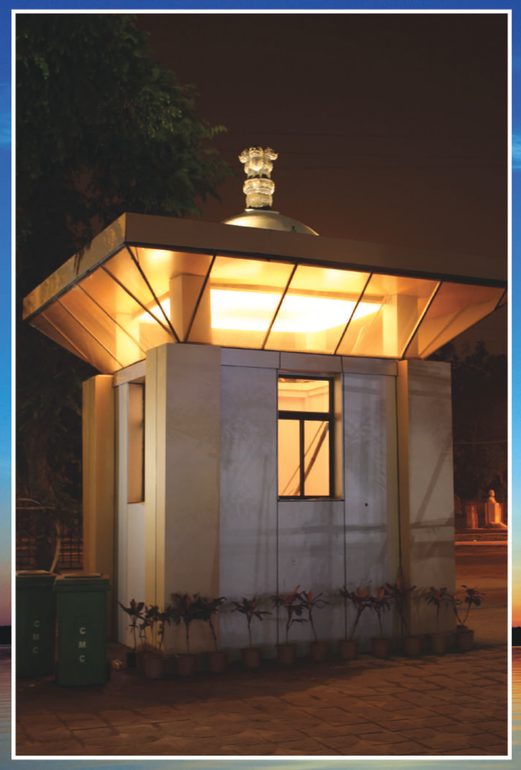

VIDYA

NEWS LETTER

11th Issue 4th Quarter - 2013

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March 21, 2014

MESSAGE

I am happy to know that Odisha Judicial Academy is going to publish its Newsletter "Vidya" (11th Issue) 4th Quarter, 2013. The Issue covers programmes held in the Academy wherein Hon'ble Judges of Supreme Court of India have guided the deliberations and also articles contributed by the Hon'ble Judges and judicial officers. I am sure the Issue will be of immense benefit to the legal fraternity.

I wish the efforts of the Academy all success.

(Adarsh Kumar Goel)

Justice Ajay Manikrao Khanwilkar
CHIEF JUSTICE

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Dated : 27.11.2013

MESSAGE

*I am glad to know that Odisha Judicial Academy is going to organize a "National Conference" on "**Plea Bargaining & Sentencing**" on 30th November and 1st December, 2013 at Cuttack.*

I feel distinctly honored on being invited to attend this Conference which is immensely important and relevant in the current situation of docket explosion, a problem, which has posed serious challenge in providing timely and efficacious justice to the seekers.

The concept of Plea Bargaining which found its way into our criminal jurisprudence by way of Chapter 21-A of the Criminal Procedure Code was brought on the statute book through Criminal Law (Amendment Act), 2005. Though, the mechanism of Plea Bargaining had been applied with considerable success in the Countries like U.S.A., U.K. and Canada, in the sense that around 90% cases in these jurisdictions are being resolved through the process of Plea Bargaining, its efficacy in the Indian Judicial System since its inception in 2005 has not been very encouraging, therefore, it is right time to examine, discuss and deliberate upon various issues which have a close bearing upon the effective

implementation of this concept so that it can be applied to de-clog the Criminal Justice Delivery System from ever increasing arrears. Programmes like the present one can indeed be quite helpful in generating awareness, discussing relevant issues and evolving ways and means to prepare a road map for its effective application.

The issue of Sentencing has also been a debated one during past couple of decades and concerns have been expressed from judicial quarters that we lack policy orientation as far as sentencing is concerned. I hope, that the present Conference will help in discussing the relevant issues and will also pave the way for formulation of sound and logical Sentencing Policy.

I wish all the success to the Conference.

(Ajay Manikrao Khanwilkar)

Justice Indrajit Mahanty

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MESSAGE

I am immensely pleased to know that the Academy is going to publish a quarterly Newsletter **"Vidya"** (11th Issue) 4th Quarter, 2013.

It is a matter of great pride that the Academy is in the pursuit of fulfilling the requisites and aspiration of the judicial fraternity of the State. Different conference and Seminar organized by this Academy have the occasion of delivery of speeches by Hon'ble Mr. Justice A.K.Patnaik, Judge, Supreme Court of India & Hon'ble Mr. Justice V.Gopala Gowda, Judge, Supreme Court of India which are printed in this issue and I trust that they will render necessary benefit to every Judicial Officer of the State.

Members of legal fraternity are to expound their views to be part of contents of **"Vidya"**. Their contribution to enrich Newsletter should continue.

May best wishes to the Newsletter **"Vidya"**.

Chairperson
Odisha Judicial Academy, Cuttack

Editorial Note ...

It is said that the Justice should not only be done, it must also be ensured. Such a standard of perfection can be achieved only if all the organs of Justice Delivery System such as Judges, lawyers, police officials, forensic experts and executive officers of other wings are also well equipped with infrastructure tools, legal and scientific literature. It is therefore said that updated knowledge is the real parameters to enhance the knowledge. It is also often said that sharing of knowledge is also gaining the knowledge but the assurance of having special knowledge or adequate knowledge may be difficult without any training on legal and judicial education. It is, therefore, training is necessary to enhance the capacity in updating their knowledge so as to keep space.

The concept of instutionalised legal and judicial education even in the developed countries of the world is not too old. Training in the judicial field was initiated and accepted in France in 1958. This was followed by the US establishing the National Judicial College in 1963. United Kingdom followed by establishing the Judicial Studies Board in 1979. Of Late, other countries including India established formal training for Judicial Officers.

Our academy although 10 years old but has imparted training on substantive and procedural law to the in-service Judicial Officers and newly recruited Judicial Officers. Recently, Hon'ble the Chief Justice of India and other Hon'ble Judges of Supreme Court of India while inaugurating the new building of the Academy, stressed upon the training programs of the Academy and expressed their satisfaction on its performance. Subsequently, Hon'ble Judges of the Supreme Court of India visited the Academy and also advised the Academy to keep it up with the programs and the curriculum on the subjects imparted to the Judicial Officers. So, the Judicial Officers of the State must identify themselves as modern Judges and acquire adequate knowledge to justify their claim. Not only this but also, they have to discharge their duties and functions by keeping ego outside and observing impartiality, integrity with hard work. The values must be inculcated within the Judicial Officers to show their expertise in adjudication of rights of the common man who has reposed confidence on Justice Delivery System.

Director,
Odisha Judicial Academy, Cuttack

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Speech on
Plea Bargaining & Sentencing
HON'BLE MR. JUSTICE A. K. PATNAIK
JUDGE, SUPREME COURT OF INDIA

Respected Justice S.B. Sinha, my brother Justice Gopala Gowda, Chief Justice Goel of the Orissa High Court, Chief Justice Sen Gupta of the Andhra Pradesh High Court, Justice Kanade of the Bombay High Court, Justice Sarangi of the Orissa High Court, all my brother and sister Judges of different High Courts, sitting and retired, Judicial Officers present, Ladies and Gentlemen.

Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India addressing the participants.

When Justice Indrajit Mahanty of the Orissa High Court telephoned me and invited me to this National Conference on Sentencing Policy, I requested him to hold the Conference also on Plea-Bargaining because after Plea- Bargaining was introduced in the Criminal Procedure Code by the Criminal Law Amendment Act, 2005, we have discussed this topic in different Judicial Academies only on a few occasions and thereafter stopped discussing on this topic. The result is that the provisions of Plea-Bargaining in Chapter XXI-A of the Criminal Procedure Code have not been implemented by our courts throughout the country. This will be clear from the statistics of cases settled by Plea- Bargaining as compared to by Lok Adalat, Mediation and Conciliation in different States of the country given below:

DATA WITH REGARD TO LOK ADALATS, MEDIATION, CONCILIATION AND PLEA-BARGAINING

S. No.	SLSAs	No. of cases disposed of through ADR methods			
		Lok Adalat	Mediation	Conciliation	Plea Bargaining
1.	Andhra Pradesh	162634	433	14	Nil
2.	Arunachal Pradesh	7			
3.	Assam	60022	87		
4.	Bihar	22552	204		2
5.	Chhattisgarh	298213	613	2	592
6.	Goa	321	4	8	
7.	Gujarat	223274	541	14	
8.	Haryana	49091	5854		
9.	Himachal Pradesh	202	136		
10.	Jammu & Kashmir	2984	64	82	
11.	Jharkhand	119919	1494	203	13
12.	Karnataka	35398	216	20	
13.	Kerala	6573	1413	16	
14.	Madhya Pradesh	5593	147		27
15.	Maharashtra	27031	12676	75	
16.	Manipur				
17.	Meghalaya	1050	5	3	
18.	Mizoram	102	4		12
19.	Nagaland				
20.	Orissa	98602	795	1035	
21.	Punjab	261003	1679	7	0
22.	Rajasthan	264104	1224	150	
23.	Sikkim	435	19		
24.	Tamil Nadu	3695			
25.	Tripura				
26.	Uttar Pradesh	217825	1622	307	41
27.	Uttarakhand		107	39	
28.	West Bengal	130	2		579
29.	Andaman & Nicobar Islands				
30.	Chandigarh U.T	597	448		
31.	Dadra & Nagar Haveli U.T.	102			
32.	Daman & Diu				
33.	Delhi	9499		248	2438
34.	Lakshadweep				
35.	Puducherry				

Until I came to Supreme Court and heard a number of criminal matters filed under Article 136 of the Constitution, I had not realized the importance of Plea-Bargaining. During my more than four years' tenure as a Judge of the Supreme Court, several matters have come up before the Supreme Court via the High Courts in which the allegations against the accused, though trivial and amount to small offences, the High Court had refused quashing of the criminal cases against the accused saying that the allegations can be proved or not proved only at the trial. The result is that many accused persons have had to appear in the courts on different dates and face trials. Many of these trials have ended in conviction of the accused for petty offences and the convictions have also been confirmed by the High Court. When the accused approaches the Supreme Court in such cases, it is not possible for the Supreme Court also to set aside their convictions considering the facts that the Trial Court and the High Court have found the accused guilty of the offences. As a sentence of imprisonment following the conviction affects the liberty of the accused, he has no option but to take a chance in the Supreme Court by filing a special leave petition. The result is, the Trial Courts, the High Courts and the Supreme Court are troubled by a large number of such cases of petty offences and have very little time to try the most serious offences and hear other civil and constitutional maters.

Section 265A Cr.P.C. permits Plea-Bargaining in the case of all offences other than offences for which the punishment is death or imprisonment of life or imprisonment for a term extending to seven years and other than offences which affect the social economic condition of the country or have been committed against women or children below the age of 14 years. Examples of such offences in respect of which Plea-Bargaining is permissible under Section 256A of the Cr.P.C. are:-

Section	**Offences**	**Punishment**
323	Voluntarily causing hurt	Imprisonment for one year or fine of Rs.1,000/- or both
324	Voluntarily causing hurt by dangerous weapons or means	Imprisonment for three years, or fine or both
334	Voluntarily causing hurt on grave and sudden provocation not intending to hurt any other than the person who gave the provocation	Imprisonment for one month or fine of Rs.500/- or both
341	Wrongfully restraining any person	Simple imprisonment for one month or fine of Rs.500/- or both
342	Wrongfully confining any person	Imprisonment for one year or fine of Rs.1,000/- or both
506	Criminal Intimidation	Imprisonment for two years or fine or both

In such cases, if compounding is not possible, the Court can dispose of the cases through Plea-Bargaining by a sentence which satisfactorily disposes of the case and by awarding compensation to the victim, only if the accused files the application for Plea-Bargaining voluntarily.

The truth is that most of the petty offences are in fact committed by the accused on account of socio-economic and emotional factors, but the accused does not plead guilty and chooses to be tried. Our criminal justice system is unnecessarily put to lot of strain. If an accused has really committed the offence and voluntarily admits the commission of the offence and prays that he should be let off with a lesser punishment, the court should readily dispose of the matter following the provisions of Plea-Bargaining in the Cr.P.C. This is the only way we can make our criminal justice system more humane and truthful.

Plea-Bargaining has succeeded in America where 75% of the criminal cases are disposed of on the basis of Plea-Bargaining. I do not see any reason as to why it cannot succeed in India. I think we have not given the provisions relating to Plea-Bargaining in the Criminal Procedure Code a chance. It is time that Judicial Academies in different States emphasise on the need to implement the provisions of Plea-Bargaining in the Criminal Procedure Code through our Judicial Officers of various subordinate courts.

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PLEA BARGAINING

HON'BLE MR. JUSTICE V. GOPALA GOWDA, JUDGE, SUPREME COURT OF INDIA

Good morning everyone. My lord Hon'ble Justice A. K. Patnaik, Judge, Supreme Court of India, My Lord Justice S.B. Sinha, Former Judge, Supreme Court of India. Hon'ble Mr. Justice A.K. Goel, Chief Justice of Orissa High Court, Hon'ble Mr. Justice K.J. Sen Gupta, Chief Justice, Andhra Pradesh High Court, Hon'ble Mr. Justice V. M. Kanade, Judge, Bombay High Court, Hon'ble Justice Dr B.R Sarangi, Judge, Orissa High Court, Madam Prativa Patnaik, My Sister & Brother, Former Brother Judges of Orissa High Court, other Brother Judges from different Courts in India, My Sister and Brother Judges who are participants from 18 State District Judiciary, the members of the Registry of Orissa High Court, the Directors of various Judicial Academies, who are participating in this seminar, respected invitees, ladies and gentleman.

Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India addressing the participants.

The topic of our discussion today is 'Plea Bargaining', a relatively new concept in our criminal justice system. At the outset, I must congratulate the Chief Justice of Orissa High Court, the Patron In Chief of Odisha Judicial Academy and Board of Governors of Judicial Academy for having arranged this meaningful National Seminar to deliver a speech on an important topic which has been confronting all of

us. Justice Goel made his presentation on Chapter 21-A of the Criminal Procedure Code. For the last 8 years, all over the country, colloquium and seminars were being conducted on these topics. We have been deliberating on the subject but still there is a dilemma in the minds of Judges. We are happy that the Orissa Judicial Academy has taken a lead and thought that plea bargaining, sentencing policy and death penalty are important topics for which today's seminar is being organized. Therefore, on behalf of everyone of us, I am congratulating them for giving the opportunity for all of us to apply our mind and deliberate, discuss and resolve how to go about for effective implementation of these provisions of the Criminal Procedure Code.

Mahatma Gandhi, in his Autobiography 'The Story of my Experiments with truth' notes an incident that happened during his life in South Africa. A friend of him was to be prosecuted for smuggling and he approached Gandhi to save him. Gandhi asked him to offer to pay the penalty the Customs officer fixed the odds of doing which was that the officer would be agreeable to that, or go to jail. Gandhi told him, 'I am of the opinion that the shame lies not so much in going to jail as in committing the offence. The deed of shame has already been done. Imprisonment you should regard as a penance. The real penance lies in resolving never to smuggle again.' Gandhi met the customs officer and told him how penitent his friend was feeling and the case against him was compromised.

I choose to take a more conservative view of plea bargaining as I feel the system have some inherent disadvantages to it.

I will go through the basic aspects of the concept and its particular relevance to India.

The criminal justice system in India opened its eyes towards the concept of plea bargaining to avoid the menace of abnormal delays in the disposal of criminal trials and appeals and to alleviate the sufferings of the large number of under trial prisoners languishing in jails for many years. While ADR mechanism is available to avoid backlog and unwarranted delays in the realm of civil justice administration, no such mechanism has been traditionally instituted in that of criminal justice administration, where backlog and delay is much more acute.

Plea bargaining may be understood as a situation where the accused defendant and the prosecutor reach a mutually satisfactory disposition of a criminal case subject to the approval of the court. It is thus a non trial procedure and in a way works against the general principle of criminal justice administration. Most courts and scholars around the world have had a critical approach to plea bargaining till the mid 20th century. One strong argument against it was that it results in undue leniency towards offenders. However now, in spite of drawbacks that are pointed out by critics, the mechanism has found favour with many jurisdictions around the world. The U.S. Supreme Court in Santobello v. New York [404 U.S., 257, 260, 197] observed that it is an essential component of the administration of justice. Plea bargaining has now become a prominent feature of the American Justice System. As per the **Sourcebook of Criminal**

Justice Statistics, published by the U.S. Department of Justice, Bureau of Justice Statistics, over 90% criminal cases in the U.S. are settled by plea bargaining.[1] This example could adequately show that plea bargaining helps deal with backlog of cases and expedite delivery of justice.

In general, plea bargaining can be classified into three types - charge bargaining, sentence bargaining and fact bargaining. While all three of these involve implied sentence reductions, these differ in the manner of achieving those reductions. In charge bargaining the defendant pleads guilty to reduced charges. It occurs when a defendant pleads guilty to necessarily included offences.[2] Sentence bargaining assures lighter or alternative sentences in return for a defendant pleading guilty. In the U.S. it can be granted only if approved by the trial judge. A sentence bargain may both allow the prosecutor to obtain a conviction to the most serious charge, and assure the defendant of an acceptable sentence. In the type of plea bargaining known as fact bargaining, negotiation involves an admission to certain facts in return for an agreement not to introduce certain other facts into evidence. This type of plea is least used in negotiations.

INDIAN LAW :

The practice of plea bargaining, is relatively new in India. Criminal Law (Amendment) Act 2005 inserted chapter XXIA on 'Plea Bargaining' in the Code of Criminal Procedure 1973. The system of plea bargaining as it exists in India today does not give recognition to any existing practice akin to plea - bargaining. It, on the other hand, lays down a procedure with a distinct feature of enabling the accused to file an application for plea-bargaining in the court when the trial is pending.

Before 2005, Courts looked at plea bargaining with an eye of suspicion and as something that is illegal, unconstitutional and against public policy.[3]

In the 1968 Supreme Court decision in Madanlal Ram Chandra Daga v. State of Maharashtra[4] the court observed that: "in our opinion is it very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the court thinks that leniency can be shown on the facts of the case, it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered for the complainant through their agency. "

Another important decision in this regard is Murlidhar Meghraj Loya v. State of Maharashtra[5] wherein the court observed that the practice of plea bargaining pleases everybody except the silent society, which is the distant victim. "The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisional excursions to higher courts, the court sighs

1. Kathleen Maguire and Ann L. Pastore, Sourcebook of Criminal Justice Statsitics 1995, U.S. Department of Justice
2. The paragraph is from DJA Journal (2006) 5 at p. 275. The footnoted sentence from David Levinson, Encyclopedia of Crime and Punishment, (2003 Vol 3) SAGE Publications, p. 1147
3. State of U.P. v. Chandrika AIR 2000 SC 164, also K.A.Sheikh v. State of Gujarat AIR 1980 SC 854
4. 1968 Cri LJ 1469
5. 1976 Cri LJ 1572 : AIR 1976 SC 1929

relief that its ordeal, surrounded by a crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old professions. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through predetermined legislative fixation of minimum sentences and by subtly subverting the mandate of the law."

P.N. Bhagwati J. in Thippaswami v. State of Karnataka[6] observed that it would be violative of Article 21 of the Constitution of India to induce or lead an accused into pleading guilty on the promise that he would be given only a lighter punishment and in appeal revision, to enhance the sentence. The court held that in such cases the court should set aside the conviction and sentence and remand the case to the trial court for trial so that the accused can defend him and if found guilty, proper sentence may be imposed on him too.

Then in 1980, in the case of Kacchia Patel Santhilal Koderlal v. State of Gujarat[7] , Bhagwati. J. observed that allowing plea bargaining is against public policy, unreasonable and violative of Article 21.[8] The conviction of an accused based on a plea of guilty entered by him as a result of plea-bargaining with the prosecution and the Magistrate must be held to be unconstitutional and illegal. The court also observed that this practice would also tend to encourage corruption and collusion and as a direct consequence, contribute to the lowering of the standard of justice. The court remanded the case back for trial to the trial court, directing the magistrate to ignore the plea of guilt of the appellant.

It was held in State v. Chandrika that except in the case of those offences that are compoundable under Section 320 of Cr.P.C., the concept of negotiated settlement in criminal cases is not permissible. It was also held that this method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences does not require encouragement. Neither the State nor the public prosecutor nor even the judge can bargain that evidence would not be lead or appreciated in consideration of getting flee bite sentence by pleading guilty. Criminal cases have to be decided on merits. If the accused confesses guilt, appropriate sentence has to be implemented.

The Supreme Court in Kripal Singh v. State of Haryana 2000(1) Crimes 53 (SC) observed that neither the Trial Court nor the High Court has the jurisdiction to bypass the minimum sentence prescribed by law on the premise that a plea bargain was adopted by the accused.

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6. 1983 Cri LJ 1271
7. 1980 CriLJ 553
8. Ibid at para 4

After this, there was a shift in judicial thinking, leading up to plea bargaining being introduced into the criminal procedural system. The 2003 Report of the Committee on Reforms of the Criminal Justice Systems[9], under the chairmanship of the inimitable Dr. Justice V.S. Malimath, speaks of the success of the plea bargaining system as implemented in the U.S. and that the same has to be seriously considered for India. It further went on to say that the U.S experiment shows that plea bargaining helps the disposal of accumulated cases and expedites delivery of criminal justice. The 142nd Report of the Law Commission, of 1991, adverted to the concessional treatment of offenders who are on their own initiative choose to plead guilty without any bargaining, and observed that when the accused feels contrite and wants to make amends, and is honest and candid to plead guilty in the hope that the community will enable him to pay the fine for the crime with a degree of compassion, then he deserves to be treated differently from the accused who seeks trial involving considerable time -cost and money- cost of the community. The Commission in the Report also noted that about 75% of the convictions in U.S.A. are a result of plea bargaining, while contrasting it with the 75% of acquittals in India. Plea bargaining was suggested as a viable alternative to deal with arrears of criminal cases in India. The 154th Report of the Law Commission, 1996, echoed the observations of the 142nd Report and recommended that this concept may be made applicable as an experimental measure to offences which are liable for punishment with imprisonment of less than 7 years and/or fine and also cautioned that plea bargaining should not be available to habitual offenders, and those accused of socio-economic offences and offences against women and children. The recommendations of this report have been fairly incorporated in the CrPC, vide the 2005 amendment.

CRIMINAL LAW (AMENDMENT) ACT, 2005

Chapter 21A was inserted to the Code of Criminal Procedure, and Ss. 265A to 265L were added to incorporate the concept of plea bargaining into our criminal jurisprudence. The procedure for plea bargaining in India is briefly given below:

- A person accused of an offence for which the punishment is not death or imprisonment for life or for a term exceeding 7 years may file an application for plea bargaining in the court in which such offence is pending for trial.
- Application should contain a brief description of the case, including the offence and shall be accompanied by an affidavit sworn by the accused stating that he is voluntary preferred plea bargaining after understanding the nature and extent of punishment provided under the law for that offence, and that he has not been previously convicted by a court for the same offence.
- After receiving the application, the Court shall issue a notice to the public prosecutor or the complainant and the accused to appear on the date fixed for the case.
- The Court then proceeds to examine the accused alone in camera without the presence of the other party in the case, in order to satisfy itself that the accused has filed the application voluntarily.
- Once the Court is satisfied on this, it shall provide time to the parties to work out a mutually satisfactory disposition of the case together(including the victim).

9. Report of March 2003

- This may include giving to the victim by the accused the compensation and other expenses during the case and thereafter fix the date for further hearing, and the Court shall prepare a report of such disposition.
- As per Section 265 E, where a satisfactory disposition has been worked out, the Court shall dispose of the case in the following manner:-
  - o Award compensation in accordance with the disposition and hear parties on quantum of punishment or releasing accused on probation as per law;
  - o If the question of probation does not apply, the Court shall decide the quantum of punishment;
  - o If minimum punishment is provided for the offence, it may sentence the accused to half of such punishment;
  - o If minimum punishment is not provided, then it may sentence the accused to one-fourth of the punishment provided.
- The accused may also avail the benefit under Section 428 of the Cr.P.C. which allows setting off the period of detention undergone by the accused against the sentence of imprisonment in plea bargained settlements. (Section 265 L)

ADVANTAGES OF PLEA BARGAINING

1. Avoids the uncertainty of trial, minimizes the risk of undesirable results for either side
2. It is speedier and saves money
3. Permits more participation, is cooperative and reduces stress

Sikri. J [10] argues that plea bargaining helps courts and prosecutors manage caseloads. Judges also reason that using plea bargains to process out offenders who are not likely to do much jail time leads to fewer problems with overcrowding. The state is thus more easily able to fulfil its constitutional obligation to provide a speedy trial.

Plea bargaining projects a victim-oriented reform to the criminal justice administration by providing greater respect and consideration towards victims and their rights. According to A.K. Sikri J. the responsiveness to the personal needs of victims, witnesses and accused that plea bargaining can help to maintain a high level of confidence in the administration of justice among those directly affected by its processed. It provides greater choices to the victim in satisfactory disposition of the case.

THE OTHER SIDE OF PLEA BARGAINING

While many in India are touting the introduction of the refreshing option of plea bargaining into the system of criminal procedure, the dark side of this system is apparent in the country from where it is borrowed - the United States of America.

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10. Justice A.K.Sikri, Reforming Criminal Justice System: Can plea bargaining be the answer, Nyaya Deep 2007 (8) at p. 39

- Unconstitutional (against the right against self-incrimination)
- Can result in corruption
- Reduced deterrent effect

The criticism is mainly of two types, one being that plea bargaining is not fair as the defendant gives up some of their constitutional rights, especially the right to trial. Another criticism stresses on the sentencing policy. The criticism is that the sentencing policy that prescribes particular punishment for particular kind of offences is affected by plea bargaining. It is also suggested that incorporating plea bargaining in the system might reduce the deterrent effect of punishments as the criminal will have to spend only lesser time in jail. In People v. Griffin[11] - Judhe Van Voorhis observed that the practice of accepting pleas to lesser crimes is generally intended as a compromise in situations where conviction is uncertain of the crime charged. In United States v. Jackson, 390 U.S. 570 (1968) the Court questioned the validity of the plea bargaining process if it burdened a defendant's right to jury trial. The issue at hand was a statute that imposed death penalty only after a jury trial. Accordingly, to avoid death penalty, defendants were waiving trials and eagerly pleading guilty to lesser charges. Potter Stewart. J. writing for the majority, noted that the problem with the state was not that it coerces guilty pleas but that it needlessly encouraged them. 'The case against Plea Bargaining'[12], released by the Cato Institute in the USA, speaks of the inherent discrimination of the judicial system to accused persons who seek trial instead of pleading guilty.

The system of plea bargaining is relatively new in India, and it is now for the courts in the country to keep up the spirit of the law to keep justice alive. Judicial independence and impartiality should not be forgotten and accused persons should not be coerced into entering a guilty plea to induce bargaining. Another aspect may be the reformative potential of plea bargaining. The 142nd Report of the Law Commission notes that plea bargaining and resultant concession in punishment would enable the accused to start life afresh after undergoing a lesser sentence. This is an important aspect of plea bargaining, especially since our country is looking at improving our criminal justice system by including a reformative aspect to it.

I will conclude my speech. I thank you for giving opportunity to speak on the topic before such an august gathering.

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11. 166 NE 2D 684 (1960)
12. "The case against plea bargaining" by Timothy Lynch, Cato Institute at http://object.cato.org/sites/cato.org/files/serials/files/regulation/2003/10/v26n3-7.pdf

SENTENCING AND PLEA BARGAINING - AN APPRAISAL

JUSTICE B. N. MAHAPATRA
JUDGE, ORISSA HIGH COURT

SENTENCING

When man is pure laws are useless; when man is impure all laws are broken. An impure man breaks the laws and brings tears in the eyes of many innocent men. The sacred 'Dharma' of Judiciary is to wipe out the tears from the eyes of innocent men, the victims by sentencing the impure man, i.e., the culprit.

Hon'ble Mr. Justice B. N. Mahapatra, Judge, Orissa High Court addressing the participants

At the same time, Judiciary has the bounden duty to guard the prisoners and visit the prisons when necessary because sometimes it is found that prisoners are subjected to harassment/torture both physical and mental.

In the case of Sunil Batra Vs. Delhi Administration, AIR 1980 SC 1579, petitioner-Sunil Batra wrote a letter complaining brutal assault meted out to another prisoner, Prem Chand by the Head Warder of Tihar Jail. The victim in that case had received serious anal injury due to forced insertion of a stick by the Warder on the premise of an unfulfilled demand for money. In the said case, the Hon'ble Supreme Court held that Court has a continuing responsibility to ensure that the Constitutional purpose of deprivation is not defeated by Prison Administration.

In the case of Charles Sobharaj Vs. Superintendent of Tihar Jail, AIR 1978 SC 1514, the Hon'ble Supreme Court held that the Court must intervene when Constitutional rights of prisoners are transgressed.

The Hon'ble Supreme Court further held that whenever fundamental rights are flouted or legislative protection ignored to any prisoner's prejudice, the Court's writ will run breaking through stone walls and iron bars to right the wrong and restore the rule of law.

Therefore, imprisonment does not spell farewell to fundamental rights laid down under Part-Ill of the Constitution. The prisoners retain all rights enjoyed by free citizens except those lost because of confinement.

2. Sentencing should be certain/definite and firm to avoid discrimination and arbitrariness. But there are certain gray areas where sentencing is not certain.

(a) Under Section 53 of the Indian Penal Ccode "imprisonment for life" is one of the punishment to which the offenders are liable. The term "imprisonment for life" has not been defined anywhere in the Code.

After Delhi Nirvaya Incident, IPC has been amended and it is for the first time in the year 2013 under Sections 376(2) and 376-A IPC, "imprisonment for life" has been defined to mean imprisonment for the remainder of that person's natural life.

Thus, while in Sections 376(2) and 376-A IPC, the "life imprisonment" is defined to mean imprisonment for the remainder of that person's natural life, other sections in the Code providing life imprisonment remain unchanged.

However, the Hon'ble Supreme Court in the case of Naib Singh vs. State of Punjab, AIR 1983 SC 855, held that "life imprisonment" means imprisonment for the whole of a convict's life and does not automatically expire on his serving a sentence of 14 years or 20 years. Therefore, this aspect should be clarified in the Code itself.

(b) After introduction of Section 376-A in IPC in 2013 with definition of "imprisonment for life", the Trial Court would be confronted with the problem while awarding punishment under Section 511 read

with Section 376A, IPC for an offence of attempting to commit rape and inflicting injury, which causes death of a woman.

Under Section 511, IPC, punishment provided is 50% of the punishment of "life imprisonment" or 50% of the "longest term of imprisonment" provided for committing any particular offence, if no express provision is made in IPC for punishment for attempting to commit such offence. Under Section 57, IPC, in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. But under Section 376-A, IPC, the minimum punishment is 20 years and the longest punishment is imprisonment for life which has been defined as imprisonment for remainder of the person's natural life.

At this stage, the difficulty that would be faced by the Trial Court is to find out the terms of punishment for life imprisonment provided under Section 376-A, since the Court cannot take 20 years as provided under Section 57, IPC which is the minimum punishment provided under Section 376-A. Therefore, clarification is required as to how many years are to be taken for calculating 50% of the term "life imprisonment" prescribed in Section 376-A, IPC.

(c) Under Section 235 Cr.P.C. (in case of Sessions Procedure case) and Section 248 Cr.P.C. (in case of warrant procedure case), if the accused is convicted, the Judge shall hear the accused on the question of sentence and then pass sentence upon him according to law, but there is no such privilege available to the accused in summons procedure case under Section 255 Cr.P.C. Needless to say that the conviction, under summons procedure case has also far reaching consequences like losing of government job or losing a seat in Parliament if imprisonment is awarded for a term of two years. In summons procedure case, there is no harm in providing hearing on the question of sentence before passing the sentence upon the accused, which would amount to fair-play and eliminate the blame of discrimination and arbitrariness.

(d) Section 53 IPC prescribes punishment which the offenders are liable. These are death, imprisonment for life, simple imprisonment, rigorous imprisonment with hard labour, forfeiture of property and fine. In many sections it is specifically said as to whether the punishment is 'death' or "imprisonment for life" or simple or rigorous imprisonment or imprisonment of either description. In all those cases there is no difficulty in awarding punishment.

In some sections of the IPC, punishment provided is imprisonment for a particular term, without prescribing the nature of punishment i.e. whether simple or rigorous or either description. In that case the trial court would face the trouble. For example, Section 498-A, IPC provides imprisonment for a term which may extend to three years and so also in special statute like Section 138 of the Negotiable

Instruments Act provides imprisonment for a term which may extend to two years without saying whether such imprisonment is simple or rigorous or of either description.

Thus, for the selfsame offence while one Judicial Officer on conviction may award imprisonment for a particular term without mentioning the nature of imprisonment, i.e., simple or rigorous, another Judicial Officer may award simple imprisonment and third Judicial Officer may award rigorous imprisonment. Further, if punishment is awarded for any term of imprisonment without specifying the nature of imprisonment, the Jail Authority would face difficulty in executing the order of punishment. This aspect needs to be addressed to avoid discrimination and arbitrariness etc.

3. Otherwise also under the Criminal Jurisprudence wide discretion is vested in Judicial Officers/ Judges while awarding sentence to a convict. It goes without saying that said discretion has to be exercised judicially because discretion is not fancy or sweet will of a Judge. The exercise of this discretion is a matter of prudence and not of law. In most of the offences, the policy of law is to prescribe the maximum penalty which is to be awarded in worst case. It is always open to the discretion of the Court to award punishment lesser than the maximum punishment provided.

PLEA BARGAINING

4. Now coming to plea bargaining, in Criminal Law, plea bargaining means pre-trial negotiation between the accused and the prosecution during which the accused without any coercion or duress voluntarily agrees to plead guilty in exchange for certain concessions by the prosecutor under judicial scrutiny. In India, the defendant will plead guilty in return for lesser sentence. It can be claimed only for the offences that are penalized by imprisonment below seven years.

The primary object of deciding criminal cases by plea bargaining method in certain type of offences is for speedy disposal of huge number of criminal cases and thereby reducing the burden on the courts. It saves time and energy of the Court, prosecution, accused and victim.

However, the benefit of plea bargaining would not be available to habitual offenders. It is not: available for offences which might affect the socio-economic condition of the country or for an offence committed against woman or child below 14 years; of age. Provisions as to plea-bargaining shall not apply to any juvenile or child as defined in Sub-clause (k) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

However, critics say plea bargaining is immoral compromise in criminal cases and there is apprehension of likely misuse. They further say that it shows undue leniency for offenders and it is unconstitutional.

5. The concept of plea-bargaining is year-old. In the early days, King was enforcing law impartially and was punishing the wrong doers.

The Mogul Emperor Jahangir had put a bell at the top of his palace tied with a rope. The person aggrieved would pull that rope and the Emperor Jahangir would appear for hearing complaint then and there and decide the case according to law prevailing at that time. Once a complaint was made before the Emperor Jahangir that Prince had misbehaved with the wife of the complainant and as per law in existence at the relevant time was "tit for tat". Therefore, the punishment to be awarded was that the complainant had to misbehave with the wife of the Prince. At that stage, Begam Noorjahan intervened and pleaded for plea bargaining and the complainant was compensated in shape of money.

6. In India efficiency in crime investigation and prosecution is poor; it lacks credibility for which more than 70% accused are acquitted. Then the alternative is to bargain confession from the accused.

7. Criminals are not born but are products of the environment that they live in. Every Saint has a past and every sinner has a future. To convert an offender to a non-offender, sentencing plays an important role. No doubt sentencing is an integral part of the criminal law, but while awarding punishment the Court must be cautious and should ensure that the sentence awarded is neither vindictive in nature nor too lenient. It must commensurate with the gravity of the offence because just punishment is the collective cry of the society.

Therefore, while awarding sentence, various aspects like gravity/nature of the offence, the circumstances/situation under which the offence is committed; whether it is the first offence committed by the convict or there is any prior criminal record of the offender, his age, background of the offender with reference to education, homelife, motive for commission of the crime, conduct of the accused, nature of the weapon used, emotional or mental condition of the offender, prospect for rehabilitation and other factors are to be considered.

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Welcome address by Hon'ble Mr. Justice S. K. Mishra, Judge, High Court of Orissa on the occasion of National Conference on Plea Bargaining, Sentencing and Capital Punishment.

Dated 1st December 2013

Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India, Hon'ble Mr. Justice S. B. Sinha, Former Judge, Supreme Court of India, Hon'ble Mr. Justice P. K. Mohanty, Judge, Orissa High Court and Executive Chairman, Odisha State Legal Services Authority, Hon'ble Mr. Justice Hrishikesh Roy, Judge, Gauhati High Court., Hon'ble Mr. Justice R. R. Tripathy, Judge, Gujarat High Court, Hon'ble Mr. Justice N. Kotiswar Singh, Judge, Manipur High Court and Hon'ble brother and sister judges off the dais.

Welcome address by Hon'ble Mr. Justice S. K. Mishra, Judge, Orissa High Court & Member, Odisha Judicial Academy.

Dear and respected delegates.

I have been given the formal task giving the welcome address. Before I do that, I would share some of experiences regarding death penalty. In the year, 2000, as the Additional Sessions Judge, Jeypore, I tried the case of Dayanidhi Bisoi, who was charged with the offence of triple murder and robbery. The prosecution case was that he deliberately in a cold blooded committed crime of two persons and their infant daughter and robbed them of their belongings. The case was based entirely on circumstantial evidence. I held him guilty and holding that it to be rarest to rare case when all other options are foreclosed I sentenced him to death. The matter went to the High Court. The Division Bench of the High Court upheld the conviction and sentence. The matter went to the Supreme Court and the judgment has been reported

in 2003, Vol. 9 SCC 310, wherein Hon'ble Justice Santosh Hegde and Hon'ble Justice S. B. Sinha confirmed the concurrent findings and upheld the death sentence though it was based entirely on circumstantial evidence.

In the year, 1980 the constitutional Bench of a Supreme Court in Bachan Singh's case upheld the constitutional validity of death sentence but held that there cannot be standardization of sentencing process. Doing so, the Supreme Court held, will be encroaching upon the legislative functioning of the State. In that case, the Supreme Court held that death sentence can only be awarded in rarest of the rare case when all other options but sentences are foreclosed.

In the year, 1983 in Machi Singh's case the Supreme Court gave the guidelines for determining the rarest of the rare case. To determine the same the Court should ask the following:

1. Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

2. Are the circumstances for the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

Generally, this two principles still hold good today. But there has been a change of thought regarding the nature of evidence, i.e. available in such a case.

In the year, 2010 in Division Bench Hon'ble Justice P. K. Mohanty and myself had the occasion to decide a death reference of a convict, who was found guilty of the offences under Section 376(2)(F) and Section 302 of the IPC. After hearing the parties, a new concept came to my knowledge, i.e. principle of irrevocability of the death sentence. I wrote the judgment in the case of Ardhu Chendreya, and concurrent by Justice P. K. Mohanty. We took into consideration the judgment of the Supreme Court in Swamy Shraddananda's case. In Swamy Shraddananda' case, the Hon'ble Justice S. B. Sinha took into consideration the irrevocability of the death sentence and held that a person whose guilty is brought home by means of circumstantial evidence should not be awarded death penalty. Justice Markandey Katju differed with Hon'ble Justice Sinha and the matter was referred to a larger Bench. The larger Bench accepted the views given by Hon'ble Justice S. B. Sinha. Later on the Supreme Court has upheld the sentence of death penalty even based on circumstantial evidence. From my experience, I see in 2000 I have the full conviction that the question of sentence, especially death sentence does not depend upon the nature of the evidence led in a case. However, 10 years latter I had to change my view and held that in case of circumstantial evidence death penalty should not be awarded. This change is there even in the judgments of the Supreme Court. I cannot say that I was wrong in deciding the Dayanidhi's case as it has been upheld by the Supreme Court. I also cannot say I was wrong in deciding the cases of Ardhu Chendreya. There is a dilemma and the dilemma may be there in the minds of some of the delegates. This session will definitely through some light to iron out such doubt.

With these few words, I welcome Hon'ble Justice S.B. Sinha, Hon'ble Justice V. Gopal Gowda, Hon'ble Justice P.K. Mohanty, Hon'ble Justice Hrishikesh Roy, Hon'ble Justice R.R. Tripathy and Hon'ble Justice N. Kotiswar Singh to this session. I also welcome to all the delegates.

Thanking you all.

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PLEA BARGAINING & SENTENCING"- A PIONEERING PARADIGM OF THE CRIMINAL JUSTSICE SYSTEM

Dr. Justice B.R.Sarangi

Meaning of Plea Bargaining

Plea Bargain in criminal procedure is a negotiation between the accused and his attorney on one side and the prosecutor on the other, in which the accused agrees to pied "guilty" or "no contest" to some crimes, in return for reduction of the severity of the charges, dismissal of some of the charges, the prosecutor's willingness to recommend a particular sentence or some other benefit to the accused,, in

Hon'ble Dr. Justice B. R. Sarangi, Judge, Orissa High Court addressing the participants

shortest possible meaning "plead guilty and bargain Lesser sentence". In its most traditional and general sense, "plea bargaining" refers to pre-trial negotiations between the accused and the prosecution. Plea bargaining essentially involves a private negotiation between the prosecution and the defence lawyer on

the charges, case facts and/or prosecution's sentencing. Its primary aim is to arrive at a mutually acceptable deal between the prosecutor and the defence, which results in the accused pleading guilty. This process is often justified for its efficiency benefits, as it saves money and resources and spares victims and accused persons from prolonged proceedings.

Categories of Plea Bargaining.

"Plea Bargaining" falls into two distinct categories depending upon the type of prosecutorial concession that is granted. The first category is "charge bargaining", which refers to a promise by the prosecutor to reduce or dismiss some of the charges brought against the accused in exchange for a guilty plea. The second category, "sentence bargaining" refers to a promise by the prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea. Both methods affect the dispositional phase of the criminal proceedings by reducing accused's ultimate sentence.

Evolution of Plea Bargaining

Plea Bargaining is a significant part of the criminal justice system in the United States; the vast majority of criminal cases in the United States are settled by plea bargain rather than by a jury trial. Plea Bargains are subject to the approval of the court, and different States and jurisdictions have different rules. Several features of the American justice system tend to promote plea bargaining. The adversarial nature of the system puts judges in a passive role, in which they have no independent access to information with which to access the strength of the case against the accused. The parties thus can control the outcome of the case by exercising their rights or bargaining them away. The lack of compulsory prosecution also gives prosecutors greater discretion as well as the inability of crime victims to mount a private prosecution and their limited ability to influence plea agreements, whereas in Canada, the courts always have the final say with regard to sentencing. Nevertheless, plea bargaining has become an accepted part of the criminal justice system although judges and Crown attorneys are often reluctant to refer to it as such. In most Canadian criminal proceedings, the Crown has the ability to recommend a lighter sentence than it would seek following a guilty verdict in exchange for a guilty plea. Canadian Judges are no', bound by the Crown's sentencing recommendations and could impose harsher penalties and therefore, the Crown and the defence will often make a joint submission where they will both recommend the same sentence or relatively narrow range so as to maintain the visibility of the judge's ability to exercise discretion.

Indian Concept

Plea Bargaining is the result of modern judicial thinking. Prior to the introduction of Plea Bargaining in the criminal justice system, most courts and scholars tended to ignore plea bargaining, and when

discussions of the practice occurred, it usually was critical and most legal experts described plea bargaining as a lazy form of prosecution that earlier the Criminal Jurisprudence of India did not recognize the concept of "plea bargaining" as such. The Supreme Court in AIR 1968. SC 1267 (Madanlal Ramchandra Daga v. The State of Maharashtra) in paragraph 8 has been pleased to hold:

> "In our opinion, it is very wrong for a court to enter into a bargain of this character. Offences should be tried and punished according to the guilt of the accused. If the Court thinks that leniency can be shown on the facts of the case, it may impose a lighter sentence. But the court should never be a party to a bargain by which money is recovered for the complainant through their agency. We do not approve of the action adopted by the High Court and for the same reason, we would refrain from accepting the suggestion of Mr.Nuruddin Ahmed that we should increase the fine with a view to reducing the sentence of imprisonment."

Further, in AIR 1976 SC 1929 (Muralidhar Meghraj Loya etc. v. State of Maharashtra etc.), Justice V.R.Krishna Iyer speaking for the Court in paragraph 13 stated as follows:

> "To begin with, we are free to confess to a hunch that the appellants had hastened with their pleas of guilty hopefully, induced by an informal, tripartite understanding of light sentence in lieu of nolo contendere stance. Many economic offenders resort to practices the Americans call 'plea bargaining', plea negotiations', 'trading out' and 'compromise in criminal cases' and the trial Magistrate drowned by a docket burden nods assent to the sub rosa ante-room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades out' of the situation, the bargain being a plea of guilt, coupled with a promise of 'no jail.' These advance arrangements please everyone except the distant victim, the silent society. The prosecutor is relieved of the long process of proof, legal technicalities and long arguments, punctuated by revisionsal excursions to higher courts, the court sighs relief that its ordeal, surrounded by a.crowd of papers and persons, is avoided by one case less and the accused is happy that even if legalistic battles might have held out some astrological hope of abstract acquittal in the expensive hierarchy of the justice-system he is free early in the day to pursue his old profession. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice intrudes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilt and partly justify it philosophically as a sentence concession to a defendant who has, by his plea 'aided in ensuring the prompt and certain application of correctional measures to him'.

"In civil cases we find compromises actually encouraged as a more satisfactory method of setting disputes between individuals than an actual trial. However, if the dispute ....., finds itself in the field of criminal law, "Law Enforcement" repudiates the idea of compromise as immoral, or at best a necessary evil. The "State" can never compromise. It must "enforce the law." Therefore open methods of compromise are impossible." (Arnold, Law Enforcement - An Attempt at Social Dissection, (1932) 42 Yale LJ 1, 19)."

In AIR 1980 SC 264 (Ganeshmal Jashraj v. Government of Gujarat and another), in paragraphs 4 and 5, the apex Court has been pleased to hold as follows:

"In a trial for an offence under S. 16 (1) (a) (i) Prevention of Food Adulteration Act, the Magistrate after the closure of the prosecution case and examination of the accused under S. 313 Cr. P. C. convicted the accused on his plea of guilty recorded on the same day as a result of plea bargaining and sentenced the accused for imprisonment till the rising of Court and also to pay a fine of Rs.300. The High Court in revision suo motu enhanced the sentence which was in breach of mandatory requirement of the section holding that the conviction on the basis of evidence recorded was not vitiated. In appeal by special leave against the judgment of the High Court.

Held, that when there is an admission of guilt made by the accused as a result of plea bargaining or otherwise, the evaluation of the evidence by the Court is likely to become a little superficial and the Court may be disposed to refer to the evidence not critically with a view to assess its credibility but mechanically as a matter of formality in support of the admission of guilt. The entire approach of the Court to the assessment of the evidence would be likely to be different when there is no admission of guilt by the accused. In the instant case the approach of the Magistrate was affected by the admission of guilt made by the appellant and in the circumstances, it would not be right to sustain the conviction of the appellant. Accordingly, the case was remanded to the trial court to proceed afresh from the stage of examination under S. 313, Cr. P. C. 1979 Cr LR (Guj) 234; Reversed."

In AIR 1980 SC 854 (Kasambhai Abdulrehmanbhai Sheikh etc. v. State of Gujarat and another), the Supreme Court has held that the practice of plea bargaining is unconstitutional, illegal and would tend to encourage corruption, collusion and pollute the pure fount of justice.

In AIR 1983 SC 747 (Thippeswamy v. State of Karnataka), the Supreme Court in paragraph 1 has held as follows :

"Where by reason of plea bargaining the accused pleaded guilty and was convicted and sentenced by Magistrate acting upon his plea of guilty, the enhancement of sentence by the appellate or

revisional Court in appeal or revision by acting on plea of guilty would not be reasonable fair and just. It would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he woutd be let off lightly and then in appeal or revision, to enhance the sentence. The Court of appeal or revision should, in such a case, set aside the conviction and sentence of the accused and remand the case to the trial Court so that the accused can if he so wishes, defend himself against the charge and if he is found guilty, proper sentence can be passed against him."

In AIR 2000 SC 164 (State of Uttar Pradesh v. Chandrika) the Supreme Court in paragraph 3 states as follows:

"It is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It appears that the learned Judge has overlooked the settled law or is unaware that concept of 'plea bargaining' is not recognized and is against public policy under our criminal justice system. Section 320, Cr. P.C. provides for compounding of certain offences with the permission of the Court and certain others even without permission of the Court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. Neither the State nor the public prosecutor nor even the Judge can bargain that evidence would not be led or appreciated in consideration of getting flee bite sentence by pleading guilty."

Therefore, the concept of plea bargaining in criminal justice system in India was opposed in different stages and at different point of time. However, reference can be made to Section 206(1) and 206(3) of the Code of Criminal Procedure and Section 208(1) of the Motor Vehicles Act, 1988 and these provisions enable the accused to plead guilty for petty offences and to pay small fines where after the case is closed.

Development of Plea Bargaining in India

Growth of population, increase of crimes, pendency of criminal cases in the dockets of the courts cause a great hardship both to the Under Trial Prisoners as well as convicts. Therefore, finding no other way out, the Law Commission of India thought it proper for introduction of "Plea Bargaining" in its 142nd report, some of the salient features of which read as follows:

(1) It is not just and fair that an accused who feels contrite and wants to make amends or an accused who is honest and candid enough to plead guilty in the hope that the community will enable him to pay the penalty for the crime with a degree of

compassion and consideration should be treated on par with an accused who claims to be tried at considerable time-cost and money-cost to the community;

(2) It is desirable to infuse life in the reformative provisions embodied in section 360 of the Criminal Procedure Code and in the Probation of Offenders Act which remain practically unutilized as of now;

(3) It will help the accused who have to remain as under-trial prisoners awaiting the trial as also other accused on whom the sword of Damocles of an impending trial remains hanging for years to obtain speedy trial with attendant benefits such as -

(a) End of uncertainty

(b) Saving in litigation-cost.

(c) Saving an anxiety-cost

(d) Being able to know his or her fate and to start of fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career

(e) Saving avoidable visits to lawyer's office and to court on every date or adjournment.

(4) It will, without detriment to public interest, reduce the back-breaking burden of the court cases which have already assumed menacing proportions.

(5) It will reduce congestion in jails.

(6) In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining.

(7) Under the present system 75% to 90% of the criminal cases if not more, result in acquittals."

Even though in 142nd report, the Law Commission expressed its views, but the same have not been given effect to, thereby in 154th report, the Law Commission recommended the new Chapter XXIA to be incorporated in the Criminal Procedure Code. The 154th report of the Law Commission, referring to the 142nd earlier report of the Law Commission, which set out in extenso the rationale behind the said concept, its successful functioning in the USA and the manner in which it should be given a statutory shape, recommended that the said concept be made applicacble as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by section 320 of the Code. It was also recommended that plea-bargaining can also be in

respect of nature and gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children. The recommendation of the 154th Law Commission Report was supported and reiterated by the Law Commission in its 177th Report. Further, the report of the Committee on the reform of criminal justice system, 2000 under the Chairmanship of Justice (Dr) Malimath stated that the experience of United States was an evidence of plea bargaining being a means for the disposal of accumulated cases and expediting the delivery of criminal justice.

Introduction of New Chapter

Based on the recommendation of the Law Commission, the new chapter on plea bargaining making plea bargaining applicable in cases of offences punishable with imprisonment up to seven years has been included in Criminal Procedure Code and the same has come into effect from 5.7.2006. Chapter XXI-A dealing with plea bargaining will show that certain procedure prescribed for plea bargaining under Sections 265-A to 265-L of Cr.P.C. are to be complied to make it a valid plea bargaining. Even though plea bargaining is available after introduction of the said amendment to the Cr.P.C. in cases of offences, which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposition of the case which may also include giving compensation to victim and other expenses. The same cannot be done without involving the victim in the process of arriving at such settlement.

Benefit of plea bargaining

The reasons for the bargaining include a desire to cut down the number of trials, danger to the defendant of a long term in prison if convicted after trial, and the ability to get information on criminal activity from the defendant. There are three dangers; (a) an innocent accused may be pressured into a confession and plea out of fear of a severe penalty if convicted; (b) particularly vicious criminals will get lenient treatment and be back "on the street" in a short time; (c) results in unequal treatment. Public antipathy to plea bargaining has led to some State statutes prohibiting the practice, but informal discussions can get around the ban. The plea bargaining save the time and expense of trials by allowing the prosecutor to obtain guilty pleas in cases that might otherwise go to trial. The Judge must approve the plea bargain before accepting the plea.

Disadvantages of plea bargaining

In addition to the law laid down by the apex Court in the judgments referred to supra, there is every likelihood of using of coerce confessions to crimes which the accused did not commit and would result in dangerous offenders being set free too early.

Conclusion

With the above advantages and disadvantages, considering the present scenario and pendency of cases, there is no way out than to encourage the concept of plea bargaining enabling the litigants to avail the remedy of the same and to settle the pending cases. For successful implementation of plea bargaining and to achieve its objective, the role of judiciary and bar is very important. The members of the bar should encourage the litigants to opt for plea bargaining rather than to treat plea bargaining as threat to their profession. Plea bargaining may be used as an alternative dispute redressal mechanism for disposal,of pending cases to obviate the sufferings of the accused behind the bar for considerable length of time for non-disposal of the matter due to various reasons.

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JUDICIAL COLLOQUIUM ON "ROLE OF JUDGES IN 21ST CENTURY"

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India, Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India, Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India, Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court, & Patron-in-Chief, Odisha Judicial Academy and Hon'ble Mr. Justice Indrajit Mahanty, Judge, Orissa High Court & Chairperson, Odisha Judicial Academy

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India inaugurating the Amphitheatre in presence of Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India, Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India, Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court, & Patron-in-Chief, Odisha Judicial Academy and Hon'ble Mr. Justice Indrajit Mahanty, Judge, Orissa High Court & Chairperson, Odisha Judicial Academy.

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India, Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India, Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India, Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court, & Patron-in-Chief, Odisha Judicial Academy on the Dais on the occasion of Judicial Colloquium on Role of a Judge in 21st Century.

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India lighting of the lamp.

Hon'ble Mr. Justice R. M. Lodha, Judge, Supreme Court of India addressing the participants.

Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India addressing the participants.

Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India addressing the participants.

Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court, & Patron-in-Chief, Odisha Judicial Academy addressing the participants.

Hon'ble Mr. Justice L. Mohapatra, Acting Chief Justice, Manipur High Court, Hon'ble Mr. Justice A. K. Parichha, Former Judge Orissa High Court, Hon'ble Mr. Justice P. K. Mohanty, Executive Chairperson, Orissa State Legal Services Authority and Hon'ble Judges of High Court of Orissa.

Hon'ble Judges of High Court of Orissa.

Dedication of the Auditorium in honour of Chief Justice Gatikrushna Mishra.

Inauguration of Auditorium in honour of Chief Justice Gatikrushna Mishra by Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India.

Inauguration of Plaque in honour of Chief Justice Gatikrushna Mishra by Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India in presence of Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India and Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court & Patron-in-Chief, Odisha Judicial Academy

NATIONAL CONFERENCE
ON PLEA BARGAINING, SENTENCING AND CAPITAL PUNISHMENT

Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India receiving Guard of Honour at Odisha Judicial Academy.

Hon'ble Mr. Justice A. K. Patnaik, Judge, Supreme Court of India lighting the lamp.

Hon'ble Mr. Justice V. Gopala Gowda, Judge, Supreme Court of India lighting the lamp.

Hon'ble Mr. Justice S. B. Sinha, Former Judge, Supreme Court of India addressing the participants.

Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court and Patron-in-Chief, Odisha Judicial Academy addressing the participants.

Hon'ble Mr. Justice Kalyan Jyoti Sen Gupta, Chief Justice, Andhra Pradesh High Court addressing the participants.

Hon'ble Mr. Justice P. K. Mohanty, Judge, Orissa High Court addressing the participants.

Hon'ble Mr. Justice I. Mahanty, Judge, Orissa High Court & Chairperson, Odisha Judicial Academy addressing the participants.

Hon'ble Mr. Justice D. N. Patel, Acting Chief Justice, Jharkhand High Court addressing the participants.

Hon'ble Mr. Justice R. Subas Reddy, Judge, Andhra Pradesh High Court addressing the participants.

Hon'ble Mr. Justice Hrishikesh Roy, Judge, Gauhati High Court addressing the participants.

Hon'ble Mr. Justice N. Kotiswar Singh, Judge, Manipur High Court & President, Maharashtra Judicial Academy addressing the participants.

Hon'ble Mr. Justice Ravi R. Tripathi, Judge, Gujarat High Court addressing the participants.

Hon'ble Mr. Justice V.M. Kanade, Judge, Bombay High Court addressing the participants.

MARRIAGE & DIVORCE INVOLVING NRIs ISSUES BEFORE FAMILY COURTS IN INDIA

Justice Manju Goel
Former Judge of High Court of Delhi

Introduction :

The relationship of marriage is governed by Personal Law. In India we have several laws governing marriage in different societies. We have the Hindu Marriage Act,1955 dealing with marriage amongst Hindus, the Indian Divorce Act, 1869 dealing with divorce amongst Christians, the Parsi Divorce Act, 1936 dealing with marriage and divorce amongst the Parsis. The other laws in this area are the Special Marriage Act, the Foreign Marriages act, The Anand Marriages Act as well as the Saria regulating the marriage and divorce amongst the Muslims. Although there is difference in the concept of marriage in different religions, different countries and different communities, the minimum common factor that is available in all the forms of marriages is that marriage gives rise to a legal relationship between the parties to the marriage, creating mutual rights and obligations. Apart from the mutual rights and obligations, marriage may also create a right in the property of the spouse or in the share of the spouse in the joint family property and the like. This is followed by obligations of the parties to the marriage towards their children. The rights of the children against their parents and on the family property, that is, the law of inheritance also depend upon the form of marriage or the law under which the marriage has been solemnized. The grounds on which a divorce can be granted are not always the same under different laws. The rights and obligations consequent upon a divorce also depends upon the laws governing the divorce and maintenance of the parties in question.

In the last half a century with rapid transport and communication and with growing international trade and commerce, the world has shrunk. Indians go abroad to settle in lands of opulence. They may also travel for business, studies and job and stay in a foreign country not intending to settle or to give up their Indian citizenship. The number of such persons has risen so high that in certain countries, they are recognized as important section not to be ignored in the political process of that country. Non-resident Indians or NRI for short is a phrase that has come in our vocabulary because of the large number of Indians abroad.

When Indians travel and reside abroad, they have to live as parts of that society. In case of conflict, they may take recourse to law. The courts apply the law of the land and deliver justice to the parties according to that law, which the parties to any dispute have to accept. But the situation becomes quite complicated if the conflict is between the husband and the wife because their relationship is governed by their personal law. The personal law to the facts of the case may be quite different from the law which the local court is bound to apply.

The Problems & the Issues:

Matrimonial disputes amongst the couples, both of whom or one of whom is an NRI may arise just as they do with any other couple in India. However, apart from the usual cases of discord, an additional reason for discord amongst such couple is that the marriage proposals from NRIs, who carry the image of happy and prosperous, are accepted too readily without proper verification of antecedents and without proper assessment of the bride grooms' present and future circumstances.

Women in failed marriages in a foreign country are particularly pitiable. The different types of matrimonial problems that have been noticed in such marriages can be mentioned here. Some NRIs come to India for a stay of 4-5 months, during which they marry with the usual pomp and show with an unsuspecting rural or semi-urban lass; live with her during that period, giving her dreams of a happy married life with a prosperous husband in a western country and then disappear, living the brides waiting for visa papers. These people do not have any address where they can be traced and hence no action can be taken against them. There are NRIs, who marry Indian girls and may have some permanent address in US or UK where they can be traced but they do not eventually send the required documents and do not take the wives to their place of residence. These brides are also abandoned like the ones mentioned above. They may or may not receive visa papers but for all practical purposes, they remain deserted without any maintenance or financial support. Some NRIs are found to have taken their wives to their place of work or residence in USA and thrown them out of the home. These wives are sometimes so naïve and illiterate that they cannot seek the assistance of the local authorities. There have been cases where the husband has withheld the passport and the visa and has not provided the wife with any money, while throwing her out. Some wives manage to come back after being deserted by their husbands but their return does not give them any relief, except uniting her with her parental family.

In recent time the incidents of matrimonial discords between an Indian wife and an NRI husband has risen to such proportion that special cell have been created to deal with the problems in the Ministry of Overseas Indians' Affairs, as also in the National Commission for Women to help the victim of such discord. The Ministry had received about 30000 complaints till 2009. The number, however, is a poor indicator of the enormity of the problem since many of the women do not even know of the availability of governmental support and many do not approach the government for one reason or the other.

The legal issues that require study in problems in matrimonial disputes involving NRIs, where victims mostly are Indian wives are:

(a) Jurisdiction of the court before whom the dispute is brought;

(b) Enforcement/recognition of judgment;

(c) Law that is applicable in resolving such dispute;

(d) The procedure that is required to be followed in such matters, particularly for service of process; and

Jurisdiction :

I will attempt to address each of these issues. The first question that confronts the court is that of jurisdiction. For appreciating this question, we can refer to the Hindu Marriage Act, 1955, as majority of the disputes before the Family Courts in India arise out of the Hindu Marriage Act. Section 19 of the Hindu Marriage Act prescribes the territorial jurisdiction of the court in which the petition shall be presented. The same is extracted below for ready reference:

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

When a couple is married under the Hindu Marriage Act, 1955, all proceedings for divorce, annulment of marriage, restitution of conjugal rights and subsequent petition under Sections 24 and 25 for maintenance and other consequential reliefs are required to be filed in a court mentioned in Section 19 of the Hindu Marriage Act. Wherever the territorial jurisdiction is not stated so specifically in the personal law, the Code of Civil Procedure has to be resorted to. Apart from clause (i) the other clauses incorporate the words reside and one has to guard against any misinterpretation or misuse of the word. So the word needs to be properly understood.

The meaning and concept of the term "reside" or "residence" has been dealt with in a number of judgments and the same has to be understood by us for dealing with foreign judgment as well as for considering the jurisdiction of Indian courts whenever the jurisdiction is sought to be made out on the ground of residence.

In Black's Law Dictionary the word "resides" has been explained as under:

> "Reside - live, dwell, abide, sojourn, stay, remain, lodge, (Western-Knapp Egg. Co. vs. Gilbank, F 2d at p 136) to settle oneself permanently or continuously to have a settled abode for a time, to have one's residence or domicile, specially to be in residence, to have an abiding place, to be present as an element or inhere as a quality, to be vested as a right (Bowden vs. Trasen SW 2 cl at page 349)
>
> In Webster's dictionary also the word resides finds a similar meaning, which may be gainfully extracted.
>
> 1. To dwell for a considerable time; to make one's home, life, 2. To exist as an attribute or quality within, 3. To be vested, within"

In Jagir Kaur Vs. Jaswant Singh, the Supreme Court dealing with a case for maintenance u/s 488 Cr.P.C. held that the word "resides" implied something more than a flying visit to or casual stay at a particular place.

In Jagir Kaur AIR 1963 SC 1521 (1520) the Supreme Court said:

> "8. Having regard to the object sought to be achieved, the meaning implicit in the words used, and the construction placed by decided cases thereon we would define the word "resides" thus: a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen to make a particular place his abode depends upon the facts of each case."

In Ruchi Majoo's case (supra) the Supreme Court held that the minor, born in U.S.A. but coming to India with his mother intending to live in India as proved by the facts of school admission and the intention of the mother to dispose of properties in USA, was ordinarily residing in India/Delhi and so the Courts, in Delhi could exercise jurisdiction under the Guardian & Wards Act, 1890.

In Ruchi Majoo's case (supra) the Supreme Court referred to the famous case of Annie Besant vs. Narayaniah (AIR 1914 PC 41) where the Court found the two infants who had left India only months back to be educated in England were ordinary residents of Chingelpur where the infants permanently resided.

The solitary test for determining the jurisdiction of the Court under Section 9 of the Act is "ordinary residence" of the minor. The question whether the minor is residing at a given place is primarily a question of intention which in turn is a question of fact. It may be a mixed question of law and fact but unless the jurisdictional facts are admitted it can never be a pure question of law capable of being answered without an enquiry into the factual aspects of the controversy [Ruchi Majoo vs. Sanjeev Majoo (2011) 6 SCC 979.]

RECOGNITION OF FOREIGN JUDGMENT & APPROPRIATE LAW:

Indian civil law recognizes foreign judgments. The specific provisions in this respect is Section 13 of the Code of Civil Procedure. Section 13 prescribes that foreign court's judgment is conclusive except (a) where it has not been pronounced by a court of competent jurisdiction (b) where it has not been given on the merits of the case, (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable, (d) where the proceedings in which the judgment was obtained are opposed to natural justice (e) where it has been obtained by fraud or (f) where it sustains a claim founded on a breach of any law in force in India.

Now let us examine the angle of personal laws. This is an important area as some personal laws permit divorce in certain situation, whereas in the same circumstances divorce may not be available in the other personal laws. Similar conflicting situation may exists in the matter of maintenance, matrimonial property etc. Now the court which tries a petition or suit can apply the law of the land. The court in USA OR UK cannot apply Hindu Marriage Act which does not extend to those countries. Can we recognize the judgments of divorce passed under the American laws on fact on which Indian courts would not have passed certain judgment? This question is squarely answered by the Supreme Court in the case of Y. Narshima Rao & Ors. Vs. Y. Venkata Laxmi & Ors., 1991 (3) SCC 451.

In the case of Y Narshima Rao & Ors. Vs. Y. Venkata Laxmi, the parties were married at Tirupathi under the Hindu Marriage Act. Both went to the USA, where they fell apart. The husband initially sued for divorce at the Tirupathi court but he withdrew the same and filed a petition in the circuit court of St. Louis County, Missuori, United States claimaing to be a resident of the State of Missouri for 90 days immediately preceding the filing of the petition. Wife replied to the petition contending, inter alia, that she was not submitting to the jurisdiction of the foreign court. The law of the land permitted the circuit court to assume the jurisdiction over the matter as the husband was residing there for 90 days preceding the commencement of action in that court. On 19.2.1980 a decree for dissolution of marriage was passed by the Circuit Court on the ground that the marriage had irretrievably broken down. Later when the husband came to India and married another woman, the wife filed a criminal complaint against the husband

for the offence of bigamy. The husband pleaded that he had committed no offence as his marriage with his first wife had already been dissolved. When the matter came up before the Supreme Court, the Supreme Court held that the Circuit Court had no jurisdiction in the matter because according to the Hindu Marriage Act, under which the parties were married, a petition for divorce could be filed either at the place of marriage or at the place where the parties last resided together. The Supreme Court further held that the husband was in the State of Missouri only as a "bird of passage" and was otherwise an ordinary resident of Louisiana as he had stated in his petition in the Tirupathi Court. The Supreme Court further held that even assuming that the court had jurisdiction to grant a valid decree for divorce under the local laws, the divorce was on a ground not available in the law under which the parties were married and the wife had not submitted to the jurisdiction to that court, and so the decree cannot be recognized in our country and cannot be enforced. The following rule could be detected for recognizing the foreign matrimonial judgment in this country. The jurisdiction assumed by the foreign court as well as the grounds on which the relief is granted, must be in accordance with the matrimonial law under which the parties are married. The exception to this rule can be identified as under:

(i) Where the matrimonial action is filed in the forum where the respondent is a domicile or habitually or permanently reside and the relief is granted on a ground available in the matrimonial law under which the parties are married;

(ii) Where the respondent voluntarily and effectively submits to the jurisdiction of the forum, as discussed above and contests the claim which is based on a ground available under the matrimonial law under which the parties are married;

(iii) Where the respondent consents to the grant of the relief, although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties.

Another important point settled in this judgment was that the domicile of the married woman did not follow that of her husband and therefore the husband's domiciliary law cannot determine the jurisdiction of the forum or the applicable law.

A case of marriage under a foreign law:

The appropriate law to be applied with Indians married in a foreign country is the Foreign Marriages Act. In the case of Dr. Abdul Rahim Undre Vs. Smt. Padma Rahim Undre, AIR 1982 Bombay 341, Dr. Abdul Rahim Undre, a Mohammedan married Padma, a Hindu, in England as per the procedure laid down by the British Marriages Act. Later their relationship became strained. Dr. Abdul Rahim gave talaq to his wife in her absence but sent a oral intimation to her of his talaq. Padma, in the absence of Dr. Abdul Rahim, broke into the flat of Dr. Rahim in Bombay. Dr. Rahim sued for permanent injunction to restrain

her from entering her flat and for taking away their children from his custody and also sought a declaration that Padma was not his wife. The High Court of Bombay ruled that the marriage was performed under the secular law namely the British Marriages Act, in which the religion of parties was not material. The court held that such a marriage could not be termed as Nikah Fasid simply because two witnesses are required in a Mohammedan marriage were present during the marriage ceremony in Weymouth, England. Further the court held that the law, as would apply to the parties in India, would be the Special Marriages Act and the Foreign Marriages Act giving jurisdiction to Indian court for dissolving the marriage solemnized outside India.

Foreign Marriages Act & Special Marriages act:

At this stage, it may be worthwhile to take a brief look at the Foreign Marriages Act and the Special Marriages Act. The Special Marriages Act makes no reference to any religion. It applies to marriages solemnized under the Act as well as to marriages solemnized under other laws, but registered under the Act. Any two persons can marry under the Act if the male is of the age of 21 and the female 18, provided, of course, none of them is already married or is of unsound mind and they are not within prohibited degrees. The grounds for divorce, to mention briefly, are very similar to those provided for in the Hindu Marriage Act, viz., cruelty, desertion, mental disorder, adultery, venereal disease etc.

The Foreign Marriages Act provides for a procedure for solemnization of marriages of Indians in a foreign country (section 4), for registration in India of marriage performed in a foreign country (Section 17) and for matrimonial relief to marriages performed in a foreign country (Section 18). Section 18 of Foreign Marriages act provides that for marriages performed in a foreign country in which one of the parties at least is an Indian, reliefs as per chapter IV, V, VI and VII of the Special Marriages Act, dealing with consequences of marriage, Restitution of conjugal rights, nullity of marriage and Divorce can be granted. The Jurisdiction of the court and procedure for such matters also follows the provisions of the Special Marriages Act.

The requirement of registration of Foreign Marriage Act under Section 18 is mandatory for seeking divorce in Indian courts. In Smt. Joya Sumathi vs. Robert Dickson Brodie, the trial court held that the petition for divorce was not maintainable as the petitioner claimed to have been married under Foreign Marriage Act but could not produce proof of registration of her marriage. High Court of Madhya Pradesh came to the rescue of the petitioner by holding that though the marriage of the petitioner was not a foreign marriage solemnized in accordance with the procedures laid down under Sections 5 to 14 of the Foreign Marriage Act and registered under Section 17, it was a marriage solemnized in a foreign country between the parties of whom at least one (the appellant) was a citizen of India and the provisions of Special Marriage Act, 1954 would apply. The Court held that appellant being an Indian citizen was as much

entitled to maintain a petition under the Special Marriage Act as any party to a marriage which was solemnized under the Foreign Marriage Act and that the petition for divorce under Section 27 of the Special Marriage Act read with Section 18 of the Foreign Marriage Act was maintainable.

MAINTENANCE FROM NRI HUSBAND :

Apart from the issues of divorce, there can be other question of maintenance. When a wife of a NRI husband seeks maintenance in India, there are mainly two issues. One is of jurisdiction of the court and the other is that of assessment of husband's income. In the very recent case of Indira Sonti Vs. Surya Narayan Murti Sonti the High Court of Delhi disposed of a suit under Section 18 of the Hindu Adoption & Maintenance Act, 1956 and for damages. As per the fact disclosed in the judgment dated 5.2.2013, the parties were married according to the Hindu rites and ceremonies at a Hindu temple in USA but on account of the failure of the family of the wife to pay dowry of Rs.10 lacs, she was sent back to India. She first moved an application for maintenance before the Family Court, Willington, Delaware, USA but having failed to obtain any order from that court, presented a suit for maintenance and damages in the High Court. The suit was opposed, inter alia, on the ground that Section 18 of Hindu Adoption & Maintenance Act does not have any provision of territorial jurisdiction and, therefore, the only provision to apply was Section 20 of the Civil Procedure Code, which requires a suit to be instituted in the court, within whose jurisdiction the defendant resides or where the cause of action arises. The High Court held that the wife had been deserted by the husband and that although the factum of desertion took place in USA, desertion was a continuous act and referred to the judgment of the apex court in the case of Vipin Chander Jay Singh Bhai Shah Vs. Prabhawati AIR 1957 SC 176. The court also referred to the judgment of the Bombay High Court in Sucheta Dilip Ghate & Anr. Vs. Dilip Shantaram Ghate, AIR 2003 Bombay 390. The Bombay High Court opined in this judgment that the Hindu Adoption & Maintenance Act was a beneficial legislation for the benefit of women and infirm and old parents for their maintenance while in distress and it cannot be expected that they would run from pillar to post for relief, if the husband or the son keeps on changing his residence or prefers to reside in far away town from that of his wife or parents. The High Court took the view that taking recourse of Clause (c) of Section 20 of the Code of Civil Procedure, the proceedings could be instituted at a place of residence of wife. The High Court of Delhi, therefore, assumed jurisdiction to try the case of maintenance filed by Indira Shonti. Looked at from another angle, maintenance is a continuing cause of action and this arises wherever the wife or the person seeking maintenance resides. Hence even without going into the considerations mentioned in the judgment of Indira Sonti, the court could have assumed jurisdiction. Unless the husband is an employed on a fixed salary and the wife knows the source of employment, the wife cannot have clear knowledge of the income of the husband. Most of the wives seeking maintenance in courts make a rough assessment of

the husband's income and attempts to prove the same by summoning documents and witnesses if and when available. The husband who disputes the wife's allegations, may prove his own assertion by oral and documentary evidence. If the husband is not before the court at all, chosing to let the matter go ex parte or does not produce cogent evidence of his income, the court does not expect the wife to summon evidence from a foreign country. The courts have held that the wife can only estimate the income of the husband and the onus to prove his income is squarely on the husband, the same being in his special knowledge as provided in Section 106 of the Indian Evidence Act. If the husband does not discharge the burden as per Section 106 of the Indian Evidence act, the allegations of the wife have to be accepted as correct (Gopal Krishanji Ketkar Vs. Mohammad Haji Latif, AIR 1968 SC 1413, Maganbhai Vs. Maniben, AIR 1985 Guj. 187 and Indira Sonti Vs. Suryanarayan Sonti supra). The High Court granted the order, directing the husband to pay maintenance @ US$500 per month, although the High Court did not grant a prayer for damages.

PROCEDURE FOR SERVICE AND FOR TAKING EVIDENCE :

A problem frequently faced by our courts in dealing with a NRI respondent is of service of process. Another problem is of recording evidence of NRI in a foreign country. Hence I deem it appropriate to bring it to the notice of the participants two Hague Conventions which India has signed recently. They are 1) Convention of 15 November, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil Or Commercial Matters and Convention of 18 March, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

The Convention on Service Abroad, as mentioned above, intends to create appropriate means to ensure service of judicial and extrajudicial documents to the addressees and to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure. The Convention applies to all cases in civil and commercial matters where there is occasion to transmit judicial or extrajudicial document for Service Abroad. Each contracting State has to designate a Central Authority which shall undertake to receive request for service coming from other contracting States. This Authority on receiving request from the Appropriate Authority or judicial officer of the contracting State(s) is required to arrange the service of the documents as per the internal law upon persons who are within its territory or by a particular method requested by the applicants unless such a method is incompatible with the law of the State addressed. A certificate from the recipient country follows certifying the service as required. However, the treaty does not do away with direct service through diplomatic or consular agents or through postal channel or through judicial officer of the recipient country.

The other Convention of 18 March, 1970 facilitates transmission and execution of letters of request and to further the accommodation of different methods which they use for the purpose and to improve mutual judicial cooperation in civil or commercial matters. Each Contracting States is required to designate

the Central Authority to receive Letters of Request from judicial authority of another Contracting State and to transmit them to the authority competent to execute them. The Letter of Request has to specify, inter alia, the question to be put to the person to be examined or the subject matter about which they are to be examined, the documents or other property (real or personal) to be inspected and the instructions whether the evidence is to be given on oath or affirmation and any special form to be used. The judicial authority which executes a letter of request shall apply its own laws as to the method and procedure to be followed, although the law of the requesting authority or special method may be followed unless that is incompatible with the loss of the requesting countries. The convention recognizes that diplomatic officers and consular agent may also take evidence of the nationals of the States they represent.

More than 60 countries including USA and UK are parties to this convention. These two Conventions will go a long way in proceeding with civil and commercial litigation, including matrimonial litigation where a party or a witness is living abroad and service of process on them or their examination as witnesses are vitally essential.

SUGGESTION :

In the 219th report of the Law Commission of India of March, 2009, the Commission expressed the need for family law legislations for the Non-resident Indians. The Commission observed several situations of conflict of laws in the area of family law. It said, "The lure for settling in foreign jurisdiction affects a sizable Indian population but the problems created by such migration largely remains unresolved." In Section II of the report the problem as stated by the Commission in the following words:

> "2.1 Solicitors and litigants overseas worldwide frantically look for professional opinions and advice when the problems come to the Indian resident abroad. Instances of conditions of validity of marriages solemnized in India, modes and means of divorce under Indian law, legal formalities to be complied with for adopting children from India, remedies available in Indian law for enforcing parental rights in child abduction and other family law issues relating to non-resident Indians abound. Likewise, there are a plethora of problems in matters concerning succession and transfer of property, banking affairs, taxation issues, execution and implementation of wills and other commercial propositions for non-resident Indians. However, application of multiple laws, their judicial interpretation and other legalities often leave the problems unresolved even though remedies partially exist in Indian law and partly need new urgent legislation."
>
> "2.2 ……..This clash of jurisdictional law is commonly called Conflict of Laws in the realm of Private International Law which is not yet a developed jurisprudence in the Indian territory."

The Commission suggested the remedy as under:

> "5.2 A reading in totality of the matters in the overseas family law jurisdictions gives an indication that in such affairs, it is the judicial precedents which provide the much available guidance and judicial legislation on the subject. With the large number of non-resident Indians now permanently living in overseas jurisdiction, it has now become important that some composite legislation is enacted to deal with the problems of non-resident Indians to avoid them from importing judgments from foreign courts to India for implementation of their rights. The answer, therefore, lies in giving them law applicable to them as Indians rather than letting them invade the Indian system with judgments of foreign jurisdictions which do not find applicability in the Indian system. Hence, it is the Indian legislature which now seriously needs to review this issue and come out with a composite legislation for non-resident Indians in family law matters. Till this is done, foreign court judgments in domestic matters will keep cropping up and courts in India will continue with their salutary efforts in interpreting them in harmony with the Indian laws and doing substantial justice to parties in the most fair and equitable way."

The recommendation for a legislation has not so far been taken note of by the Government of India. The present position of law in this area is totally governed by judicial precedents which by now is quite large in number.

In the case of Neerja Saraph Vs. Jayant Saraph 1994 (6) SCC 461 Supreme Court came out with further suggestion for enactment in the field of personal law of the Non-resident Indians. The Court suggested that, although it was a problem of private international law and not easy to resolve, but with the change in social structure and rise of marriages with NRIs, Union of India may consider enacting laws like the Foreign Marriages (Reciprocal Enforcement) Act, 1993 enacted by the British Parliament under which the Govt. of United Kingdom issued a Reciprocal Enforcement of Judgments (India) Order, 1958. The Court also observed that Indian and Colonial Divorce Jurisdiction Act, 1940 safeguards the interests of Indians so far as United Kingdom is concerned. But the rule of domicile replacing nationality rule in most of the countries for assumption of jurisdiction in granting relief in matrimonial matters has resulted in conflict of laws. The Court suggested legislations incorporating provisions as:

(1) No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court;

(2) Provision may be made for adequate alimony to the wife in the property of the husband both in India and abroad.

(3) The decree granted by Indian courts may be made executable in foreign courts both on principle of comity and by entering into reciprocal agreements like Section 44-A of the Civil Procedure Code which makes a foreign decree executable as if it had been a decree passed by that court.

In my humble opinion, India should join the Convention of 1 Feb., 1971 on the Recognition & Enforcement of Foreign Judgments in Civil & Commercial matters. This Convention makes it mandatory to the Contracting States to enforce judgments of the other Contracting States. Many women stranded because of neglect and apathy of their overseas husband will gain relief if the orders they receive from the Indian Courts, particularly of maintenance, child custody and return of matrimonial property or istridhan or their own income in the hands of their husbands can be implemented abroad. Many women, who simply resign to fate and suffer in silence, may be encouraged to seek redressal in Indian Courts if the Convention is signed by the Government of India.

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SOLID WASTE MANAGEMENT - HOW TO COPE WITH IT

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INTRODUCTION

Human activities create waste and it is the way these wastes are handled, stored, collected and disposed of, which can pose risk to the environment and public health. Thus, the environment is more contaminated or polluted where intense human activities concentrate, such as in urban centres, appropriate and safe solid waste management (SWM) are of utmost importance to allow healthy living condition for the population. When this fact has been admitted by most governments, many municipalities are still struggling to provide even the most basic services. Typically 1-2/3rd of solid wastes generated is not collected as revealed from the report of World Resource Institute. As a result, the un-collected waste which is often also mixed with human and animal excreta, is dumped indiscriminately in the streets and in the drains, so contributing to flooding, breeding of insects and rodent vectors and the spread of diseases. Most of the Municipal Solid wastes in low income Asian countries which is collected is dumped on land in a more or less uncontrolled manner. Such inadequate waste disposal creates serious environmental problems that affect health of humans and animals and cause serious economic and other welfare losses.

URBANIZATION AND URBAN ENVIRONMENTAL MANAGEMENT

Rapid urbanization is taking place especially in low income countries. Globally, IN 1985, 41% of the urban population lived in urban areas and by now it is 47% but by 2015 the proportion is projected to rise to 60%, as per report of 1992. Of this, urban population 68% will be living in the cities of low-income and lower middle income countries. Between 1990-95 Asia's urban population has grown at an average rate of 3.2% compared with just 0.8% growth in rural areas. In 1994, 9 of 14 large urban agglomerations with a population of over 10 million people were located in the Asia- Pacific region. Many of the smaller cities are facing urban environmental management problems where appropriate approaches are sought now, before the cities urban environments deteriorate any further. The situation is even more acute, in as much as, the slums are growing at an alarming rate and in the urban poor areas where the municipal solid waste management are lacking behind the needs of the inhabitants.

WASTE GENERATION :

Globally the per capita amounts of municipal solid waste generate on a daily basis varies significantly. Following table will show the waste generation rate of some Asian countries sorted by Gross National Income. (GNI).

Country	GNI	Waste Generation (KG/Capita day)
Nepal	240	0.2-0.5
Cambodia	260	1.0
Lao PDR	290	0.7
Bangladesh	370	0.5
Vietnam	390	0.55
Pakistan	440	0.6-0.8
India	450	0.3-1.0
Indonesia	570	0.8-1.0
China	840	0.8
Sri Lanka	850	0.2-0.9
Philippines	1040	0.3-0.7
Thailand	2000	1.1

Although the table shows an increase of the waste generation rates with higher GNI, It is important to note that the ranges given are large. In most cases, this reflects the large differences between rural and urban areas.

Following table will show average waste characteristic in urban cities, sorted by descending bio-degradable waste fraction.

City	Bio-degradable	Paper	Plastic	Glass	Metal	Textiles & Leather	Inerts (ash, earth) & Others
Indonesia	74	10	8	2	2	2	2
Dhaka	70	4.3	4.7	0.3	0.1	4.6	16
Kathmandu	68.1	8.8	11.4	1.6	0.9	3.9	5.3
Bangkok	53	9	19	3	1	7	8
India	42	6	4	2	2	4	40
Karachi	39	10	7	2	1	9	32

The high content of bio-degradable matter and inert material, results in high waste density (weight to volume ratio) and high moisture content. These physical characteristics significantly influence the feasibility of certain treatment options. Vehicles and systems operating well with low-density wastes such as in industrialized countries will not be suitable or reliable under such conditions. Additionally to the extra weight, abrasiveness of the inert material such as sand and stones, and the corrosiveness caused by the high water content, may cause rapid deterioration of equipment. Wastes with a high water or inert content will have low calorific value and thus also not be suitable for incineration.

CHALLENGES BEFORE URBAN LOCAL BODIES :

Local authorities of the Asian cities see their main challenges as:

- Unplanned growth and increasing pressure to provide services.
- Lack of adequate authority to address people, infrastructure and resourcing problems.
- Bureaucratic confusion and delays due to a multitude of agencies (local, provincial and national level) operating within the same municipal boundaries.
- Lacking accountability.
- Limited communications within the city administration and more importantly between the city administration and the various stakeholders.
- Political interference, as elected representatives often do not confine themselves to strategic planning, policy setting and oversight of performance, but instead become involved in daily operations.
- Lacking skills of municipal workforces, whereby training is often reserved to senior staff and seen as a reward for good work and seen as a chance to break away from the daily obligations.

For example, in Municipal Corporation, Delhi there are about 46,000 workers in solid waste management but only 33,000 are available in the field. It is reported, the rest serve as domestic servants at the residents of the influential persons, so the matters contributing to lacking of solid waste management facilities are many. So the Public Private Partnership (PPP) is a term used for describing the relationship between the public and private sector to tackle the need of the municipalities and Government to ensure solid waste management. In the city of Mumbai, community initiatives in solid waste management are currently being supported by municipal authorities. After seeing interest of the community Municipal Commissioner initiated a scheme called "Advanced Locality Municipal Scheme". Under this scheme, he designated one officer called Officer on Special Duty to promote such scheme. It is formed street-wise or small area-wise and consists of community based structure or neighbourhood initiatives. Under this

scheme municipality provides a platform for exchange and communication for ALM representatives and municipal authorities. By the exchange of dialogues many problems including the waste management are sorted out. Not only this but also recently in Jamshedpur, Tata Companies have been over work of the solid waste management being a partner of Jamshedpur Municipality. This private company is providing the know-how technology and the necessary infrastructure to manage the solid waste of that municipality. These are the few examples to tackle the solid waste management.

LEGISLATIONS :

The laws of the land are plenty to monitor, manage and tackle the solid waste management following the different pronouncements of the Apex Court. There are catena of decisions on this issue, viz. - Ratlam Municipality Case, M. C. Mehta case etc. Since solid waste pollutes the environment enormously, the Legislatures framed the Rules, viz. - Bio-Medical Waste (Management and Handling) Rules, 1998 and the Municipal Solid Waste (Management & Handling) Rules, 2000(hereinafter called the MSW Rule). Under the MSW Rule, the responsibility has been given to the municipal authorities for implementation of the provisions of this Rule and infrastructure development for collection and storage, segregation, transportation, processing and disposal of municipal solid wastes (See Rule - 4). Similarly, State Pollution Control Board, Central Pollution Control Board and the District Magistrate have the overall responsibility for the enforcement of these Rules. In Schedule II, processing of municipal solid waste has been described here under - as municipal authorities shall adopt suitable technology or combination of such technologies to make use of wastes so as to minimize burden or landfill. Following criteria shall be adopted, namely:-

(1) The biodegradable wastes shall be processed by composting, vermicomposting, anaerobic digestion or any other appropriate biological processing for stabilization of wastes. It shall be ensured that compost or any other end product shall comply with standards as specified in Schedule IV.

(2) Mixed waste containing recoverable resources shall follow the route of recycling. Incineration with or without energy recovery including pelletisation can also be used for processing wasting specific cases. Municipal authority or the operator of a facility wishing to use other state-of-the-art technologies shall approach the Central Pollution Control Board to get the standards laid down before applying for grant of authorization.

Similarly, under Schedule II it has been prescribed as to how to dispose of municipal solid wastes. Land filling shall be restricted to non-biodegradable, inert waste and other waste that are not suitable either for recycling or for biological processing. Land filling shall also be carried out for residues of waste

processing facilities as well as pre-processing rejects from waste processing facilities. Land filling of mixed waste shall be avoided unless the same is found unsuitable for waste processing. Under unavoidable circumstances or till installation of alternate facilities, land-filling shall be done following proper norms. Landfill sites shall meet the specifications as given in Schedule III.

The above provisions are not exhaustive for the municipal authorities for taking care of solid wastes. It is also enshrined in Schedule II to hold regular meetings of the citizens and sensitize them for solid waste management. In spite of such legal provisions the municipal authorities are not been able to tackle the crisis for the reasons already discussed. In this respect it may be noted that Dharavi, a small town of Maharashtra is today known as re-cycling capital of India - dealing with wastes from all over the World (Down to Earth, November, 2007). Almost everything gets recycled here, from tooth brush and refrigerators to poly-bags, metals, cardboard and paper. There are 4000 to 5000 re-cycling units and ware-houses in Dharavi. Here also the Government does not provide license. It means whenever the community based solid waste management is on, it is authorities to encourage but not to discourage. The municipal authorities as such should implement the provisions of re-cycling by taking aid of the communities. Section 15 read with 19 of the Environment Protection Act, 1986 clearly say that whoever violates or fails to comply the provisions of the Act and the Rule made thereunder, shall be punishable after due cognizance is taken. There is no publicity of such penalty clearly say that whoever violates or fails to comply the provisions of the Act and the Rule made thereunder, shall be punishable after due cognizance is taken. There is no publicity of such penalty provisions for which the public are not aware to exercise their rights against the municipal authorities, State Pollution Control Board or the Central Pollution Control Board, as the case may be. It will not be out of place to mention that any person whoever finds infringement of the provisions can send notice to the State Pollution Control Board or other authorities and after waiting for 60 days can file a complaint before Court of law. Recently, Hon'ble High Court of Orissa have also passed stringent orders against the pollutants for not taking care of the bio-medical wastes of the hospital (Maitree Sansad Vrs. State of Orissa, AIR 2007(NOC)451(Ori)D.B.)

EPILOGUE :

Public awareness and attitude to waste can affect the population willingness to co-operate in adequate waste management practices. General environmental awareness and information on health risks due to lacking of solid waste management are very much required. So the NGOs have to sensitize the general public about the solid waste management. They have to also educate the people how to carry the solid waste from door to door and the demonstrate recovery and re-cycling activities at all levels of the waste management stream. Open dumping in an uncontrolled manner should not be encouraged and this practice is to be taught to the common man at the instances of the NGOs. Implementation of the

Green Laws is one of the duty of NGO, beside the duty of municipal, government authorities and the statutory authorities to monitor same. The statutory procedure for advancing the complaints by the general public and the punishment, if any, should be made aware to the general public to ensure the solid waste management so that the present burning problem in urban areas can be eradicated for pollution free environment.

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DOCTRINE OF POSTPONEMENT - BALANCING RIGHT TO FAIR TRIAL OF ACCUSED & RIGHT TO FREEDOM OF SPEECH & EXPRESSION OF MEDIA

Sri Anupam Patra
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"A defendant on trial for a specific crime is entitled to his day in court, not in a stadium or a city or nationwide arena."

Thomas Campbell Clark (United States Attorney General from 1945 to 1949 and an Associate Justice of the Supreme Court of the United States from 1949 to 1967)

While upholding the death sentence of Ajmal Kasab in August last year, the Hon'ble Supreme Court came down heavily on the electronic media and made a scathing criticism of its reckless coverage of the 26 November terror attack on Mumbai and observed that *"the coverage helped the assailants counter security movements as their positions were being reported live. The operational movements were being watched by the collaborators across the border on TV screens and being communicated to the terrorists."*[1]

One specific area where the media of our country urgently needs to focus is that of achieving a correct poise while dealing with *subjudice* matters without surrendering journalistic ideals. In the case of ***State of Maharashtra vs. Rajendra J. Gandhi***[2] the Hon'ble Apex Court has declared that "A trial by press, electronic media or public agitation is the very antithesis of rule of law". Unfortunately, rules designed to regulate journalistic conduct are inadequate to prevent their encroachment upon civil rights. Therefore any prevention and / or regulation must necessarily come from the outside. Amidst such circumstances, the Hon'ble Supreme Court has delivered its landmark verdict in the case of ***Sahara India Real Estate & Ors Vs Securities & Exchange Board Of India & Anr.,***[3] wherein it has expounded what is known as the doctrine of postponement. In this case the Hon'ble Court was seized with the adjudication of a dispute between the Sahara Group and market regulator SEBI (Securities Exchange Board of India) which had arisen due to alleged leakage of sensitive confidential communication inter parties and their consequential

1. Reported in www.indianexpress.com on 29th August 2012
2. Reported in *(1997) 8 SCC386*
3. Judgment was delivered by the Hon'ble Apex Court on 11th September, 2012

publication by the media. As a preventive measure against publications tending to prejudice the targets of such publication, the Hon'ble Apex Court propounded the 'doctrine of postponement' the gist of which it stated as thus:

> *"anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the .... principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not he an unreasonable restriction and on the contrary would fall within the proper constitutional framework. "*

Hence if the accused can establish substantial risk of prejudice against him due to the content of any published material, he can successfully obtain injunction against publication the such content during his trial. The doctrine however comes with a caveat that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. The Supreme Court has categorically remarked that orders of postponement should not disturb the content of the publication and such orders would only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. The Hon'ble Court elucidated the requirement of the doctrine by observing that

> *'when there is no other practical means that is capable of avoiding the real and substantial risk of prejudice to the connected trials, postponement orders safeguards the fairness of such trials.'*

The principle underlying issuance of postponement orders is revealed if one conjunctively reads Article 19(2), Article 129/ Article 215 and Article 142(2) of the Constitution. These Articles make it clear that Courts of Record have the power to punish for their contempt. Now it is needless to mention that an unwarranted prejudicial media publication is likely to entail prosecution of the publisher for contempt of Court as his actions interfere with the due administration of justice. Hence as a necessary corollary to the provisions of the aforestated Articles, Courts of Record are also clothed with the power to postpone publication in appropriate cases as a preventive measure without disturbing its content, as the same would check a contemptuous publication. In most common law jurisdictions, discretion is given to the courts to evolve neutralizing devices under contempt jurisdiction such as postponement of the trial,

re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. The Hon'ble Apex Court has made it categorically clear that order of postponement is one such neutralizing recourse which should be availed in order to achieve fair administration of justice.

Critics of the verdict predict that the judgment will lead to harassment of media persons and that it would create serious problems and make way for the high and mighty to seek virtual censorship.[4] However, in order to preempt any inference of its verdict as an attempt to suppress freedom of the media, the Hon'ble Apex Court while indoctrinating in the aforestated case has already made its views on the importance of media's role clear. The Hon'ble Court has acknowledged that the media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. It has been further clarified that by setting forth the doctrine the Hon'ble Court is not passing a blanket order, rather the concerned Courts shall be free to deal with each application on a case by case basis. It is equally noteworthy that, this is not the first time that the Supreme Court has favoured the principle of postponement. In several instances in the past it has allowed prior restraint on publication and has thereby asserted that such an approach on its part is neither unwarranted nor unjustified.[5]

A fair and unbiased media is indispensable in our country. It has in its own way served as a check against the corrupt and that it has stood guard against exploitation of the vulnerable. Incidental to such purport and objective of its function, the media must necessarily carry with it the inherent right to freedom of speech and expression, guaranteed by our Constitution. However, unlike in the United States of America where freedom of expression is absolute under the First Amendment, in India freedom of speech and expression is not absolute and it is subject to reasonable restrictions. It's high time the media realized the necessity of such a limitation keeping in mind the principles discussed and directions laid down in Sahara India Real Estate & Ors Vs Securities & Exchange Board Of India & Anr6 . It must also further realize that playing to the gallery may maximize its immediate commercial gains but slowly yet surely it'll stand bereft of the support and admiration of the right minded people and that would be a barter the media cannot afford. Reinforcing the foundation of our democracy involves according due weight to both - right to free speech and expression on one hand and the effective administration of justice by ensuring fairness of trials on the other - a valued rule required to be remembered by all concerned.

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4. As reported in www.thehindu.com on September 12, 2012
5. Kindly see Virendra vs. State of Punjab AIR 1957 SC 896; K.A. Abbas vs. Union of India AIR 1971 SC 481; Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers Bombay (P) Ltd. AIR 1989 SC 190
6. Supra at (4)

Law Day

The people of India gave to themselves the unique document to govern their national life, the Constitution of India on November 26, 1949, which is being celebrated as Law Day. This document was superbly designed to make this country a Democratic Republic to be governed by Rule of Law and to keep it as one huge nation with its wonderful and matchless unity in diversity.Thus, Law Day symbolizes the emergence of our Constitution.

Hon'ble Mr. Justice A. K. Goel, Chief Justice, Orissa High Court & Patron-in-Chief, Odisha Judicial Academy addressing the participants on the occasion of Law Day.

Hon'ble Mr. Justice Indrajit Mahanty, Judge, Orissa High Court, & Chairperson, Odisha Judicial Academy addressing the participants on the occasion of Law Day.

This year it was resolved by the Judicial Academy and training committee to observe the Law Day in the Odisha Judicial Academy for the first time coincide with a symposium on the topics- **Right of accused persons under Constitution, Role of trail judges under Constitution and Right of victims under constitution** The main goal of the symposium is to provide platform for Judicial officers of the state to discuss and deliberate on several important afore quoted legal issues. For the purpose the judicial officers of the state were requested to contribute articles and the academy received total number of 49 articles out of which 15 were short listed for deliberation on the occasion.(five on each topic)

Hon'ble Mr. Justice Indrajit Mahanty, Judge, Orissa High Court & Chairperson, Odisha Judicial Academy & Hon'ble Mr. Justice B. K.Patel, Judge, Orissa High Court & Member, Odisha Judicial Academy.

Hon'ble Mr. Justice M. M. Das, Judge, Orissa High Court, Hon'ble Mr. Justice B. N. Mahapatra, Judge, Orissa High Court and Hon'ble Mr. Justice B. K. Nayak, Judge, Orissa High Court sitting on the Dais.

All the selected judicial officers have got an opportunity to convey their views on the topics in presence of Honble Sri Justice A.K. Goel,Chief Justice of Orissa and Patron in Chief ,Odisha Judicial Academy and Honble Judges of Orissa High Court and participant judicial officers. They gave much emphasis on importance of a Constitution and what it means to a legal system and its significance remains beyond question. A Constitution is unique; it is an amalgamation of the beliefs of our forefathers at the time, their ideals for the future nation, and a representation of what the present thinks on legal system as well. Following from this, it is obvious that not every Constitution lasts; one need not look far for examples.

Dr. D. P. Choudhury, Director, Odisha Judicial Academy, Cuttack

Basing on their performance and to encourage them to do well in future , certificate of merits were distributed.

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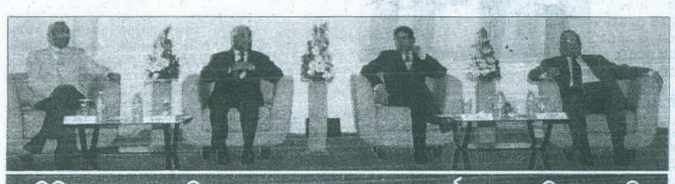
ଓଡ଼ିଶା ଜୁଡ଼ିସିଆଲ୍ ଏକାଡେମିରେ ଆଲୋଚନାଚକ୍ର

'ବିଚାରପତି ଚାପର ବଶବର୍ତ୍ତୀ ହେବା ଅନୁଚିତ'

ଜଟଜ-ସିଡ଼ିଏ,୩୦।୧୧(ଇମିସ): ସିଡ଼ିଏସ୍ଥିତ ଓଡ଼ିଶା ଜୁଡ଼ିସିଆଲ୍ ଏକାଡେମି ପରିସରରେ ଆଜି 'ପ୍ଲି ବାର୍ଗେନିଙ୍ଗ୍ ସେଣ୍ଟେନ୍ସିଂ ଏବଂ କ୍ୟାପିଟାଲ୍ ପନିସ୍‌ମେଣ୍ଟ୍' ଶୀର୍ଷକ ଆଲୋଚନାଚକ୍ର ଅନୁଷ୍ଠିତ ହୋଇଛି। ଓଡ଼ିଶା ହାଇକୋର୍ଟର ମୁଖ୍ୟ ବିଚାରପତି ଆଦର୍ଶ କୁମାର ଗୋଏଲ୍‌ଙ୍କ ଅଧ୍ୟକ୍ଷତାରେ ଅନୁଷ୍ଠିତ ଏହି ଆଲୋଚନାଚକ୍ରକୁ ସୁପ୍ରିମକୋର୍ଟର ବିଚାରପତି ଅଳଙ୍କ କୁମାର ପଟ୍ଟନାୟକ ଉଦ୍‌ଘାଟନ କରିଛନ୍ତି। ଦୁଇ ଦିନ ଧରି ଚାଲିବାକୁ ଥିବା ଏହି ଆଲୋଚନାଚକ୍ରର ପ୍ରଥମ ଦିନରେ ଆଜି ପ୍ଲି ବାର୍ଗେନିଙ୍ଗ୍ ଓ ସେଣ୍ଟେନ୍ସିଂ ବିଷୟ ଉପରେ ଆଲୋଚନା ହୋଇଥିଲା। ଏବେ ଦେଶର ବିଭିନ୍ନ କୋର୍ଟରେ ୩କୋଟିରୁ ଅଧିକ ମାମଲା ବିଚାରାଧୀନ ଅବସ୍ଥାରେ ପଡିରହିଛି। ଲୋକ ଅଦାଲତ ଭଳି ଏହି ସବୁ ମାମଲାର ତ୍ୱରିତ ପଇସଲା 'ପ୍ଲି ବାର୍ଗେନିଙ୍ଗ୍, ସେଣ୍ଟେନ୍ସିଂ ଏବଂ କ୍ୟାପିଟାଲ୍ ପନିସ୍‌ମେଣ୍ଟ୍' ଦ୍ୱାରା ବି ଜରାଯାଇପାରିବ ବୋଲି ବିଚାରପତିମାନେ ଗୁରୁତ୍ୱାରୋପ କରିଥିଲେ। ଏଥିପାଇଁ ବିଚାରପତିମାନେ ରାଜନୈତିକ, ସାମାଜିକ, ଅର୍ଥନୈତିକ, ସର୍ବୋପରି ଗଣମାଧ୍ୟମ ଚାପର ବଶବର୍ତ୍ତି ନହୋଇ ନ୍ୟାୟିକ ବ୍ୟବସ୍ଥାରେ ବିଚାର କରିବା ଉଚିତ୍। ଯେଉଁ ଚଟାରେ ଜଣେ ବ୍ୟକ୍ତି ଚରମ ଯାଏଁ ଦଣ୍ଡ ଭୋଗିବାର ଥିବ, ଯଦି ସେହି ବ୍ୟକ୍ତି କୋର୍ଟରେ ନିଜର ଦୋଷ ସ୍ୱୀକାର କରେ ଏବଂ କୋର୍ଟଙ୍କ ନିର୍ଦ୍ଦେଶ ମୁତାବକ କ୍ଷତିପୂରଣ ପ୍ରଦାନ କରେ, ତେବେ ତାହାର ଦଣ୍ଡ ଆନ୍ୟୂନ ୩/୪ ଭାଗ କମ୍ କରାଯାଇପାରିବ। ଏଥିପାଇଁ ସଂପୃକ୍ତ ବ୍ୟକ୍ତି ଓକିଲଙ୍କୁ ମଧ୍ୟସ୍ଥି ଭାବେ ବ୍ୟବହାର କରିପାରିବ। ଏହାଦ୍ୱାରା ଅଦାଲତ ଉପରୁ ମାମଲାର ଚାପ ହ୍ରାସ ପାଇବା ସହ ମାମଲାର ତ୍ୱରିତ ପଇସଲା ହୋଇପାରିବ। ତେବେ ମାମଲାର ତ୍ୱରିତ ପଇସଲା ଏବଂ ଲୋକଙ୍କୁ ସଚେତନ କରାଇବା ପାଇଁ ପ୍ରତ୍ୟେକ ରାଜ୍ୟରେ ଏପରି କର୍ମଶାଳା ଆୟୋଜନ ହେବାର ବହୁତ ଆବଶ୍ୟକତା ରହିଛି ବୋଲି ବିଚାରପତିମାନେ ଗୁରୁତ୍ୱାରୋପ କରିଥିଲେ। ଏହି ଅବସରରେ ଏକାଡେମି ପକ୍ଷରୁ ଶୋଭନୀୟ ପୁସ୍ତକ 'ବିଦ୍ୟା' ଉନ୍ମୋଚିତ ହୋଇଥିଲା। ଏହି ଆଲୋଚନାଚକ୍ରରେ ସୁପ୍ରିମକୋର୍ଟର ବିଚାରପତି ବି. ଗୋପାଳ ଗୌଡ଼ା, ପୂର୍ବତନ ବିଚାରପତି ଜଷ୍ଟିସ୍ ଏସ୍.ବି. ସିନ୍ହା, ଆନ୍ଧ୍ରପ୍ରଦେଶ ହାଇକୋର୍ଟର ମୁଖ୍ୟ ବିଚାରପତି ଜେ.ଜେ. ସେନଗୁପ୍ତା, ବମ୍ବେ ହାଇକୋର୍ଟର ବିଚାରପତି ଭି.ଏମ୍. କାନାଡେ, ଓଡ଼ିଶା ହାଇକୋର୍ଟର ବିଚାରପତି ଡ. ବି.ଆର. ସାରଙ୍ଗୀ ପ୍ରମୁଖ ବକ୍ତବ୍ୟ ପ୍ରଦାନ କରିଥିଲେ। ଏକାଡେମୀର ନିର୍ଦ୍ଦେଶକ ଡ. ଡି.ପି. ଚୌଧୁରୀ ସ୍ୱାଗତ ଭାଷଣ ପ୍ରଦାନ କରିଥିଲେ। ଆଲୋଚନାଚକ୍ରରେ ଏକାଡେମୀର ଅଧ୍ୟକ୍ଷ ଜଷ୍ଟିସ୍ ଇନ୍ଦ୍ରଜିତ୍ ମହାନ୍ତିଙ୍କ ସମେତ ଓଡ଼ିଶା, ବମ୍ବେ, ଝାରଖଣ୍ଡ, ଗୁଜୁରାଟ, ମଣିପୁର, ଆନ୍ଧ୍ରପ୍ରଦେଶ ହାଇକୋର୍ଟର ବିଚାରପତି ମାନେ ଉପସ୍ଥିତ ଥିଲେ।

'ବିଚାରବ୍ୟବସ୍ଥା ଜନସାଧାରଣଙ୍କ ଆସ୍ଥାଭାଜନ ହେଉ'



ଜୁଡିସିଆଲ୍ ଏକାଡେମିରେ ଆଲୋଚନାଚକ୍ର ଓ ଲୟର୍ସ ଏକାଡେମି ଉଦ୍‌ଘାଟିତ

ଜଟଜ-ସିଡିଏ,୧୮।୧୨(ଇମିସ): ସିଡିଏସ୍ଥିତ ଜୁଡିସିଆଲ୍ ଏକାଡେମି ପରିସରରେ ଆଜି 'ଏକ ବିଂଶ ଶତାବ୍ଦୀରେ ବିଚାରପତିଙ୍କ ଭୂମିକା' ଶୀର୍ଷରେ ଏକ ଆଲୋଚନାଚକ୍ର ଅନୁଷ୍ଠିତ ହୋଇଯାଇଛି। ଏହି ଅବସରରେ ଅନୁଷ୍ଠାନ ପରିସରରେ ଆଜି ଏକ ଆମ୍ଫିଥିଏଟର, ଜଷ୍ଟିସ୍ ଗଡିକୃଷ୍ଣ ମିଶ୍ର ମେମୋରିଆଲ୍ ଅଡିଟୋରିୟମ୍, ବି ଲୟର୍ସ ଏକାଡେମି ଉଦ୍‌ଘାଟିତ ହୋଇଯାଇଛି। ସେହିପରି ଏକ ପ୍ରଶିକ୍ଷଣ ଶିବିର ମଧ୍ୟ ଅନୁଷ୍ଠିତ ହୋଇଯାଇଛି। ଏହି ସବୁ କାର୍ଯ୍ୟକ୍ରମରେ ସୁପ୍ରିମ୍‌କୋର୍ଟର ବିଚାରପତି ଜଷ୍ଟିସ୍ ଆର.ଏମ୍.ଲୋଧା, ଜଷ୍ଟିସ୍ ଅଳଙ୍କ କୁମାର ପଟ୍ଟନାୟକ, ଜଷ୍ଟିସ୍ ଭି.ଗୋପାଳ ଗୌଡ଼, ଓଡ଼ିଶା ହାଇକୋର୍ଟର ମୁଖ୍ୟ ବିଚାରପତି ଜଷ୍ଟିସ୍ ଆଦର୍ଶ କୁମାର ଗୋଏଲ୍‌ଙ୍କ ସମେତ ଅନ୍ୟ ବିଚାରପତିଗଣ ଅତିଥି ଭାବେ ଯୋଗ ଦେଇଥିଲେ।

ବିଚାରବ୍ୟବସ୍ଥା ସବୁବେଳେ ଜନସାଧାରଣଙ୍କ ଆସ୍ଥା ଭାଜନ ହେବା ଆବଶ୍ୟକ ବୋଲି ଆଲୋଚନାଚକ୍ରରେ ଯୋଗ ଦେଇ ସୁପ୍ରିମ୍‌କୋର୍ଟର ବିଚାରପତି ଜଷ୍ଟିସ୍ ଆର.ଏମ୍.ଲୋଧା, ଜଷ୍ଟିସ୍ ଅଳଙ୍କ କୁମାର ପଟ୍ଟନାୟକ, ଜଷ୍ଟିସ୍ ଭି.ଗୋପାଳ ଗୌଡ଼ ନିଜ ନିଜ ବକ୍ତବ୍ୟରେ ମତ ପ୍ରକାଶ ପ୍ରକାଶ କରିଛନ୍ତି। ସମୟ ଓ ସମାଜ ପରିବର୍ତ୍ତିତ ହେଇଥିବାରୁ ନ୍ୟାୟ ପ୍ରଦାନ ସମୟରେ ସୃଷ୍ଟି ହେଇଥିବା ଚାଲେଞ୍ଜର ମୁକାବିଲା କରିବା ବିଚାର ବ୍ୟବସ୍ଥା ସବୁବେଳେ ପ୍ରସ୍ତୁତ ହୋଇ ରହିଥିବା ଉଚିତ୍। ନ୍ୟାୟାଳୟ ସବୁବେଳେ ବିଶ୍ୱାସର ଭାର୍ତ୍ତା ବହନ କରିଥାଏ। ଯଦି ନ୍ୟାୟାଳୟକୁ ଲୋକେ ନିରାଶ ହେବେ ତେବେ ସାମ୍ବିଧାନିକ ବ୍ୟବସ୍ଥା ଭୁଶୁଡ଼ି ପଡିବ। ତେଣୁ ନ୍ୟାୟ ପ୍ରଦାନ ସମୟରେ ବିଚାରପତିମାନେ କୌଣସି ବାହ୍ୟ ବଶବର୍ତ୍ତୀ ହୁହନ୍ତୁ ବୋଲି ଅତିଥିମାନେ ମତବ୍ୟକ୍ତ କରିଥିଲେ। ଆଲୋଚନାଚକ୍ର ପ୍ରାରମ୍ଭରେ ଜଷ୍ଟିସ୍ ଆଦର୍ଶ କୁମାର ଗୋଏଲ୍ ସ୍ୱାଗତ ଭାଷଣ ପ୍ରଦାନ କରିଥିବାବେଳେ ଜଷ୍ଟିସ୍ ଇନ୍ଦ୍ରଜିତ୍ ମହାନ୍ତି ଧନ୍ୟବାଦ ଅର୍ପଣ କରିଥିଲେ। ପରବର୍ତ୍ତୀ ସମୟରେ ଅତିଥିମାନେ ଅଡିଟୋରିୟମ୍ , ଆମ୍ଫିଥିଏଟର ଉଦ୍‌ଘାଟନ କରିଥିଲେ। ଏହି କାର୍ଯ୍ୟକ୍ରମରେ ବିଚାରପତି, ବିଚାରବିଭାଗୀୟ ଅଧିକାରୀଙ୍କ ସମେତ ଜୁଡିସିଆଲ୍ ଏକାଡେମିର ଡେପୁଟି ଡାଇରେକ୍ଟର୍ ଡ. ପବିତ୍ର ମୋହନ ପାତ୍ର, ସୁପରିଣ୍ଟେଣ୍ଡଣ୍ଟ ଅଭ୍ୟୁଦୟ ପାତ୍ରଙ୍କ ସମେତ ଅନ୍ୟମାନେ ଉପସ୍ଥିତ ଥିଲେ। ସେହିପରି ଅନ୍ୟ ଏକ ଉତ୍ସବରେ ଅତିଥିମାନେ ବି ଲୟର୍ସ ଏକାଡେମି ଉଦ୍‌ଘାଟନ କରିଥିଲେ। ଦିନକୁ ଦିନ ବଢୁଥିବା ଆଇନ ଙ୍ଗପର୍କରେ ଯୁବଆଇନଜୀବୀମାନେ ସଚେତନ ହେବାର ଆବଶ୍ୟକତା ରହିଛି ବୋଲି କାର୍ଯ୍ୟକ୍ରମରେ ଯୋଗ ଦେଇ ଜଷ୍ଟିସ୍ ଆର୍.ଏମ୍.ଲୋଧା ମତବ୍ୟକ୍ତ କରିଥିଲେ। ଏଭଳି ଏକ ଏକାଡେମି ଗଠନ ଉଦ୍ୟମକୁ ବିଚାରପତିମାନେ ପ୍ରଶଂସା କରିଥିଲେ। ଆଡଭୋକେଟ୍ ଜେନେରାଲ୍ ଅଶୋକ ମହାନ୍ତିଙ୍କ ଅଧ୍ୟକ୍ଷତାରେ ଅନୁଷ୍ଠିତ ଏହି କାର୍ଯ୍ୟକ୍ରମରେ ହାଇକୋର୍ଟ ବାର୍ ଆସୋସିଏସନ୍ ସଭାପତି ତଥା ଜରିଷ୍ଠ ଆଇନଜୀବୀ ବିଜନ ବିହାରୀ ରାୟ ସ୍ୱାଗତ ଭାଷଣ ପ୍ରଦାନ କରିଥିଲାବେଳେ ଜରିଷ୍ଠ ଆଇନଜୀବୀ ସୂର୍ଯ୍ୟ ପ୍ରସାଦ ମିଶ୍ର ଅତିଥି ପରିଚୟ ପ୍ରଦାନ କରିଥିଲେ। ଜରିଷ୍ଠ ଆଇନଜୀବୀ ବିପିନ ବିହାରୀ ହୋଟ, ଏକାଡେମିର ମ୍ୟାନେଜିଂ ଟ୍ରଷ୍ଟି ତଥା ଜରିଷ୍ଠ ଆଇନଜୀବୀ ବିଶ୍ୱମୋହନ ପଟ୍ଟନାୟକ ପ୍ରମୁଖ ଉପସ୍ଥିତ ଥିଲେ। ଏହି କାର୍ଯ୍ୟକ୍ରମରେ ବାର୍ କାଉନସିଲ୍ ଅଧ୍ୟକ୍ଷ ଗୋପାଳକୃଷ୍ଣ ମହାନ୍ତି, ଜରିଷ୍ଠ ଆଇନଜୀବୀ ତୁଷବେଦ ରାଉତରାୟ, ଆଇନଜୀବୀ ବୟାଳିସି ଜେନାଙ୍କ ସମେତ ବହୁ ଅଇନଜୀବୀ ଯୋଗ ଦେଇଥିଲେ।