Sub-section (1) relates to Chap. XX of the I.P.C., dealing with 'offences relating to marriage' [s s. 493-498]. A complaint relating to any such offence, abetment thereof or attempt to commit such offence [sub-sec.(7)] can be made only by the 'person aggrieved'.
2. Primarily, this expression would refer to the person injured, *e.g.* , the woman wronged by deceitful cohabitation, in the case of an offence under s. 493. [45]
3. But the section itself engrafts exceptions to the foregoing general rule, *e.g.* , in the Proviso to sub-sec. (1); sub-sec. (2). [46]

   (a) As regards offences under s s. 494-495 I.P.C., the category of 'persons aggrieved' has been enlarged by amending Proviso (c) to sub-sec. (1) in 1978 empowering the Court in his behalf (see *above)* .

(b) Sub-sec. (2) specifies the person aggrieved in case of an offence under s. 497 or s. 498, I.P.C., *viz.* , the husband of the woman, or, where the husband is absent, some person who had care of the woman at the time of commission of the offence (provided the latter obtains leave of the Court).

No prosecution for such person is maintainable even by the Police, unless the husband [47] or such other person makes a complaint within the meaning of s. 2(d),*ante.*

When the wife filed the F.I.R. before the police alleging bigamy and adultery against the husband and the police files a charge sheet against the husband, the provision of *s. 198 Cr.P.C.* though mandatory are not violated. Moreover, the wife also filed a complaint before the Magistrate and the Magistrate issued process. So, the prosecution against the husband is not vitiated.[48]

It is true that the complaint of bigamy has to be filed by the person aggrieved. When the husband of the wife converted into Islam and married for the second time, the first wife does not automatically cease to be first wife of her husband and she is the person aggrieved to file the complaint of bigamy against her husband. [49]

For prosecution of the husband for the offence of bigamy has not been initiated by the second wife but on her behalf by her father but against her wish which she had stated in a sworn statement before the Magistrate that she was a major and had been living happily and peacefully with her husband. In the circumstances, the prosecution of the husband for bigamy at the instance of the father of the second wife cannot be maintained and cognizance taken by the Magistrate on the complaint of the father of the second wife has been quashed. [50]

5. Wife committing bigamy.—

When the wife commits the offence of bigamy, it is the husband alone who is the person aggrieved to file a complaint under s. 405 I.P.C. [51]

6. Sub-section (2) of s. 198, if discriminatory.—

Sub-section (2) of *s. 198 Cr.P.C.* is not discriminatory on the ground that the right to prosecute the adulterer is given only the husband of the adulterers and not extended to the wife of the adulterer.[52]

7. Revision.—

The bar of this section goes to the root of the jurisdiction of the Court to take cognizance; [53] hence, a complaint made by a person who is not authorised by this section shall be without jurisdiction. (See under s. 197,*ante.*)

8. Sub-sec. (2).—

1. Neither sub-sec. (2) of this section, [54] nor s. 497 of the I.P.C. [55] can be challenged as violative of *Art. 14 of the Constitution* , on the ground that though the husband of the adulteress has been given the right to prosecute the stranger adulterer, wife of the adulterer has not been given that right.

2. Neither the husband nor the wife can prosecute each other for adultery. This is not a discrimination on the ground of sex but is aimed at protecting the matrimonial home from prosecution in a Criminal Court, leaving them to amicable settlement, or, failing that, to divorce. [56]

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41 Subs. by Act No. 45 of 1978, S. 17(i) for " Section 494" (w.e.f. 18-12-1978).

42 Ins. by Act No. 45 of 1978, S. 17(ii) (w.e.f. 18-12-1978).

43 Subs. by the *Code of Criminal Procedure* (Amendment) Act, 2008 (5 of 2009), S. 18, for the words "fifteen years of age" (w.e.f. 31-12-2009).

44 *Ashwin v. State of Maharashtra,* AIR 1967 SC 983 [*LNIND 1966 SC 246*](985-86) : 1967 Crlj 943 ; *A.Krishna Reddy v. Indravati* 1983 Crlj 1746 AP .

45 *Ashwin v. State of Maharashtra,* AIR 1967 SC 983 [*LNIND 1966 SC 246*](985-86) : 1967 Crlj 943 ; *A.Krishna Reddy v. Indravati* 1983 Crlj 1746 AP .

46 *Ashwin v. State of Maharashtra,* AIR 1967 SC 983 [*LNIND 1966 SC 246*](*985-86*) : 1967 Crlj 943 ; *A.Krishna Reddy v. Indravati* 1983 Crlj 1746 AP .

47 *Joginder v. State of Haryana,* (1974) Crlj 117 (paras 13-14) P&H.

48 *Mahendra Kumar v. State of U.P.,* 1988 Crlj 544 All .

49 *Lily Thomas v. Union of India,*
AIR 2000 SC 1650 [
LNIND 2000 SC 827]:
(2000) 6 SCC 224 [
LNIND 2000 SC 827] :
2000 SCC (Cri) 1056 [
LNIND 2000 SC 827] :
2000 Crlj 2433 .

50 *Manish Das (Dr.) v. State of U.P.,*
(2006) 6 SCC 536 [
LNIND 2006 SC 1175] :
(2006) 3 SCC 113 (Cri) :
(2006) 4 Crimes 370 .

51 *Raxaben v. State of Gujrat,*
1992 Crlj 2946 Guj .

52 *V. Ravathi v. Union of India,*
AIR 1988 SC 835 [
LNIND 1988 SC 144]:
(1988) 2 SCC 72 [
LNIND 1988 SC 20] :
1988 Crlj 921 .

53 *Narasimham v. Chokkappa,*
AIR 1972 SC 2609 [
LNIND 1972 SC 414]:
(1972) 2 SCC 680 [
LNIND 1972 SC 414] :
1973 Crlj 52 .

54 *Revathi v. Union of India,*
AIR 1988 SC 835 [
LNIND 1988 SC 144](para 5) :
(1988) 2 SCC 72 [
LNIND 1988 SC 20] :
1988 Crlj 921

55 *Sowmithri v. Union of India,*
AIR 1985 SC 1618 [
LNIND 1985 SC 202]: 1985 Supp SCC 137 :
1985 Crlj 1302 .

56 *Narasimham v. Chokkappa,*
AIR 1972 SC 2609 [
LNIND 1972 SC 414]:
(1972) 2 SCC 680 [
LNIND 1972 SC 414] :
1973 Crlj 52 .

THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

[57] [S. 198-A. Prosecution of offences under Section 498A of the Indian Penal Code.

No Court shall take cognizance of an offence punishable under *Section 498A of the Indian Penal Code (45 of 1860)* except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption].

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1. Amendment.—

Section 198A of the Cr.P.C. has been inserted by the *Criminal Law (Second Amendment) Act, 1983* , as the procedural sequel to s. 498A which has been inserted in *Indian Penal Code* , in order to penalise offences against married women which are known as 'dowry offences'. Section 498A of the I.P.C says—

2. 498. Husband or relative of husband of a woman subjecting her to cruelty.—

Whoever, being the husband or the relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

3. Explanation.—

For the purposes of this section, "cruelty" means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

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57 Inserted by Act No. 46 of 1983, S. 5 (w.e.f. 25-12-1983).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

[58] [S. 198-B. Cognizance of offence

No Court shall take cognizance of an offence punishable under *section 376B of the Indian Penal Code (45 of 1860)* where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.]

This new provision has been introduced by the *Criminal Law (Amendment) Act, 2013* on the recommendations of the Justice J.S. Verma Committeee. A new offence under Section 376 was created whereby sexual intercourse by a husband upon his wife during separation has been made punishable. The present procedural provision lays down the conditions for the court to take cognizance of the offence under *Section 376B of the Indian Penal Code* .

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58 Inserted by the *Criminal Law (Amendment) Act, 2013* (13 of 2013), s. 19 (w.e.f. 3-2-2013).

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THE CODE OF CRIMINAL PROCEDURE, 1973 (ACT NO. 2 OF 1974)

CHAPTER XIV
CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

S. 199
Prosecution for defamation.

(1) No Court shall take cognizance of an offence punishable under Chapter XXI of the *Indian Penal Code (45 of 1860)* except upon a complaint made by some person aggrieved by the offence :

Provided **that where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.**

(2) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the *Indian Penal Code (45 of 1860)* is alleged to have been committed against a person who, at the time of such commission, is the President of India, the Vice-President of India, the Governor of a State, the Administrator of a Union territory or a Minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.

(3) Every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

(4) No complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction—

(a) of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government;

(b) of the State Government, in the case of any other public servant employed in connection with the affairs of the State;

(c) of the Central Government, in any other case.

(5) No Court of Session shall take cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

(6) Nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint.

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1. Scope of s. 199.—

This section combines s s. 198(1) and 198B of the *old* Code, with changes, as follows :

(i) Sub-sec. (*1*) corresponds to *old* s. 198 and the first Proviso redrafted, the offence of defamation being brought under this section.

(ii) Sub-sec. *(2)* to *(5)* corresponds to the sub-secs. (*1*) to *(4)* of *old* s. 198B, with the changes shown in italics.

(iii) Sub-sec. (*6*) corresponds to sub-sec. (*13*) and *(14)* of *old* s. 198B redrafted and consolidated.

(iv) Sub-secs. (*S*) to (*11*) of *old* s. 198B have been put under *new* s. 237 regarding the procedure governing trials of cases instituted under the *new* s. 199(2), by the Court of Session (see *post).*

(v) A simpler provision has been made in sub-sec. (4), that the public prosecutor should obtain the previous sanction of the Government concerned in all cases before making complaint.

2. Sub-sec. (1) : 'Person aggrieved'.—

1. Obviously, the person aggrieved by defamation is the person who has been defamed. By judicial interpretation, the expression has been held also to include the following persons ;

(i) The husband, in the case of defamation of a married woman. [59]

(ii) Where a company has been defamed,—the Board of Direction or Manager, Secretary or person holding power-of-attorney on behalf of the company. [60]

When a private limited company is defamed, the complaint for defamation can be filed by any director of the company. The collocation of the word 'by some person aggrieved' in *s. 199 Cr.P.C.* need not necessarily be the defamed person. If a company is described as engaged itself, in nepharious activities, its impact would certainly fall in every director of the company and he can legitimately feel the pinch of it. So, the hostel against which the imputations were published by the public limited company, it is too far fetched to rule out one of its directors feeling aggrieved on account of abuses hurled against other.[61]

2. When Netaji Subhas Bose was defamed by an author, the nephew of Netaji Subhas could file the petition of a complaint on behalf of his uncle. Whereabouts of Netaji had not known and he has been heard for long. So, the nephew was a person aggrieved. [62]

In the case of defamation of husband, the wife would also be treated as the person aggrieved to lodge the complaint. Where such defamation affects and reputation of his wife is well but not so it relates to the purpose of the official duty of the husband. [63]

For defamation of a Guru, disciple is not a person aggrieved. [64]

In case of defamation of a senior member of a religious body which is a society registered under *Societies Registration Act* , an ordinary member is not a person aggrieved. [65]

Where a collective body has been defamed, any member thereof made complaint under s. 199(1) *Cr.P.C.* [66] provided such collective body has an identifiable and definitive body. [67]

Where it is an un-incorporated body, such as, an Ashrama, a member thereof cannot be complained for defamation of the Ashrama of its spiritual head. [68]

On behalf of the accused, it is contended that the alleged imputation being against the father of the complainant, the son has no *locus standi* to file the complaint because he is not a person aggrieved. However, on going through the complaint, it is found that the imputation was not only against the father of the complainant but also against the complainant. So, the complaint by the son cannot be quashed. [69]

A complaint for defamation of a company filed by a person authorized by the Board of Directors by power of

attorney to take legal proceedings on behalf of the company is maintainable. [70]

3. Imputation against un-identifiable and fluctuating body.—

When an indefinite and unascertainable body of persons is defamed, it may not be possible to identify an individual to so that he has been defamed. There cannot be defamed against the community as such when such community is a fluctuating body, such as Syrian Christian and no member of its cannot be said to have been defamed. [71] When some of the leaders than him are alleged to have been defamed. [72]

4. Revision.—

The provision in s. 199(1) being mandatory and going to the root of the jurisdiction of the Court to take cognizance, proceeding founded on a complaint for defamation made by a person who is not an 'aggrieved person' within the purview of s. 199(1) shall be without jurisdiction and liable to be quashed. [73]

5. Sub-secs. (2)-(6).—

These sub-sections correspond to *old* s. 198B, with the following changes:

(a) Sub-secs. (2)-(5) correspond to sub-secs. (1)-(4) of *old* s. 198B, with verbal changes.

(b) Sub-sec. (6) corresponds to sub-sec. (14) of *old* s. 198B.

(c) Sub-secs. (6)-(11) of *old* s. 198B, which provided compensation to be made payable by a Minister or public servant, in case of frivolous accusation, [74] have been *omitted.* It is to be noted that the general provision in s. 250,*post,* is not attracted to a complaint under the present section inasmuch as under s. 199(2), the offence is triable, not by a Magistrate, but by a Court of Session. The result is that there would be no compensation payable by the virtual complainant under the *new* s. 199(2) where the complaint proves to be frivolous.

(d) Old sub-secs. (12), (13) have been omitted as unnecessary, and confusing. [75]

6. Sub-sec. (2): Conditions for its application.—

1. This provision was enacted for the specific purpose of allowing the State to prosecute a person for defamation of a high dignitary or a public servant, when such defamation is directed against the conduct of such dignitary or official in the discharge of his public functions, [76] by way of exception to the general rule enacted in sub-sec. (1) [*old* s. 198] that a court can take cognizance of the offence of defamation only upon a complaint made by the person aggrieved by such defamation. [77] , [78]
2. This sub-section authorises a Court of Session to take cognizance of the offence of defamation (offence under Chap. XXI of the I.P.C.), (a) without the case being committed to it under s. 209,*post*

and (b) upon a written complaint of the Public Prosecutor [see s. 237,*post*], provided the following conditions are satisfied :

(a) The person defamed belongs to any of the following categories :

(i) The President of India;

(ii) The Vice-President of India;

(iii) The Governor of a State;

(iv) A Minister of the Union, of a State or of a Union Territory;

(v) A public servant who was employed in connection with the affairs of the Union or a State, in respect of his conduct in the discharge of his public functions.

(b) The person defamed must occupy any of the foregoing positions at the time when offence of defamation had been *committed.* [79]

7. ‘ Public servant ... public functions’.—

This is condition includes the following ingredients:

(a) The person defamed must be a ‘public servant’ at the time when the offence of defamation had been committed. [As to ‘public servant’, see under s. 197(1),*ante.*]

(b) Such public servant must have been employed in connection with the affairs of the Union or of a State. [80]

(c) The conduct in respect of which he had been defamed must be in the discharge of his public functions in connection with such employment.

8. ‘In the discharge of his public functions’.—

It is to be noted that while the word ‘ *duty* ’ is used in s. 197(1), the word ‘functions’ is used in s. 199(2). From this it has been held that the scope of the protection under s. 199(2) is wider than under s. 197(1). [81]

2. The point to be determined for applying s. 199(2) is not whether the public servant could or could not have done the act imputed in the discharge of his official duty, but whether the imputation was in respect of his public functions. [82]

3. So, it is clear that the public servant concerned was implied in connection with affairs of the State. [83]

When the Andhra Pradesh State Road Transport Corporation has been created by the Government, their function is an affair of the State. So, when the Vice-Chairman of such Corporation was defamed, he answered the description of the public servant under s. 199(2) *Cr.P.C.* Directed the complaint can be filed before the Court of Sessions by the Pubic prosecutor.[84]

9. 'Complaint made by the Public Prosecutor'.—

1. Sub-section (2) is not intended as supplementary to sub-sec.(1), but to prove an *alternative remedy* in the case of defamation of the persons specified in sub-sec. (2), *i.e.* , the President, the Vice-President of India, a Governor the Administrator of a Union Territory, the Minister of the Union, of a State or of a Union Territory, or any other public servant. [85]

2. Consequently, the complaint under sub-sec. (2) is to be signed only by the Public Prosecutor and does not require to be signed by the person aggrieved as well. [86]

3. For the same reason, instead of proceeding under the present provision, the aggrieved public servant may institute a private complaint under sub-sec. (1), in the ordinary manner, as made clear by sub-sec. (6), *post.*

4. The words 'at the time of such commission', make it clear that the special procedure under this section would not be available to a person who has ceased to be a dignitary as mentioned or a public servant when the defamation is alleged to have been committed. [87]

5. When after according sanction to prosecute an accused for defamation of public servant, State Government through public prosecutor sought to withdraw that the prosecution without assigning any reasons, the Sessions Judge was justified in refusing prayer for withdrawal. [88]

6. The trial of such offences is triable by the Court of Sessions direct. [89]

10. Sub-sec. (4): Sanction for prosecution.—

1. Sub-section (2) enables the Public Prosecutor to make a complaint to the Court of Session for taking cognizance of an offence of defamation which comes that sub-section. The present section provides a condition precedent to such complaint, namely, that Public Prosecutor cannot make such complaint without obtaining the previous sanction of the appropriate Government. [90]

2. Under *old* s. 198B(3), the procedure for sanction by the Government was complicated by laying down that the sanction was to be accorded by 'Secretary to the Government authorised in this behalf'. This raised questions such as whether a general or specific authorisation was required, [91] or whether the Governor was to apply his mind or the Secretary, to the matter of giving sanction, [92]

   The *new* Code has obviated such questions by laying down that the sanction shall be given by the 'State Government' or the 'Central Government', as the case may be. For the interpretation of these two expressions, we should turn to Section 3(60) and. *S. 3(8) of the General Clauses Act, 1897* , which, when read with the *Constitution* , will mean the President or the Governor,

acting on the advice of his Council of Ministers, and Arts. 77(2) and 166(2) will be applicable for proof of the sanction made by the President or the Governor respectively.[1]

3. Nevertheless, the general conditions for validity of a sanction, which have already been discussed under s. 197,*ante,* are also applicable to a case under s. 199(2),*e.g.* , that the sanction would be invalid if it appears that it was given by the sanctioning authority without applying his mind. [2] Thus, if the facts which constitute the charge do not appear on the face of the sanction, it must be established by extraneous evidence that those facts were placed before the sanctioning authority before giving his sanction. [3]

11. Sub-sec. (6).—

This sub-section makes it clear that the personal right of the defamed person to make a complaint and the right of the Public Prosecutor to make a complaint under s. 199(2) are independent rights and that (a) the mere fact that a defamed public servant has himself made a complaint would not bar a complaint being made by the Public Prosecutor under the present section; [4] or (b) the fact that the Public Prosecutor has made a complaint would not debar the public servant to make private complaint, as an individual. [5]

12. Effects of non-compliance.—

1. The provisions of this section are mandatory, which conclusion is affirmed by s. 222(4) [*old* s. 238(3)]. [6]
2. Hence, the Court shall have no jurisdiction and its orders shall be a nullity in the following cases. *Inter alia* :

(i) Where there is no proper complaint or where the facts stated therein did not make out the offence alleged in the complaint or the [7] complaint was not made by a person 'aggrieved', [8] in a case coming under sub-sec. (1).

(ii) Where, in a case coming under sub-sec. (2), the complaint was made without a proper sanction of the Government as required by sub-sec. (4); [9] or the sanctioning authority granted the sanction without applying his mind to the facts of the case or without having the proper facts and materials before him. [10]

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59 *Chhotalal v. Nathabhai,* (1900) 25 Bom 151(FB) .

60 *Phaltan Sugar Wks.* v. *Mansingrao,* (1977) Crlj 2021 (paras 14-15).

61 *John Tomas v. K. Jagadeesan,* (2001) 6 SCC 30 [LNIND 2001 SC 1323] 2001 SCC (Cri) 970 2001 Crlj 3322 AIR 2001 SC 2651 [LNIND 2001 SC 1323] [ ] : : : [ ].

62 *Patsharp v. Dwijendra Nath Bose,* (1954) 1 Crlj 364 .

63 *Nazim v. State of Kerala,* 1988 Crlj 487 Ker .

64 *Ganesh v. Dibyanand,* 1980 Crlj 1036 Del .

65 *Prem Pal Singh v. Phool Singh,* 1980 Crlj NOC 160.

66 *Sahib Singh v. State of U.P.,* AIR 1965 SC 1450 ; *Tek Chand v. Karanjia,* 1969 Crlj 536 All .

67 *Narasimham v. Chokkappa,* AIR 1972 SC 2609 [LNIND 1972 SC 414] (1972) 3 SCC 889 1972 SCC (Cri) 790 [ ]: : .

68 *Dhirendra v. Rajat,* AIR 1970 Cal 216 [LNIND 1969 CAL 197] AIR 1970 Cal 248 [LNIND 1969 CAL 196] [ ]; *Sukomal v. Saulamari Ashrama,* [ ].

69 *Ram Swarup v. Mohammed Javed Razack,* AIR 2005 SC 2005 [LNIND 2005 SC 189] 2005 Crlj 1725 (2005) 10 SCC 393 [LNIND 2005 SC 189] 2005 SCC (Cri) 1549 [LNIND 2005 SC 189] [ ]: : [ ] : [ ].

70 *C.M. Ibrahim v. Tata Sys Ltd.,* 2009 Crlj 228 Kant .

71 *M.P. Narayana Pillai v. M.P. Chako,* 1986 Crlj 2002 Ker .

72 *K. Mathew v. Balan,* 1985 Crlj 1039 Ker .

73 *Nazeem v. State of Kerala,* (1988) Crlj 487 (paras 3A, 4) Ker.

74 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 [*LNIND 1960 SC 243*] : (1961) 1 Crimes 566 . [This case gives the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

75 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 1 SCR 63 : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

76 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

77 *Sahib Singh v. State of U.P.,* AIR 1965 SC 1451 [*LNIND 1965 SC 15*]; *Tek Chand v. Karanjia,* (1969) Crlj 536 (All) .

78 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

79 In this connection, see the different wording of s. 197(1),*ante.*

80 *Dasaratharami v. Dara,* (1980) Crlj 377 (paras 1-2).

81 *Muneshwara v. State,* AIR 1961 All 24 [*LNIND 1960 ALL 79*](paras 35-36).

82 *Sankar v. State,* AIR 1959 Ker 100 108 [*LNIND 1958 KER 252*].

83 *S.D. Reddy v. H. Dara,* 1980 Crlj 377 AP .

84 *Vdayan Telegu Daily v. State of Andhra Pradesh,* 1987 Crlj 145 AP .

85 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

86 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

87 The contrary view in *Ramesh v. P.P.,* AIR 1960 All 763 [*LNIND 1959 ALL 214*](*768*) is *not* good law.

88 *T. Venkatram Reddy v. D. Gopala Krishnan Raju,* 1994 Crlj 1247 .

89 *Public Prosecutor v. Anwar Kamala,* 1979 Crlj NOC 136AP .

90 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

91 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

92 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

1 Cf. *Ishwarlal v. State of Gujarat,* AIR 1968 SC 870 875 : (1968) 2 SCR 267; *State of U.P., v. Gupta,* AIR 1970 SC 679 (*685*) : (1969) 3 SCC 775 [*LNIND 1957 SC 2*].

2 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 [*LNIND 1960 SC 243*] : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

3 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 [*LNIND 1960 SC 243*] : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].

4 *Dilip v. State,* (1976) CHN 48 (para 9).

5 *Dilip v. State,* (1976) CHN 48 (para 9); *Sant Lal v. Krishnan,* (1976) Crlj 215 (Del) .

6 *Abdul v. Haji,* AIR 1960 SC 82 [*LNIND 1959 SC 161*](paras 11-13) : 1960 Crlj 158 .

7 *Abdul v. Haji,* AIR 1960 SC 82 [*LNIND 1959 SC 161*](paras 11-13) : 1960 Crlj 158 .

8 *Ashwin v. State of Maharashtra,* AIR 1967 SC 983 [*LNIND 1966 SC 246*]: 1967 Crlj 943 .

9 *Gour Chandra Rout v. Public Prosecutor,* AIR 1963 SC 1198 [*LNIND 1962 SC 390*](para 3) : 1963 Supp (2) SCR 447 : (1963) 2 Crimes 194 .

10 Cf. *Joshi v. State of U.P.,* AIR 1961 SC 387 [*LNIND 1960 SC 243*](paras 8-9, 11) : (1961) 2 SCR 63 [*LNIND 1960 SC 243*] : (1961) 1 Crimes 566 . [This case give the history of the section; see also 41st Rep. of the Law Commission, paras 15, 139 *et seq*].