MISCELLANEOUS

Section 25. Recovery of fines—Sections 63 to 70 of the Indian Penal Code (45 of 1860) and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines, shall apply to all fines imposed under any Act, Regulation, rule or bye-law, unless the Act, Regulation, rule or bye-law contains an express provision to the contrary.

SYNOPSIS

1. MEANING OF THE SECTION

This section affords itself an example of legislation by referential incorporation.[1] It deals with the issue, and execution of warrants for the levy of fines. It is contemplated that the particular Act, regulation, rule, or bye-law under which any sentence or penalty of fine may be imposed might itself provide for the mode in which and the procedure by which the fine so imposed or levied should be recovered and might itself contain adequate provisions for the issue and execution of warrants for the levy of fines and might even provide for imprisonment of the person subject to such fine in the event of his default of the payment thereof. In that case the provisions so prescribed or the mode so laid down under that particular Act, regulation, rule, or bye-law shall alone apply and s 25 of the General Clauses Act will have no application, because the more special provisions of that particular Act, regulation, rule, or bye-law shall override the general principle contained for recovery of fines in s 25 of the General Clauses Act. However, in case any such special Act, regulation, rule, or bye-law has, although provided for the penalty of a fine, not made provisions

1 For legislation by referential incorporation: s 8, heading: 'Clause 1'

in relation to imprisonment in default, or to the issue and execution of the warrants for the levy of fines imposed thereunder, the provisions of s 25 of the General Clauses Act, which, on the doctrine of referential incorporation, include the provisions of ss 63–70 of Indian Penal Code along with the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants of fines, shall apply.[2]

The word 'Act' occurring in this section includes an ordinance, vide s 30 of the General Clauses Act.

The section applies to all Acts and regulations, and it has been held to apply, with retrospective effect, to the Prevention of Gambling Act, though passed earlier than the General Clauses Act.[3] The section was held to apply to the payment of fines under s 391 of Calcutta Municipal Act.[4]

The Code of Criminal Procedure, which followed the enactment of the General Clauses Act 1897, was the Code enacted in 1898 (Act 5 of 1898). Section 386 of that Code had made provisions for warrant of levy of fines. The Code of 1898 has been repealed and replaced by the Code of Criminal Procedure 1973 (Act 2 of 1974) which came into force on the 1 April 1974. Section 386 of the old Code corresponds to s 421 of the new Code which provides, firstly, that when an offender has been sentenced to pay a fine, the court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may:

(i) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender; or

(ii) issue a warrant to the collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary to do so, or unless it has made an order for the payment of expenses or compensation out of the fine under s 357.

Section 421 of the new Code provides, secondly, that the state government may make rules regulating the manner in which warrants under cl (a) above are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

2 *Kishan Lal Sindhi v Executive Officer, Padampur Notified Area Council* 1980 Cr LJ 365 (Ori), (1979) 48 Cut LT 542 (imprisonment can be awarded in default of payment of fine even if not provided for in the local or special statute).

3 *Maung Pyo Tha v Ko Min Pyu* (1900–02) 1 Low Bur Rul 150–51.

4 *UK Mitra v Corpn of Calcutta* AIR 1932 Cal 63, 33 Cr LJ 303, 35 CWN 865.

This means that when s 421 of the Code is made applicable, by force of s 25 of the General Clauses Act, to a case of recovery of fines under any special Act, regulation, rule or bye-law, the rules, if any, made by the state government regulating the manner in which a warrant has to be executed for the levy of the amount of fine by attachment and sale of movable property belonging to the person subject to such penalty of fine, shall also become applicable to that case.

Section 421 of the new Code provides, thirdly, that where the court issues a warrant to the collector under cl (b) of sub-s (1), the collector shall realise the amount in accordance with the law relating to recovery of arears of land revenue, as if such warrant were a certificate issued under the law, provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

It follows again that in the event of applicability of s 25 of the General Clauses Act, to a case of recovery of fine under any special law, where the order of recovery of fine is addressed to the collector for recovery as arrears of land revenue, the law relating to the recovery of arrears of land revenue for the time being in force shall also become applicable to that case.

The referential incorporation in s 25 of the General Clauses Act, of the provisions contained in ss 63–70 of the Indian Penal Code 45 of 1860, have made it necessary to notice, in the context of recovery of fines, also the provisions of ss 63–70 of the Indian Penal Code. Section 70 of the Penal Code has, however, been held inapplicable to fines imposed by the High Court for its own contempt.[5]

Section 63 of the Indian Penal Code provides that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable, would be unlimited, but shall not be excessive. Section 64 thereafter provides that in every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment, or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence. Section 65 then states that the term for which the court directs the offender to be imprisoned, in default of payment of a fine, shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Section 66, further says that the imprisonment, the court imposes in default of payment of a fine, may be of any description to which the offender might have been sentenced for the offence. Then comes s 67 providing that if the offence is punishable with fine only, the imprisonment which the court

5 *RL Kapoor v State of Tamil Nadu* AIR 1972 SC 858–60, 1972 Cr LJ 643, (1974) 1 SCJ 123.

imposes in default of payment of the fine shall be simple, and the term for which the court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case. Section 68, which follows next, has expressed that the imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by the process of law. Section 69, thence, reads that if, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine is paid or levied that the terms of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate. The last in this link is s 70 speaking that the fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if under the sentence the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from liability, any property which would, after his death, be legally liable for his debts.

In all the above provisions of the Indian Penal Code as also in s 421 of the Code of Criminal Procedure 1973, the recovery of fines is relatable to the person who is an offender, that is to say, who has been adjudged to have committed an offence. The term 'offence' as defined under s 3(38) means any act or omission made punishable by any law for the time being in force. Thus, a person, who incurs a penalty of fine for non-payment of any amount leviable under any taxing or revenue law by any department of the government, and proves himself a defaulter in the payment of the amount thereby levied upon him, would be guilty of omission of payment of such dues and such omission which subjected under such law to a penalty of fine, would naturally fall within the ambit of an offence as defined under s 3(38) of the General Clauses Act. A defaulter may, hence, be deemed to be an offender for purposes of s 25 of the General Clauses Act.

2. APPLICATION OF THE SECTION

By virtue of this section, an order passed by a magistrate under s 15(b), Madras General Sales Tax Act 1939, directing the accused to undergo imprisonment in default of payment of fine has been held legal inasmuch as s 64 of the Penal Code would apply to fines imposed under the Madras General Sales Tax Act.[6] The provisions of ss 64 and 67 of the Indian Penal Code, have been held to be applicable, by virtue of s 25 of the General Clauses Act, to the fines to be imposed in accordance with the rules framed under the Sugarcane Act

6 *Re Darla Ramadoss* AIR 1958 AP 707.

1939, because when an offender is convicted of an offence punishable with fine under a special or local law, although such law has omitted to make specific provision for imprisonment in default of payment of fine, there would always follow a power to impose a sentence of imprisonment in default of payment of such fine, by virtue of the provisions of this section read with the provisions of ss 64 and 67 of the Indian Penal Code,[7] and such imprisonment in default of payment of fine shall be legal.[8]

3. THIS SECTION AND ARTICLE 215 OF THE CONSTITUTION

Article 215 declares that every High Court shall be a court of record and shall have all powers of such a court including the power to punish for contempt of itself. Whether art 215 declares the power of the High Court already existing in it by reason of its being a court of record, or whether the article confers the power as inherent in a court of record, the jurisdiction is a special one, not arising or derived from the Contempt of Courts Act, and therefore, not within the purview of either the Penal Code or the Code of Criminal Procedure. Such a position was also clear from the provisions of the Contempt of Courts Act 1952.[9] Section 3 of that Act provided that every High Court shall have and exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice in respect of contempt of courts subordinate to it as it has and exercises in respect of contempts of itself. The only limitation to the power as provided by sub-s (2) of s 3 thereof, that it should not take cognisance of a contempt committed in respect of a court subordinate to it where such contempt is an offence punishable under the Penal Code.

As explained in *Shukhdev Singh Sodhi v Chief Justice and Judges of the Pepsu High Court*,[10] s 2 of the 1952 Act is similar to s 2 of the 1926 Act, and far from conferring a new jurisdiction, assumes, as did the old Act, the existence of a right to punish for contempt in every High Court and further assumes the existence of a special practice and procedure, for it states that every High Court shall exercise the same jurisdiction, powers and authority in accordance with the same procedure and practice. In any case, so far as contempt of the High Court itself is concerned, as distinguished from that of a court subordinate to it, the Constitution vests these rights in every High Court and so no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority.

7 *Sakaldeo Singh v Emperor* AIR 1937 Pat 4, ILR 16 Pat 92.

8 *UK Mitra v Corpn of Calcutta* AIR 1932 Cal 63.

9 Since repealed and replaced by the Contempt of Courts Act 70 of 1971. The provisions of s 3 of the old Act corresponds to s 10 of the new Act. The case discussed should, hence, be read in that context.

10 [1954] SCR 454, AIR 1954 SC 186.

No doubt, s 5[11] of the Act states that a High Court shall have jurisdiction to inquire, into and try a contempt of itself or of a court subordinate to it whether the alleged contempt is committed within or outside the local limits of its jurisdiction and whether the contemner is within or outside such limits. The effect of s 54 is only to widen the scope of the existing jurisdiction of a special kind and not to confer a new jurisdiction. It is true that under s 4 of the Act, the maximum sentence and fine which can be imposed is respectively simple imprisonment for six months and a fine of Rs 2,000, or both. But that again is a restriction on an existing jurisdiction and not conferment of a new jurisdiction. That being the position, s 25, General Clauses Act 1897, cannot apply.[12]

4. IMPRISONMENT IN DEFAULT OF FINE

Though there is no provision of imprisonment in default of payment of fine in Narcotic Drugs and Psychotropic Substances Act 1985, but order of sentencing to imprisonment in default of payment of fine under the said Act can be legally passed in the light of ss 40(2) and 64 of Indian Penal Code and s 25 of General Clauses Act.[13]

Section 26. Provision as to offences punishable under two or more enactments—Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

SYNOPSIS

1. APPLICABILITY

Section 26 will not bar two trials in respect of the two offences. Section 26, in fact, contemplates those cases where the acts alleged fall within the definition of offences under two enactments.[14] There is no bar under this

11 Section 5 of the 1952 Act now corresponds to s 11 of the new Act of 1971 (70 of 1971).
12 *RL Kapur v State of Tamil Nadu* AIR 1972 SC 858, 1972 Cr LJ 643, (1972) 2 SCA 90.
13 *Daulat Raghunath Devale v State of Maharashtra* (1990) 3 Bom CR 608.
14 *Gopi Nath v State* 1979 Cr LJ 414, 1979 All LJ 159, 1979 All Cr R 124.

second trial but the only bar is against two punishments. Article 20(2) of the Constitution of India, circumscribes the plea of *autre fois convict* as known to English jurisprudence or the plea of double jeopardy as known to the Constitution of the United States of America, by providing that there should be not only a prosecution but also punishment in the first instance to operate as a bar to a subsequent a prosecution and punishment.[15] If, therefore, on the former occasion the accused has been acquitted, the courts are not prohibited from convicting him at the second trial. Only, if for the same act or omission the accused has been punished under one statute, can he not be punished again for the same act under another statute,[16] there being no bar to simultaneous prosecution under more than one enactment,[17] one general and another special,[18] subject, however, to the overriding consideration of double jeopardy.[19] Where there are two parallel provisions, the prosecution may proceed under either of the provisions.[20] Section 26 has no application if the offences are distinct,[21] or have distinct ingredients.

What is prohibited under this section is punishment for the same set of facts under two sections but not the trial of an accused on alternate charges, where acquittal on one charge is no bar to conviction on the other.[22] In case of identical definition of the offences, the court can select the law of choice to convict the accused.[23] Thus, a trial of the accused for offences under s 161, IPC, and s 5(2) of the Prevention of Corruption Act cannot be challenged as being prohibited by the present section.[24] This section has, however, nothing to do with any sanction required for starting a prosecution.[25]

For a false statement in verification of an income-tax return, a person can be prosecuted under both, s 177 of the Indian Penal Code, and s 52 of the Income Tax Act 1922 at the same time. Section 26 of the General Clauses

15 *Maqbool Hussain v State of Bombay* AIR 1953 SC 325, 328, 1953 Cr LJ 1432, (1953) SCJ 466.

16 *Rasool v State* AIR 1950 Mys 136.

17 *Re, P Bapanaiah* AIR 1970 AP 47, 1970 Cr LJ 199.

18 *Lingam Krishna Bhupathi v Kovuru Baisivireddi Garu* AIR 1918 Mad 460 (2), 461, 18 Cr LJ 992, 6 Mad LW 283 (prosecution either under general or under special law, with punishment not to be duplicate).

19 *Nathmull Poddar v Salil Kumar Chakraborty* AIR 1971 Cal 93, 97, 1971 Cr LJ 361, (1970) 74 CWN 792; *Rajjab Ali v State* 1974 Cr LJ 139, 141 (All) (s 26 not to bar first and subsequent prosecution under the same Act).

20 *State v Raj Kumar* AIR 1956 Pepsu 1–2, 1956 Cr LJ 100.

21 *President, Panchayat Board, Velgode v Chinna Venkata Reddy* AIR 1932 Mad 537, 19 Mad WN 860; *Steel Authority of India Ltd, Bhilai v Aeltemesh Rein* 1984 Jab LJ 552, 1984 MPLJ 40.

22 *State of Madhya Pradesh v Veereshwar Rao Agnihotri* AIR 1957 SC 592, 594, 1957 Cr LJ 892, (1957) SCJ 519.

23 *Bhagwagir Mukundgir v State* AIR 1950 MB 58, 51 Cr LJ 1345.

24 *Gulab Singh v State* AIR 1962 Bom 263, (1962) 2 Cr LJ 598; *Balmukund Sharma v Board of Revenue* 1967 Raj LW 36, (1966) ILR 16 Raj 1091; *Suraj Pal Singh v State of Uttar Pradesh* AIR 1961 SC 583, 586, (1961) 1 Cr LJ 730, 1961 All LJ 298, 196 2 SCJ 293 (s 5(2) or 5(3) does not create any offence; hence, acquittal on charge under s 5(1)(c) bars trial under s 5(2) or 5(3)).

25 *KP Sinha v Aftabuddin* AIR 1955 Pat 453, 1955 Cr LJ 1382.

Act bars punishment of the offender twice for the same offence and not the trial or conviction under both the enactments.[26] The same offence means the identity of its ingredients,[27] coupled with a community of time, place, person and commodity.[28]

When the accused is sentenced under s 135 of the Customs Act and he has also to be sentenced under r 126P of the Defence of India Rules, no provision of the General Clauses Act bars such sentence under s 26.[29] Similarly offence under s 9(1) read with s 51 of Wild Life Protection Act cannot be termed same as an offence under s 429 of Indian Penal Code, as the ingredients of the offences are different.[30]

Under s 26 an accused should not be made to suffer punishment more than once for the same acts or omissions because they constitute offences under two or more enactments. The section does not prevent the accused from being charged with and tried for the same acts or omissions under different provisions of law. It does not even prevent an accused from being convicted in respect of each of these offences or from being sentenced separately in respect of each of the offences, so long as he is not made to suffer punishment twice for the same act or series of acts. If the court makes the punishment run concurrently it does not violate the provisions of s 26 of the General Clauses Act.[31]

In a case from Madras,[32] the facts were that a person had once been convicted on a charge of disobedience to a statutory notice to submit his child for vaccination. It was held that he could not be convicted once again on the same facts for disobeying a second notice for the same purpose.

Proceedings under s 273 of the Indian Penal Code are not barred merely because food has been destroyed under s 287 of Bihar and Orissa Municipal Acts.[33]

2. OBJECT OF THE SECTION

The section was enacted to avoid implied repeal of the General Clauses Act by special enactments.[34] Therefore, s 26 will apply when both the enactments

26 *TS Balaiah v TS Rangachari, Income-tax Officer Central Circle VI* (1969) 1 FTJ 732, [1969] 72 ITR 787, (1969) 2 Mad LJ (SC) 9, (1969) 1 SCJ 890, (1969) 2 Andh WR 9 (SC), (1969) Mad LJ 547 (Cr), AIR 1969 SC 701.

27 *Manipur Admn, Manipur v Thockchom Bira Singh* AIR 1965 SC 87, 90, (1965) 1 Cr LJ 120, (1965) 1 SCJ 451.

28 *Municipal Corpn of Delhi v Moti Lal* 1972 Cr LJ 1536, 1540, 74 Punj LR (D) 316 (FB).

29 *Aravinda Mohan v Prohlad* AIR 1970 Cal 437.

30 *State of Bihar v Murad Ali Khan* AIR 1989 SC 1, 7.

31 *Hari Rachukandi v State of Maharashtra* 73 Bom LR 891.

32 *KV Subramania Iyer v Emperor* AIR 1931 Mad 181–82, 32 Cr LJ 662, 60 Mad LJ 296.

33 *Madan Lal v Emperor* AIR 1934 Pat 113.

34 *Jogesh Chandra Choudhury v Kshirode Ranjan Bhattacharji* (1961) 2 Cr LJ 564 (Tri); *State v Dina Nath* AIR 1956 Punj 85, 1956 Cr LJ 415.

stand in operation, and either of them has not been necessarily repealed by the other.[35]

3. SCOPE

Section 26 is wider in scope than its corresponding s 33, English Interpretation Act 1889. Not only does it premise that the Act or omission constituting an offence must fall under two or more enactments,[36] one general and another special or both local, but also it deals, having regard to the meaning of an 'enactment', with an act which is an offence under two or more sections of the same Act.[37]

A petitioner sought a direction against the respondent, Union of India, for rectifying the mistake allegedly committed by the passport authority in mentioning his date of birth wrongly. Since the passport authority itself can correct the entries in the passport including those in relation to the date of birth in view of the provisions of s 21 of the General Clauses Act, it was felt not proper to refer the matter to the judicial magistrate. Judicial magistrates are not conferred with such a jurisdiction under any law. Direction was, therefore, given to the passport authority to hold an inquiry and, on hearing the claim of the petitioner and on satisfying itself with regard to his claim, effect necessary changes in the passport issued in favour of the petitioner.[38]

Section 26 of the General Clauses Act creates a bar against the prosecutions and punishment twice over for the same offence. But this bar would be attracted only if the ingredients which constitute the two offences are identical.[39]

Section 26 has no application to an offence of abetment for which there can be no conviction under the Penal Code but only under the Salt Act 1882.[40]

But the imposition of a civil penalty, such as confiscation or seizure or a penal tax, will not absolve the transgressor from the liability to criminal prosecution. The application of the doctrine of 'double jeopardy' is not attracted as the imposition of civil penalties will not amount to conviction and sentence. Thus s 18 of the Sea Customs Act would not preclude proceeding under s 167(81) of the same Act in those cases where the customs officers have levied the penalties of confiscation or fine.[41]

35 *State v Bhimrao* (1954) ILR Hyd 558, 561, AIR 1955 NUC (Hyd) 5923 (DB).

36 *Akki Veeraiah v State* AIR 1957 AP 663, 1957 Cr LJ 1078, 1956 Andh WR 73 (DB).

37 *Jayarama Iyer v State of Hyderabad* AIR 1954 Hyd 56; *Balmukund Sharma v Board of Revenue* (1966) ILR 16 Raj 1091, 1967 Raj LW 36.

38 *Jigar Harish Shah v Union of India & Anor* AIR 2001 Bom 60-62 (DB).

39 *GC Datta v State of Uttar Pradesh* 1995 All LJ 637.

40 *Sangam Madho v Ramnarain* AIR 1930 Oudh 497, 499, 32 Cr LJ 104, 7 OWN 895 (DB).

41 *Mahommad Kasim v Asst Collector of Excise* (1961) 2 Mad LJ 382 (FB).

Section 26 has no application to two offences under the same section of an enactment, eg, disappearance of evidence in respect of two crimes committed by the same act which would be offences under s 201 of the Indian Penal Code.[42]

Section 26 no doubt provides for prosecution and punishment under either or any of the enactments. But where the burden of proof differs in respect of prosecutions under the various enactments, it is clear that there cannot be joinder of charges at a common trial, as it would be highly prejudicial to the accused.[43]

Section 26 has no bearing upon the question whether prosecution should be started for an offence which required no sanction although the facts mentioned in the complaint might eventually disclose an offence which required sanction. It speaks of an offence under two enactments and it says that the offender can be liable to be prosecuted under either of those enactments. Even if it is assumed that the section applies to two offences mentioned in the same enactment, it means only that the offender is liable to be prosecuted for either of those two offences; it has no reference to sanction.[44] According to s 27 of the Bombay General Clauses Act, if an act constitutes an offence under the IPC as well as the Maharashtra Co-operative Societies Act and the prosecution is only under the IPC the question of obtaining sanction under s 148(3) of the Maharashtra Co-operative Societies Act does not arise.[45] The court has, however, a discretion in the choice of the provision under which the offender may be punished, and the discretion must be in favour of the provision specially introduced to deal with offences of the kind in the case.[46]

For the offence of possessing gold beyond the permitted quantity or possession of smuggled foreign gold, the offence falls under r 126P(2)(ii) and (iv) of the Defence of India Rules as well as under s 15 of the Customs Act, but more particularly, under the Defence of India Rules which have been specially enacted for the purpose. The court using its discretion must punish the accused under the Defence of India Rules.[47] Section 26 of the General Clauses Act creates a bar against the prosecutions and punishment twice over for the same offence; but this bar would be attracted only if the ingredients which constitute the two offences are identical.[48]

42 *Roshan Lal v State of Punjab* AIR 1965 SC 1413, (1965) 2 Cr LJ 426, (1966) 1 SCJ 233.

43 *Neithenga Ham v Asst Collector of Central Excise and Land Customs* AIR 1963 Mani 1.

44 *KP Sinha v Aftabuddin* AIR 1955 Pat 453; *Waman Sambhaji v Narhari Sambhaji* AIR 1968 Bom 124; *TS Baliah v TS Rangachari* AIR 1969 Mad 145; *Re Adhi* (1964) 2 Mad LJ 430, 432 (conviction under s 363 cannot be avoided even if the offence charged also falls under s 498 of the Indian Penal Code).

45 *Waman Sambhaji v Narhari Sambhaji* (1967) ILR Bom 1147, 69 Bom LR 687, 1967 Mah LJ 988, 1968 Cr LJ 305, AIR 1968 Bom 124; *Emperor v Shridhar Mahadeo Pathak* AIR 1935 Bom 36.

46 *Public Prosecutor v Avvaru Annappa* AIR 1969 AP 278, 1969 Cr LJ 1022.

47 Ibid.

48 *GC Datta v State of Uttar Pradesh* 1995 All LJ 637.

4. ACT OR OMISSION

The section applies only when an act or omission is constituted an offence by two or more different enactments. The prosecution must, thus, be with reference to the law under which the offence is created and, then, the punishment must also be in accordance with what that law has prescribed.[49] It makes no difference to the application of s 26 that the procedure laid down in two enactments with regard to the prosecution of an offender is different or even if different sentences are provided in the two enactments.[50]

An 'act' is nowhere defined. It must necessarily be something short of a transaction which is composed of a series of acts, but cannot, in ordinary language, be restricted to every separate willed movement of a human being, for when we speak of an act of shooting or stabbing we mean the action taken as a whole, and not the numerous separate movements involved.[51] In *Rahmatullah v Emperor*,[52] the accused by one act resisted the police and endangered the lives of by-standers. One offence is under the Penal Code and the other under the Railways Act. It was held that conviction under the Railways Act must be set aside. But the contention that because of a special enactment dealing with an offence similar to the offence dealt with by the Indian Penal Code, the provisions of the Indian Penal Code should be taken to have been repealed to that extent, is not acceptable.[53]

5. DISTINCT OFFENCES UNDER SAME ENACTMENT OR DISTINCT ENACTMENTS

Article 20(2) of the Constitution of India prohibits the punishment of a person for the same offence more than once, but the prohibition is not against punishment more than once for different offences under different enactments. Section 26 of the General Clauses Act bars only punishment of an offender twice for the same offence and not trial or conviction under both the enactments.[54] This section deals not only with an act which is an offence under the Penal Code and under a special or local law, and an act which is an offence under two or more local Acts, but also with an act which is an offence under two or more sections of the same Act.[55]

49 *SA Venkataraman v Union of India* AIR 1954 SC 375, 379, 1954 Cr LJ 993, (1954) SCJ 461.

50 *State v Pandurang* AIR 1955 Bom 51, 57 Bom LR 868 (FB).

51 *Emperor v Bhogilal* AIR 1931 Bom 409.

52 18 Cr LJ 321 (1), 38 IC 433 (Pat); *Re Veerasami* AIR 1931 Mad 18 (s 24, Cattle Trespass Act and theft); *Bahadur Singh v Crown* AIR 1923 Lah 342 (s 6 of Act 10 of 1911 and s 17, cl (2) of Criminal Laws (Amendment) Act; convicted and undergone sentence under the former, he could not be convicted again under the latter).

53 *Segu Baliah v Ramasamiah* 18 Cr LJ 992, 42 IC 608 (Mad).

54 *TS Balaiah v TS Rangachari, Income-tax Officer Central Circle VI* AIR 1969 SC 701, 706, (1969) 1 SCJ 890; affirming *TS Baliah v TS Rangachari* AIR 1969 Mad 145.

55 *K Jayarama Iyer v State of Hyderabad* AIR 1954 Hyd 56, 55 Cr LJ 464.

The two laws making the same act or omission punishable can, however, co-exist side by side.[56] Where an act is an offence under the provisions of two enactments which are not in conflict with each other, prosecution could be resorted to under either of the enactments.[57] When the same facts have disclosed primarily and essentially two distinct offences, one of them graver than other and also requiring prior sanction, it would be at choice of prosecution to put the accused for trial for either of the two.[58] An offence punishable under s 25 of the Arms Act is not the same as one under s 411 of the Penal Code. A second trial is not barred by virtue of s 26 of the General Clauses Act.

However, s 300 of Code of Criminal Procedure 1973 bars it which runs as under:

(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-s (1) of s 221, or for which he might have been convicted under sub-s (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the state government for any distinct offence for which a separate charge might have been made against him at the former trial under sub-s (1) of s 220.

(3) A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence if the consequences had not happened or were not known to the court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may notwithstanding such acquittal or conviction, be subsequently charged with and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the court by which he was

56 *Bhup Narain v State* AIR 1952 All 35; *Re Satyanaravan Murthi* AIR 1953 Mad 137; *Mahomad Ali v State* AIR 1953 Cal 681; *State v Salubrayo Govindrao* AIR 1954 Bom 549; *Om Prakash v State* AIR 1955 All 275, 281.

57 *Muniswamappa v Government of Mysore* AIR 1951 Mys 25; *Badri Prasad v State* AIR 1953 Cal 28 (offences under two sections of an enactment); *Gopi Nath v State* 1979 Cr LJ 414, 417, 1979 All LJ 159, 1979 All Cr R 124 (assault on food inspector, a distinct offence from offence under s 16(1)(b) of the Prevention of Food Adulteration Act); *Dhirendra Nath v Nurul Huda* 56 CWN 1 (FB); *Pramath Nath v State* AIR 1951 Cal 581; *AMS Mahomad Kasim v Asst Collector of Central Excise* AIR 1962 Mad 85, (1961) 2 Mad LJ 382.

58 *RP Oberoi v State* 1982 Rajdhani LR 677.

discharged or of any other court to which the mentioned court is subordinate.

(6) Nothing in this section shall affect the provisions of s 26 of the General Clauses Act 1897 (10 of 1897) or of s 188 of this Code.

Explanation—The dismissal of a complaint, or the discharge of the accused is not an acquittal for the purposes of this section.

Illustrations

(a) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant or upon the same facts with theft simply or with criminal breach of trust.

(b) *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(c) *A* is charged before court of session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried on the same facts for the murder of *B*.

(d) *A* is charged by a magistrate of first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within sub-s (3) of the section.

(e) *A* is charged by a magistrate of second class with and convicted by him of theft of property from the person of *B*. *A* may subsequently be charged with and tried for robbery on the same facts.

(f) *A*, *B*, and *C* are charged by a magistrate of first class with and convicted by him of robbing *D*. *A*, *B*, and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

Section 26 will have no application to separate sentences passed for offences under ss 411 and 414 of the Penal Code,[59] but a conviction and sentence under s 19 of the Arms Act 1878 and s 30 of Rangoon Police Act, on same facts, is barred.[60] Where loss of life occurred due to the omission to inspect the working place in a mine as required by the provisions of the Coal Mines Regulation, the omission is punishable under s 72C(1) of the Mines Act and s 304A of IPC. The accused can be prosecuted under s 304A of IPC.[61] A person could be prosecuted and convicted both under the special enactment and also the general law, but he could be punished only once either under the former or the latter.[62] The court should select the law under which it chooses to punish.[63]

59 *Haroon Mahommad v State of Maharashtra* 1975 Mah Cr R 204, 205–06; relying on *Jayaram Vithoba v State of Bombay* [1955] 2 SCR 1049, AIR 1956 SC 146.

60 *King Emperor v Poka* (1906) 3 Low Bur Rul 213, 218 (FB).

61 *Ganeshgir v State of Madhya Pradesh* 1966 MPLJ 641, 1966 Lab IC 565, 1966 Cr LJ 1277, AIR 1966 MP 314.

62 *Emperor v Jeth Prasad* AIR 1932 All 18; *Mohamad Sakoor v Emperor* AIR 1933 Oudh 67.

63 *Rangaswamy v State* AIR 1950 MB 58.

Section 26 does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. The provisions of this section can be complied with merely by the direction that such imprisonment or transportation (now imprisonment for life) shall run concurrently with that imposed in the previous case.[64]

Sections 39 and 44 of the Electricity Act 1910 are separate for purposes of s 26 of the General Clauses Act.[65] The respective offences under s 277 of the Income Tax Act 1961 and s 193 of the Indian Penal Code are not identical and do not attract the legal bar of s 26.[66]

Where the offences under s 116 of the Motor Vehicles Act 1939 and s 279 of the Penal Code of rash and negligent driving were essentially the same, the person acquitted of an offence under the former cannot be tried once again on the same set of facts for an offence under the latter enactment.[67] But, the act or omission constituting an offence under s 116 of the Motor Vehicles Act 1939 was different from the act or omission constituting an offence under s 429 of the Indian Penal Code. The act or omission constituting the manner of driving is punishable under the former section, while under the latter, it is the result of any such act or omission, that is the fact that wrongful loss or damage is caused which is made punishable. Section 26 of the General Clauses Act, does not, therefore, invalidate the simultaneous conviction under both the sections.[68]

Separate sentences under s 5(2) of the Prevention of Corruption Act 1947 and s 161 of the Indian Penal Code, are not legally sustainable there being one act constituting the offence under both the enactments.[69] However, the High Courts of Mysore,[70] and Rajasthan,[71] hold that the two offences are distinct, though certain ingredients may be common. The Madras view[72] has been shared in the Saurashtra case of *Lohana Kantilal v State*,[73] and that of the Mysore and the Rajasthan High Courts by the High Court of Bombay.[74]

Section 26 did apply where a person was prosecuted for an act constituting offences under ss 279 and 338 of the Penal Code as well as s 116 of the Motor Vehicles Act 1939.[75]

64 *Arsala Khan v Emperor* AIR 1953 Pesh 18.

65 *Rash Behari Shew v Emperor* AIR 1936 Cal 753, 763, 38 Cr LJ 545, 42 CWN 1216 (DB).

66 *Gulab Chand Sharma v Commr of Income-tax* 1975 Tax LR 17, (1974) ILR 1 Del 190.

67 *Waeezul Khan v State of Bihar* 1967 BihLJR 180, 1967 Cr LJ 1564, AIR 1967 Pat 368.

68 *Re S Appayya* AIR 1957 AP 100, 102–03, 1956 Andh WR 784, 1957 Cr LJ 627.

69 *Re PS Aryamudha Iyengar* AIR 1960 Mad 27, 1960 Cr LJ 92, (1959) 2 Mad LJ 141.

70 *MM Gandhi v State of Mysore* AIR 1960 Mys 111, 1960 Cr LJ 934, 38 Mys LJ 265.

71 *Madan Lal v State of Rajasthan* 1976 Cr LJ 1485, 1976 Raj LW 181.

72 *Re PS Aravamudha* AIR 1960 Mad 27.

73 AIR 1954 Sau 121, 123, 1954 Cr LJ 1466 (DB).

74 *Madhukar Vishram Sawant v State of Maharashtra* (1974) 76 Bom LR 328; dissenting from *Lohana Kantilal v State* AIR 1954 Sau 121; *Re PS Aravamudha Iyengar* AIR 1960 Mad 27; relying on *Om Parkash v State of Uttar Pradesh* AIR 1957 SC 458; *State of Madras v Vaidyanath Iyer* AIR 1958 SC 61.

75 *Jayanti Lal Kup Chand Shah v State of Gujarat* (1965) 6 Guj LR 226.

In *State of Bihar v Mangal Singh*,[76] the accused has been tried and convicted under s 121 of the Motor Vehicles Act 1939 but that conviction was not held to stand as a bar in his being held guilty of offences under ss 279, 330 and 304A of the Penal Code. In *Bali Sahu v Emperor*,[77] it was held that separate sentences for possession and sale under the Opium Act 1878 and the Bihar and Orissa Excise Act 1915 was not in contravention of s 26 of the General Clauses Act.

The offences of obstructing or molesting a public servant in the performance of his duty and the offence of assaulting or using criminal force on a public servant in the execution of his duty are two distinct offences though arising out of the same facts and conviction for both offences is good.[78]

The accused obstructed a commercial-tax inspector on a particular day while the latter was examining his accounts in regard to agricultural income-tax. During his inspection, it was discovered that the accused had also committed an offence under s 26(1)(a) by failing to register himself under the Bihar Sales Tax Act. On a complaint filed by the inspector, the accused was tried on a charge under s 353, Indian Penal Code, by a magistrate with second class powers and was acquitted. He was again prosecuted on the same facts by a first class magistrate for offences under cll (a) and (b) of s 26(1), Bihar Sales Tax Act, after obtaining the necessary sanction as required by s 26(2) of the Act. It was held that so far as the offence under s 26(1)(b) was concerned the fresh trial was not barred either under art 20(2) of the Constitution or under s 26 General Clauses Act.[79]

Causing disappearance of evidence of two offences, one under s 330 and another under s 201 of the Penal Code would constitute two offences, though no separate sentences need be passed with regard to the disappearance of evidence of offence under s 330. But, the case is not covered by s 26.[80]

Section 26 envisages the possibility of the same Act or omission not only being an offence under different enactments but of the accused being charged under either or any of them, though he shall not be punished twice for the same offence. The language employed in s 26 of the General Clauses Act shows that the emphasis is on the word 'punishment' and not so much on prosecution, as what is ultimately prohibited is imposition of punishment twice for the same offence.[81] In the presence of the provisions contained in the said section of the principle of *generalia specialibus non derogant* cannot be applied.[82] Where the accused, the president and ex officio treasurer of a co-operative society was entrusted with and had dominion over the properties

76 AIR 1953 Pat 36, 1953 Cr LJ 518 (DB).
77 3 Pat LJ 433 (DB).
78 *Chhote Lal v Emperor* AIR 1936 All 74, 1936 All LJ 427.
79 *Surendra Gopinath v State* AIR 1955 Pat 247.
80 *Roshan Lal v State of Punjab* AIR 1965 SC 1116, [1965] 1 SCR 533.
81 *Re P Rapanna* 1960 Cr LJ 199, AIR 1960 AP 87.
82 *Ramanuja Iyer v State of Hyderabad* AIR 1954 Hyd 56.

of the society and the audit reports showed that those amounts were not produced by him when required, his offence is one of criminal misappropriation under the general law enacted in the Penal Code. It is not an offence mentioned in ss 45 and 46 of the Bihar and Orissa Co-operative Societies Act, for which sanction for prosecution is required under that Act. Section 26 of the General Clauses Act contemplates that a prosecution under the general law can be proceeded with.[83]

The section has, however, no application if the offences are distinct,[84] for example, one under s 168 and another under s 210(5) of the Companies Act 1956.[85]

A similar provision is made in art 20(2) of the Constitution which also directs that no person shall be prosecuted and punished for the same offence more than once.[86] However, a prosecution without punishment would not bring the case within the prohibition of art 20(1).[87] The word 'prosecution' in art 20(2) means judicial proceedings before a court or a legal tribunal.[88] These provisions apply only when the two offences are the same, that is to say, the ingredients of both the offences must be the same. If they are distinct and not identical none of the provisions would apply.[89] A person found in possession of a stolen revolver may be tried and punished both under s 411, Indian Penal Code, and s 19 of the Arms Act. The important point to be noted is that it is not the same act or omission which constitutes the offence under the two enactments.[90]

Section 304A of the Indian Penal Code provides for a distinct offence. It is different from the one punishable under s 101 of the Railways Act. That being so, s 26 would not apply and the accused can be convicted under s 304A, Indian Penal Code, also if the conditions thereof are satisfied.[91] Similarly, offences under r 126P(2) of the Defence of India Rules 1962 and s 135(b) of the Customs Act 1962 are distinct and, therefore, not amenable

83 *State v Banchanidhi* AIR 1957 Ori 165.

84 *Velgoda Panchayat v Chinna Venkata* AIR 1932 Mad 537.

85 *Seva Ram Pasari v Registrar of Companies* AIR 1964 Ori 14, (1964) 1 Cr LJ 64, 29 Cut LT 470.

86 *Sunder Navalkar v State of Maharashtra* [1971] SCR 294 (Bom) (bar of art 20 of the Constitution can be invoked when offences charged are same and identical).

87 *Re Darla Ramadoss* AIR 1958 AP 707, 1958 Cr LJ 1377.

88 *Suresh Chandra v Himangshukumar Roy* AIR 1953 Cal 316, 55 CWN 605.

89 *State of Madhya Pradesh v Veereshwar Rao Agnihotri* AIR 1957 SC 592; *State of Bombay v SL Apte* AIR 1961 SC 579.

90 *Reoti v Emperor* AIR 1933 All 461; *State of Uttar Pradesh v Prabhat Kumar* AIR 1966 All 349 (prosecutions under s 25 of Arms Act and s 411 of IPC, second trial not barred under s 380(5) under Criminal Procedure Code 1973); *Ganesh Gir v State of Madhya Pradesh* AIR 1966 MP 311 (prosecutions under s 304A, Indian Penal Code, and also under the Mines Act and Coal Mines Regulation 113 of 1959).

91 *State of Madhya Pradesh v Ranjit Kumar Chatterjee* AIR 1959 MP 284, 1959 Cr LJ 983; *President, Panchayat Board, Velgode v Chinna Venkata Reddi* AIR 1932 Mad 537, 33 Cr LJ 629, 36 Mad LW 429.

to the bar under s 26.[92] However, when an act constituting a criminal breach of trust amounts to an offence under the Penal Code and also under s 5(1)(c) of the Prevention of Corruption Act 1947, the accused is liable to be prosecuted under either.[93]

The act or omission constituting an offence must fall under two or more enactments. Where the railway clerk sells tickets, receives money, and miappropriates the same, these acts without more, cannot constitute one offence under the Prevention of Corruption Act as well as s 408, Indian Penal Code. The said act may constitute an offence under s 408, Indian Penal Code, but will not, unless the person committing the act is also a public servant, constitute an offence under s 5(1)(c), Prevention of Corruption Act. In this view, s 26, General Clauses Act, will not apply as the same acts or omissions simpliciter, do not constitute an offence under both the Acts.[94]

Where a new offence is created under any enactment the accused must be dealt with in accordance with the provisions of that enactment. Where, on the other hand, a statute makes an act, already punishable under some former law, and there is nothing in the later enactment to exclude the operation of the former, then the accused person can be proceeded against under either of the enactments.[95] An offence under s 5(1)(c), Prevention of Corruption Act, is almost identical with an offence under s 409, Indian Penal Code, when it is committed by a public servant. For all practical purposes they are one and the same offence. Two laws under which the same act or omission is punishable can co-exist. Where a new law makes an act punishable, which is already penal under an existing law, and there is nothing in the later enactment which either expresses or implies that the operation of the earlier laws is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because there is some change in procedure or some difference in penalties.[96]

Section 5(4), Prevention of Corruption Act, makes it abundantly clear that s 409, Indian Penal Code, as applicable to public servants is not repealed by s 5(1)(c) at any rate since the amendment came into force. Even for the period between 1947, when the Act was passed, and August 1952, when the amendment was made, s 409, Indian Penal Code, as it related to public servants, cannot be deemed to have been repealed by implication. A special

92 *K Vishnumoorthi v State of Mysore* 1972 Cr LJ 399, 401–02 (Mys); relying on *State of Bombay v SL Apte* AIR 1961 SC 578.

93 *Vraj Lal Vishwanath v State* AIR 1955 NUC (Sau) 5768.

94 *A Veeraiah v State* 1956 Andh WR 73, AIR 1957 AP 653.

95 *Madho Prasad v State* AIR 1963 MB 139, 141.

96 *Om Prakash v State* AIR 1955 All 227; *Amarendra Nath Roy v State* AIR 1955 Cal 235 (prevention of Corruption Act cannot, in view of the amendment of s 5(4), be held to repeal s 409, IPC); *State v Gur Charan Singh* AIR 1952 Punj 89 held no longer good law.

law does not repeal the general law unless the intention is made clear in that law.[97] See also notes under s 24 ante under the heading 'implied repeal.' When there are two alternative charges in the same trial—one under s 409, Indian Penal Code and the other under the Prevention of Corruption Act, s 5(2)—the fact that the accused is acquitted of the latter will not prevent the conviction on the former.[98]

The broad proposition, that s 26 is ruled out when there is a repeal of an enactment followed by a fresh legislation, is not correct. Section 26 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material.[99]

6. OFFENCE UNDER GENERAL AS WELL AS SPECIAL ENACTMENTS

Subject to the overriding consideration of double jeopardy, there is no bar *in limine* to prosecution for an offence under the general Act even in case where such offence is also punishable under a special Act.[1] A prosecution which is otherwise maintainable, would lie both under the special Act and the general Act, subject, however, to the overriding consideration that the accused shall not be liable to be punished twice for the same offence.[2] When facts would make out an offence punishable under the Penal Code as well as the Bombay Sales Tax Act, and of which the latter needed previous sanction, there can be no bar against prosecution under the Penal Code which needs no sanction.[3] There is no bar *in limine* on the prosecution to proceed under the general Act on an offence which otherwise lies merely because the same facts also constitute an offence

97 *State v Gulab Singh* AIR 1954 Raj 211; *Mahommad Ali v State* AIR 1953 Cal 681 relied on; but see *State v Gur Charan Singh* AIR 1952 Punj 89; *Puranmal v State* AIR 1953 Punj 249.

98 *State of Madhya Pradesh v Veereshwar Rao Agnihotri* AIR 1957 SC 592; *Om Prakash Gupta v State of Uttar Pradesh* AIR 1957 SC 458, 464, 1957 Cr LJ 575, 1957 SCJ 289; overruling *State v Gur Charan Singh* AIR 1952 Punj 89.

99 *Venkatasubba Rao v Ganapati China Kanakaya* 1955 Andh WR 204 (there was no saving clause in express terms, in Madras Estates (Abolition and Conversion into Ryotwari) Act 1948, enabling a person to continue the proceedings taken under the Madras Estates Land Act 1908, which had been repealed by the Act of 1948; still under s 25, General Clauses Act, he was entitled to proceed with the second appeal and call in question the legality of the distraint under s 95 of the Act of 1908).

1 *NK Jhajharia v L Chandra* 1974 Lab IC 685, 78 CWN 697.

2 *Nathmull v Salil Kumar* AIR 1971 Cal 93, 74 CWN 792, 1971 Cr LJ 361.

3 *State of Maharashtra v Jayanti Lal Kalidas Mehta* (1978) 80 Bom LR 649, 1978 Mah LJ 756, 763.

under the special Act, subject only to the overriding consideration of double jeopardy.[4]

This section provides for co-existence of two penal provisions covering the same subject matter. Where there is no repeal of the earlier enactment, the court shall attempt to harmonise the two separate provisions, and when prosecution is permissible both under the special law and the general statute, the subsequent remedy is cumulative and does not take away the former remedy.[5]

It has been held in *William Plythe Petrett v Emperor*,[6] that a conviction under the general law was proper even if the facts proved against the accused had amounted also to an offence under s 103(2) of the Presidency Towns Insolvency Act.

If the provisions of the Prevention of Food Adulteration Act 1954, and those of Fruit Products Order 1955 happen to constitute offences covering the same acts or omissions, it would be open to the prosecuting authorities to punish the offender under either of them, subject to the only condition that a guilty person should not be punished twice over.[7] In such cases, when the same offence falls under two Acts, one general and the other special, prosecution under general Act, whereunder penalty is graver, is maintainable.[8]

Prosecution only under the Penal Code has been held proper[9] when an act constitutes an offence falling under s 183, Penal Code as well as under the Tripura Municipal Act. Section 26 provides for prosecution under two different enactments. The same principle is applicable for prosecution under different sections of same Code.[10]

There is no legal bar to the prosecution for both offences under s 277, Income Tax Act 1961 and s 193, Indian Penal Code.[11] The offence under s 353, Penal Code, being a graver offence than that under s 26(1)(h) of Bihar Sales Tax Act 1947, there is no bar in choosing to prosecute the accused under the former,[12] without any objection as to acting colourably. The jurisdiction of the magistrate to try an offence of breach of trust is not barred because the facts also constitute an offence under s 103 of the Presidency Towns Insolvency Act.[13]

4 *Chandrika Sao v State of Bihar* AIR 1967 SC 170, 1967 Cr LJ 261; (relied on in *Nathmull v Salil Kumar* AIR 1971 Cal 93, 74 CWN 792, 1971 Cr LJ 361); *Hari Rachu Kanadi v State of Maharashtra* (1971) 73 Bom LR 891 (separate sentences under s 161 of the Penal Code and under s 5(2) of the Prevention of Corruption Act 1947 made to run concurrently held not violative of s 24 General Clauses Act).

5 *Babu Lal v Aditya Birla* 1986 (1) Crimes 249, 253 (MP).

6 AIR 1927 Mad 1018 (1), 28 Cr LJ 928, 39 Mad LT 268 (DB).

7 *Municipal Corpn of Delhi v Shiva Shankar* AIR 1971 SC 815, 1971 Cr LJ 680, 1971 Cr App Rep 192 (SC).

8 *Rishi Ram Mitra v Prahlad Chandra Das* (1972) ILR 1 Cal 72, 77 (mischief falling under s 427, IPC and s 31 of West Bengal Premises Tenancy Act 1956).

9 *Jagendra Chandra Choudhary v Kshirode Ranjan* (1961) 2 Cr LJ 564 (Tri).

10 *RR Gopal v Inspector of Police* 1992 Cr LJ 2087, 2089.

11 *Gulab Chand Sharma v HP Sharma, Commr of Income-tax* 1975 Tax LR 176 (Del).

12 *Chandrika Sao v State of Bihar* AIR 1967 SC 170, 173, 1967 Cr LJ 261.

13 *William Plythe Petrett v Emperor* AIR 1927 Mad 1018 (1), 28 Cr LJ 928.

Section 27. Meaning of service by post—Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

SYNOPSIS

1. SCOPE

This section does not lay down any inflexible or conclusive presumption as to service of notice by registered post. What it states is that the court might presume service to have been effected by ordinary course of post if those circumstances were present unless the contrary was proved. The section does not exclude evidence in rebuttal of the presumption.[14]

Punishment for contravention of a rule during the period prior to the commencement of such rules is not saved by this section.[15]

The presumption contemplated under this section applies to summons served on the defendant by registered post.[16]

Section 27 would apply to the mode of service by hanging or affixation, provided it is established that the relevant place was the ordinary place of residence of the opposite party.[17]

The section has been held to be applicable to notices,[18] even under the law relating to rent control.[19] Since the provisions of s 106 of the Transfer of Property Act is part of the general law, it may be invoked to the extent not repealed or

14 *MK Ramu Mudaliar v Kanthamani Natrajan* (1979) 1 Mad LJ 946,92 LW 5.
15 *Union of India v Samarendra Mohan Maitra* (1979) 1 Lab IC 1276 (DB) (Cal).
16 *Bai Shanta v Khalsa Ramjibhai Chhota Lal* AIR 1956 Bom 144.
17 *Commr of Income-tax v Savitri Devi Agarwalla* [1970] 77 ITR 934, 941 (Assam) (DB) overruled on another point in *Commr of Income-tax v National Ry Trackers* AIR 1985 SC 485.
18 *Mohan Lal Kejriwal v Sunderlal Nandlal Shah* AIR 1949 EP 295, 51 Pun LR 57.
19 *HL Pathak v Subhagwanti* 1972 Raj LR 153, 54 (DB)(Del).

replaced by the special law, viz the West Bengal Premises Tenancy Act 1956, for carrying into effect the purpose and provisions of the latter and this, without any further legislation, will automatically attract the presumption of service as per s 27 of the General Clauses Act.[20] When notice is required to be served by registered post, AD notice issued by mere registered post is not proper.[21]

It is not safe to decide a dispute about the service of a statutory notice on the basis of postal certificate as it is not difficult to get such postal seals at any point of time.[22] Where the certificate produced by the petitioner itself shows that he was the resident of village Sarai and was residing as a tenant, and the petitioner declined to accept the registered cover conveying the acceptance of his tender, it was held that the communication of the respondents accepting the tender was served on the petitioner.[23]

For obtaining an order from the court, a very strong and prima facie arguable case in support of the contention that there is a fraud or special equity, must be made out. The courts will not interfere with the enforcement of unconditional or conditional bank guarantees or letters of credit on the mere allegation of fraud or special equity. In the instant case, there was positive material to conclude that the board had invoked the bank guarantee and sent the communication even on 16 April 1980, but there was some delay in receiving the same by the bank. As adverted, receiving it is immaterial because the bank guarantee was invoked even prior to the expiry date. No special equity was alleged by the plaintiff. In accordance with cl 2 of the agreement, whenever a demand is made by the beneficiary, namely, the Board, the only course open to the bank was to enforce the bank guarantee and pay the amount, and it was necessary for the bank to solve the dispute between the plaintiff and the board. In the circumstances, the entire approach made by the courts below that the letter was received by the respondent on 26 May 1980 and therefore, payment made was not proper and correct, was held not to be a correct approach and that the law was erroneously applied leading to miscarriage of justice.[24]

On proof of the facts that a letter properly containing the particular document is proved to have been put into the post office, it is presumed that the letter sent through the post office reached the addressee. This presumption is not confined to the presumption of that letter being posted merely, but extends to its receipt by the addressee at its destination and at the proper time according to the regular course of business of the post office.[25]

20 *D Ennis v Calcutta Vyapar Pratisthan* AIR 1991 Cal 152, 156.

21 *United Commercial Bank v Bhim Sain Makhija* AIR 1994 Del 181.

22 *Shiv Kumar v State of Haryana* 1994 SCC (L&S) 904.

23 *Girdharilal Kesharwani v State of Madhya Pradesh & Ors* AIR 2000 MP 317, 320.

24 *Dena Bank, Madras v Gupta Iron and Steel Co, Madras* AIR 1999 Mad 453, 456–57.

25 *Kirloskar Bros Ltd, Indore v Engineering Machinery Mart, Narsinghpur* AIR 1982 MP 75, 1982 Jab LJ 82; relying on *Harihar Banerji v Ram Shashi Roy* AIR 1918 PC 102; *Mobarak Ali Ahmed v State of Bombay* AIR 1957 SC 857 relied on; holding *BL Shrivastava v MML Shridhar* 1974 MPLJ 612, AIR 1975 Mad 21 as no longer good law.

Service, through registered post, of summons of the court of small causes at Calcutta is permissible.[26] The requirement of law is to send the letter only by registered post and not that it should be sent with acknowledgment due and as such, if any excess has been done beyond the requirement of law, that will not affect the legal position as it stands under the law.[27]

Notice was sent to the respondents but neither the unserved notice nor the acknowledgment cards have so far been received from the respondents. So notice must be deemed to have been served on them.[28]

The expressions 'serve', 'give' or 'sent' have been held to convey the same meaning.[29]

2. PRESUMPTION OF SERVICE AND ITS REBUTTABILITY

The presumption under this section is not confined to the presumption of that letter being posted merely but extends to its receipt by the addressee at its destination and at the proper time according to the regular course of business of the post office.[30] Thus, the presumption under s 27 of the General Clauses Act, covers presumptions both of 'law and fact',[31] subject to its rebuttability which flows from the language of the section,[32] but it can arise only when the notice is sent by registered post. There may arise a presumption under s 114 of the Evidence Act when the notice is sent by ordinary post under s 106 of the Transfer of Property Act. Both the presumptions are rebuttable.[33] This is so because service by registered post is at any time a poor substitute for personal service.[34] Where the notices are received back with the indorsement that the parry refused to accept, them the court can presume the valid service of the notice.[35]

The basic law on the service of notice is permitted under the provisions of s 27 of the General Clauses Act and also under the provisions 114 of the Evidence

26 *Kamesh Chandra Das v National Tobacco Co of India Ltd, Calcutta* AIR 1940 Cal 536, 44 CWN 999.

27 *State of Madhya Pradesh v Ramdeo Agrawal* 1995 Cr LJ 1512 (MP).

28 *G Deendayalan Ambedkar v Union of India* (1997) 2 SCC 637.

29 *B Thammiah v Flection Officer, Banavara* (1980) 1 Kant LJ 19–20.

30 *Kirloskar Bros Ltd, Indore v Engineering Machinery Mart, Narsinghpur* AIR 1982 MP 75, 1982 Jab LJ 82.

31 *Fanni Lal v Chironjia* 1972 All LJ 499–01, 1972 All WR 299 (HC) (DB).

32 *Badri Prasad v Lakshmi Narain* AIR 1964 All 426–27, 1968 All WR 413 (HC); *Chandmal Misri Lal Firm v Ballabhdas* AIR 1955 NUC (Bho) 1788; relying on *Appabhai Motibhai v Laxmichand Zaverchand* AIR 1954 Bom 159; *Sunder Spinner v Makan Bhula* AIR 1922 Bom 377 (1); *Ratanbhai v Jagannath* AIR 1955 NUC (MB) 3022; *Commr of Income-tax, West Bengal v Mal Chand Surana* AIR 1956 Cal 537, 539, [1955] 28 ITR 634 (DB) (presumption of fact rebuttable).

33 *Sukumar Guha v Naresh Chandra* AIR 1968 Cal 49; *Gour Sankar Pani v State of West Bengal* AIR 1996 Cal 13.

34 *Sunder Spinner v Makan Bhula* AIR 1922 Bom 377 (1), 23 Bom LR 908.

35 *Jagdish Singh v Natthu Singh* AIR 1992 SC 1604, 1606.

Act. The earliest case of the issue of drawing of presumption of service under such circumstances was probably the case of *Harihar Bannerjee v Ram Sashi Roy*[36] wherein it was held that if a letter properly directed, containing a notice to quit, was proved to have been put in the post office, it could be presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed. That presumption would apply with still greater force to letters which the sender had taken the precaution to register. In the present case, it was proved by the plaintiffs that a notice as envisaged under s 106 of the Transfer of Property Act was issued by the plaintiff to the concerned defendants at their residential address in accordance with the law, therefore, it could be well-presumed in view of the statutory provisions and the case laws, that the said notices were duly served on the said defendants.[37]

There was no express authority given by the arbitrator to file the award to make it a rule of the court. Although a signed copy of the award was sent of the applicant, the forwarding letter clearly indicated that the award was sent for information. The High Court was held to have given very cogent reasons for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter sometime in May 1965. Therefore, the question of condonation of delay could not and did not arise. The Limitation Act is a statute of repose, and a bar on a cause of action in a court of law, which is otherwise lawful and valid, because of an undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. In the present case, the appellant having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, it was held that the appellant should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the respondent.[38]

When, on an appraisal of the evidence, the courts gave concurrent findings that the presumption of service of notice was not rebutted, it was held to be a finding of fact which could not be interfered with under art 226 of the Constitution.[39]

Presumption that the registered letter containing statutory notice must have reached the addressee is rebuttable by leading cogent evidence.[40]

Section 27 of the Act does not give rise to presumption of notice which was sent under a certificate of posting.[41]

It is no doubt true that issuing a notice by registered post is a recognised mode of service but, that would certainly not mean that merely by sending

36 AIR 1918 PC 102.
37 *Vinod Khanna & Ors v Bakshi Sachdev (deceased)* AIR 1996 Del 32 (DB).
38 *Binod Bihari Singh v Union of India* AIR 1993 SC 1245, 1250–51, (1993) 1 SCC 572.
39 *Radhey Shyam Patwa v 10th Addl District Judge, Varanasi* 1994 All LJ 837.
40 *Md Zafar v Passenger Tax Officer* 1994 All LJ 859.
41 *Ashok Kumar Singh v State of Bihar* (1996) 1 BLJR 869.

the notice by registered post before the expiry of the period of limitation, the customs authorities would be absolved from their duty to give the notice before the expiry of the period, as prescribed in s 110(2) of the Customs Act 1962.[42]

It is not safe to decide a dispute about the service of statutory notice on the basis of postal certificate as it is not difficult to get such postal seals at any point of time.[43]

Where the requirement of law was to send the letter only by registered post and not with acknowledgement due, any excess having been done beyond the requirement of law would not affect the legal position as it stood under the law.[44]

Where the notice was sent to the respondents but neither the unserved notice nor the acknowledgement cards were received from the respondents, the notice must be deemed to have been served on them.[45]

When the food inspector deposed before the examiner-in-chief that the report of the analyst was sent to the accused by registered post and the food inspector was not cross-examined by the accused, it could be concluded that the accused had received the report irrespective of whether or not it was sent by registered post.[46]

If the document is properly addressed, pre-paid and sent by registered post, a presumption of due and proper service could be raised.[47]

Where the report was sent by registered post, it was presumed a proper service. The delivery with acknowledgement due, is not required.[48]

Mere denial of the tenant could not absolve him of the burden of rebutting the presumption of service of notice arising from the endorsement by the postal authorities on the registered cover containing the notice.[49]

Endorsement of 'refusal' on registered post, while effecting its service, is sufficient to presume service in the absence of rebuttal evidence.[50]

Notices, which are to be served on an addressee, may be served on the members or servants of his family. If a notice is to be served personally on the addressee, it may be served either at the residence or at any other place where such addressee is working. The requirement is service on the addressee personally, or his family members, or servants. In the instant case, the notice was served on the plaintiff by both ways.[51]

42 *Oyatape Fibres Pvt Ltd v Collector of Customs* 1995 Cr LJ 1 (Cal).
43 *Shiv Kumar v State of Haryana* 1994 SCC (L&S) 904.
44 *State of Madhya Pradesh v Ramdeo Agrawal* 1995 Cr LJ 1512 (MP).
45 *G Deendayalan Ambedkar v Union of India* (1997) 2 SCC 637.
46 *Khem Chand v State of Himachal Pradesh* (1994) SCC (Cr) 212.
47 *Satish Kumar v Ram Piari* (1995) 1 Sim LC 272 (HP).
48 *State of Madhya Pradesh v Trilok Chandra Goyal* 1995 Cr LJ 3400.
49 *Jhanbul Ram v Dist Judge, Ballia* 1994 All LJ 961.
50 *Laxmibai v Keshurmal Jain* 1994 Jab LJ 747 (MP).
51 *Sushil Sharma v 13th Addl District Judge, Ghaziabad & Ors* AIR 2000 All 249, 251.

A presumption of due service can be raised if the document sought to be served is sent by properly addressing, prepaying, and posting by registered post, to the addressee and such presumption can be raised irrespective of whether, or not, an acknowledgement due is received from the addressee. Presumption under s 144(f) of the Evidence Act is on the same footing as a presumption under s 27 of the present Act. Presumption under the former section arises on the proof of posting the letter by the ordinary post, whereas, presumption under the latter section is with regard to the letter sent through registered post. In the instant case, there was no evidence of the notice having been sent through courier either. Therefore, it was held that the question of raising any presumption under s 114(f) of the Evidence Act does not arise.[52]

Where no affidavit was filed denying the service and a mere oral submission was made to that effect, such an oral denial was held not to be accepted as a proper rebuttal of the presumption of service.[53]

When the question is on counting of an interval between sending a notice of meeting and the actual holding of meeting, the starting point is the date of despatch of notice.[54] However, the mere despatch of a notice does not amount to 'giving' of notice.[55] When a notice is sent by registered post it should be delivered personally to the lessee or to one of his family or servants. However, the High Court of Allahabad,[56] has held that no presumption under s 27 would arise when the notice was served not on the addressee but on his son. As service by post is an alternative mode of service and the notice having been sent as required under s 27 of the General Clauses Act, it has to be deemed that the service has been duly effected. Mere denial[57] or statement on oath that the notice has not been received will not rebut the presumption contained in s 114 of the Evidence Act and the deeming provision in s 27 of the General Clauses Act.[58] Such presumption can be rebutted on the strength of other circumstances on record.[59] The presumption of service also stands rebutted if the addressee, who made a statement on oath about non-delivery, has not been cross-examined.[60]

The High Court of Gauhati has, however, held that when the person, on whom the notice is said to have been served, appears before the court and denies on oath that the notice was served on him, the evidence of the postman becomes necessary.[61]

52 *Surender Bala & Anor v Sundeep Foam Industries Pvt Ltd* AIR 2000 Del 300, 303–04 (DB).
53 *Gour Sankar Pani & Ors v State of West Bengal & Ors* AIR 1996 Cal 13, 25.
54 *Jai Charan Lal v State of Uttar Pradesh* AIR 1968 SC 5, 7, 1967 All LJ 936.
55 *Narsimhiah v Singre Gowda* AIR 1966 SC 330, 332, (1965) 1 SCJ 552.
56 *Sami Ullah v Mahommad Zahoor* (1979) 5 All LR 435, 437.
57 *Madan Lal Sethi v Amar Singh Bhalla* 1980 Rajdhani LR 693, (1980) 2 RCJ 543, 458; *Manik Chandra Das v Ram Chandra Goswami* 1972 Assam LR 43–44 (Gau).
58 *M Janakiram Naidu v TA Arumugha Mudaliar* (1970) 2 Mad LJ 535; *Kirloskar Bros Ltd, Indore v Engineering Machinery Mart, Narsinghpur* AIR 1982 MP 75, 79–80.
59 *Madho Lal v Roop Chand* 1970 RCR 607, 610 (Del).
60 *Amar Nath v Champa Devi* (1978) 4 All LR 90, 1978 All LJ 44.
61 *Mahmuda Khatun v Ajit Chandra Deka* AIR 1978 NOC 112 (Gau).

Notwithstanding the provisions of this section, a letter sent under certificate of posting can also be presumed to have been delivered to the addressee.[62]

The High Court of Gujarat has held that the mere production in court of an unopened envelope of a registered letter bearing an indorsement of 'refusal' does not by itself rebut the presumption arising under s 27 of the General Clauses Act.[63]

In the postal receipt, normally the whole address of the addressee is not given and on the basis merely of the postal receipt, it cannot be argued that the letter was not sent to the proper address. A copy of the notice filed along with the postal receipt would raise the presumption that the letter was sent on the correct address, and if the letter is not received back, it has to be presumed that it duly reached the addressee and was received by him.[64] It is to be remembered, however, that a certificate of posting proves only the act of posting, but not what the article posted contains. Similarly, letters sent by registered post with acknowledgement due, ensure only the delivery of the posted matter but do not certify what the cover contained.[65]

Where a combined notice under s 3(1) of the Uttar Pradesh (Temporary) Control of Rent and Eviction Act and s 106 of the Transfer of Property Act is sent by registered post, properly addressed and pre-paid and the postman returned it with the indorsement that the addressee 'refused' it, the presumption of proper service of notice under s 27 of the General Clauses Act should be drawn. Even if the postman could not identify the addressee, the presumption is not rebutted, especially when he was required to identify the addressee after a long time of one and half years and the postman was not familiar with the addressee.[66] Further, when service is effected by refusal of postal communication, the addressee is imputed with the knowledge of contents thereof.[67]

When the indorsement on the back of the registered notice to the tenant to quit states that the tenant was concealing himself and refusing to receive the notice and personal notice had failed, a copy of the notice affixed on the door of the tenant's house was held to be sufficient compliance with the requirements of law under s 106 of the Transfer of Property Act in view of s 27 of the General Clauses Act and s 114 (Illust (e) of the Evidence Act).[68] In *Jogendro Chander v Dwarka Nath*,[69] service was deemed sufficient of a notice to quit sent by registered post produced in the cover of its despatch containing

62 *Dineshwar Prasad Singh v Manorama Devi* AIR 1978 Pat 256.
63 *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badindas* AIR 1975 Guj 54, 15 Guj LR 655.
64 *Ayisabeevi v Aboobaker* AIR 1971 Ker 231, 1971 KLT 273, 1971 Ker LJ 485.
65 *Bashettiyevar Bros v IV, ITO, Hubli* (1982) 1 Kant LJ 447–48.
66 *Dwarka Singh v Ratan Singh* 1969 All LJ 849, 1960 RCR 849, 1969 All WR 477 (HC).
67 *Har Charan Singh v Shivarani* (1981) 2 SCC 535; *Aziz Agha Sarwar v Second Addl District Judge, Moradabad* (1984) 2 All RC 334.
68 *Punum Mal v Durga Singh* 1967 Kash LJ 383, AIR 1967 J&K 141.
69 ILR 15 Cal 681.

the indorsement of refusal purporting to be made by an officer of the post office, and on evidence of such letter having been posted.

The presumption of due delivery of any document required to be served by post, if properly addressed and sent by registered post, that can be raised under s 21 of the General Clauses Act is a rebuttable presumption.[70] The presumption is rebutted when, in the absence of anything else, the record contains only the returned postal cover with the indorsement of 'left'.[71]

There is a distinction between the presumption that arises under s 114 of the Evidence Act and the presumption under s 27 of the General Clauses Act. The latter is of fact and is discretionary, while the former is of law and is obligatory. The presumption under s 27 of the General Clauses Act is rebuttable and the burden of proof is on the addressee of the notice.[72]

Then again, the presumption under s 27 is for satisfaction of court whether it should pass an ex parte decree deeming the service by post as sufficient, but the same does not bind the defendant who was not represented at the ex parte hearing of the case.[73]

Where the assessee's agent received the notice on behalf of the assessee and is proved to have neither given it nor disclosed its contents to the assessee, the presumption under s 27 would get rebutted though notice was sent to the address given.[74]

The presumption raised under this section is a rebuttable presumption.[75] The onus is on the addressee to prove that the service of notice was not in fact effected on him,[76] by stating on oath that the postman never came to him with the notice.[77]

However, this view has been overruled by the Supreme Court in *Anil Kumar v Nanak Chandra Verma*,[78] and it was held that the bare statement of the tenant on oath denying tender and refusal to accept the delivery from postman is not sufficient to rebut the presumption of correctness of the indorsement of the postman that the delivery was refused.

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70 *Commr of Income-tax v Lalita Kapur* (1979) 2 ITJ 495.

71 *Ram Rati v Fakira* AIR 1988 All 75; *Hare Krishna Das v Hahnemann Publishing Co Ltd* 70 CWN 262, 264–65; distinguishing *Sitanath Mondal v Soleman Molla* 51 CWN 650; *Nagendra Nath Karmakar v Jotish Chandra Mukherjee* AIR 1952 Cal 221: distinghuished on the ground that question, being one of fact, depends on the facts and circumstances of each particular case.

72 *Dwarka Singh v Ratan Singh* 1969 All LJ 849, 1969 RCR 849, 1969 All WR 477 (HC).

73 *Ayyubhai Moolbhai v Laxman Chand Zaver Chand & Co* AIR 1954 Bom 159, 55 Bom LR 916.

74 *Commr of Income-tax v Lalita Kapur* 1979 Cur LJ 523 (Punj).

75 *Re De Souza* AIR 1932 All 347, ILR 54 All 348.

76 *Gujarat Electricity Board v Atmaram* AIR 1989 SC 1433, 1439; *Roopchand Rangildas v Haji Hussein* 24 IC 137 (Bom); *Bhagwan Radha Krishan v Commr of Income-tax* AIR 1952 All 857; overruled on another point in *Commr of Income-tax, Madras v S Chenniappa Mudaliar* AIR 1969 SC 1968; *Darbar Bawri v Ramkishor Roy* AIR 1918 PC 102; *Sushil Kumar Chatterjee v Ganesh Chandra Mitra* AIR 1938 Cal 251.

77 *Jai Datt Singh v Rana Das* AIR 1980 All 280, (1980) 6 All LR 457.

78 AIR 1994 SC 1215; *Hajiabi Abdul Gani v Abdul Latif Aziz ullo* AIR 1996 Bom 192.

It has been held in *Munshi Ram v Shakuntala Devi*[79] that when the defendant had categorically denied the receipt of any notice and had denied to have signed the acknowledgment, the trial court would be right in shifting the onus on the plaintiff, because the presumption, whether under s 114 of the Evidence Act or under s 27 of the General Clauses Act, can be raised only if it is shown that the notice had given correct particulars of the addressee on the notice and on the form of acknowledgment. In this case Mian Jalaluddin Ag CJ, has dissented from the view expressed by Anant Singh J in *Parshottam Lal v Kalyan Singh*,[80] to the effect that even in cases in which notice is sent in due course of postal transit on the correct address of the addressee, the fact of proper despatch or posting has to be proved by calling in the writer of the notice or the person who had posted it. The view of Anant Singh J was based on the decision in *Rajandram v Kanbeg Amirbeg*,[81] which, accordingly must also be taken to have been dissented from.

It is submitted that the view taken by Mian Jalaluddin Ag CJ, is open to doubt whereas that expressed by Anant Singh J, appears to be correct, because in view of the express words of s 27 of the General Clauses Act to the effect that 'service shall be deemed to be effected by properly addressing, pre-paying and posting', it is amply clear that the presumption of service can arise only upon proof of correctly addressing, pre-paying and posting by registered post the letter in question. Unless the fact of posting is proved there can be no basis for the presumption that service has been effected. Such posting has to be proved by adducing the postal receipt obtained from the office of issue and by the statement of the person who obtained such receipt from the post office which issued the registered article and passed a receipt on accepting that registered article to be put in transit.

If the lessor sends a notice by registered post properly addressed to the lessee, he need not prove service,[82] because a presumption attaches to the postman's report 'refused'.[83] Where a notice was sent by registered post and the postman indorsed 'refusal', the indorsement of refusal was held sufficient to justify presumption of service.[84] Where, the returned notice contains an indorsement 'left' made by the postman, the presumption raised by this section stands rebutted.[85] However, now the Supreme Court has held that where the landlord sent a notice to the tenant, to terminate the tenancy,

79 AIR 1978 J&K 31, 33–34.

80 AIR 1971 J&K 20, 1970 Kash LJ 299, 1970 RCR 833, 1970 RCJ 940.

81 AIR 1918 Nag 202, 48 Ind Cas 904.

82 *Saligram Rai Chuni Lal Bahadur & Co v Abdul Gani* (1952) ILR 4 Assam 357; *Balbhadur Mal v Commr of Income-tax* AIR 1957 Punj 284, 286; *Sushil Kumar Chakravarti v Ganesh Chandra Mitra* AIR 1958 Cal 251; *Hukam Chand v Dulichand* 1958 MPLJ (Notes) 62.

83 Ibid; *Budha v Bedariya* AIR 1981 MP 76, 79, 1980 Jab LJ 285.

84 *Shambhu Dayal v Aliya Bi* 1962 MPLJ (Notes) 268, 1963 Jab LJ 85.

85 *Hari Krishna Das v Hahnemann Publishing Co Ltd* (1966) 70 CWN 262.

through registered post to the correct address he must be held to have complied with the statutory requirement and the notice will be valid even if returned unserved.[86]

When the notice, served on the tenant by registered post, was returned with the postal peon's indorsement 'refused by tenant', due service of notice on the tenant can be presumed under s 27 of the General Clauses Act read with s 114 of the Evidence Act.[87] It is not necessary that the name of the sender should have been indicated on the envelope.[88] But the notice sent under certificate of posting cannot be said to be legal and valid service.[89]

In the case of notice of demand for arrears of rent, the presumption under s 114 of the Evidence Act that the letter sent by post under a certificate of posting was delivered to the addressee by following the common course of business, can be rebutted by proving some extraordinary happening or event. The presumption of delivery of the letter to the addressee only if the letter is sent by registered post that can be raised under s 27 of the General Clauses Act is quite distinct from and independent of the former. When the landlord adopted both these methods both the presumptions arise and the presumption under s 114(f) of the Evidence Act is not prevented by s 27 of the General Clauses Act. Since the landlord was living in the same house as the addressee he became aware that the registered letter could not be delivered to the addressee or any of his family or servants of the addressee and he was justified in effecting service by affixture. It was held that the notice of demand was thus served in the two ways authorised by s 106 of the Transfer of Property Act, ie, by sending it under a certificate of posting, and by affixture.[90]

Notice of termination of tenancy sent under certificate of posting is deemed to have been delivered to the addressee. Mere denial of receipt of notice is not sufficient rebuttal of presumption of service. Sending a notice by registered post is necessary for s 27 of General Clauses Act but not for s 114 of Indian Evidence Act.[91]

The presumption under s 27 arises if the four conditions are fulfilled, namely: (a) sending the letter by registered post; (b) properly addressed; (c) pre-paid, and; (d) the letter containing the document being posted. Such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not.[92] The contrary that is to be proved to rebut

86 *Madan and Co v Wazir Jaivir Chand* AIR 1989 SC 630.
87 *Munni Debi v Pushpalata* 71 CWN 782.
88 *Ramesh Chandra v Delhi Cloth & General Mills Co Ltd* 1974 RCJ 217, (1973) ILR 1 Del 283, 390 (DB).
89 *Kumbhar Naran Ala v Mehta Nana Lal Jethabhai* AIR 1988 Guj 5, (1988) 1 Guj LR 473.
90 *Om Prakash Bahl v AK Shroff* 1973 RCJ 149, 1972 RCR 960, AIR 1973 Del 39.
91 *Atosh & Sons v Asst Collector, Central Excise* (1992) 60 ELT 220, 229 (Cal).
92 Motor Vehicles Act 1988; *Tide Water Oil Co Pvt Ltd v KD Banerji* 86 CWN 156.

the presumption is with reference to these requirements only. Otherwise, the provision of s 27 can be rendered useless by the addressee avoiding to receive or even refusing the letter.[93] When the food inspector deposed in chief-examination that the report of the analyst was sent to accused by registered post and the food inspector was not cross-examined by accused, it can be concluded that the accused received the report irrespective of the fact whether it was sent by registered post or not.[94]

When on appraisal of evidence, the courts gave a concurrent finding that presumption of service of notice was not rebutted. It is finding of fact which cannot be interfered with under art 226 of Constitution.[95]

Presumption that a registered letter containing statutory notice must have reached the addressee is rebuttable by leading cogent evidence.[96]

Section 27 of the Act does not give rise to a presumption that notice was sent under certificate of posting.[97]

Presumption of service of notice is a rebuttable presumption that the notice was delivered to the addressee or that on being delivered, it was refused by the addressee.[98]

When a notice under s 33(1)(b) of the Motor Vehicles Act 1939[99] returned with the indorsement that the addressee was not known and not traceable, the presumption of service of notice under s 27 of the General Clauses Act cannot arise because a contrary and different intention appears from s 33 of the Motor Vehicles Act 1939[1] which requires that the notice under it has to be sent accompanied by an acknowledgement.[2] Where the plaintiffs had sent a copy of the notice to all the three defendants separately by registered post to the correct address and only one defendant turned up to deny his signatures in the acknowledgement due, the rebuttal shall be treated being as against the one which was served on that defendant and the presumption of service on other co-tenants of other copies can validly be drawn in favour of the landlord plaintiffs.[3] It is no doubt true that the issuing of notice by registered post is the recognised mode of service but that would certainly not mean that only by sending the notice by registered post before an expiry of the period of limitation, the customs authorities would be absolved from their duty to give the notice before expiry of the period, as prescribed in s 110(2) of the Customs Act 1962.[4]

93 *Achamma Thomas v ER Fairman* (1969) 2 Mys LJ 179, 1969 RCR 872, 19 Law Rep 435, AIR 1970 Mys 77; *Srikant Jain v BK Plastic Industries* AIR 1986 Cal 29.
94 *Khem Chand v State of Himachal Pradesh* 1994 SCC (Cr) 212.
95 *Radhey Shyam Patwa v Xth Addl District Judge, Varanasi* 1994 All LJ 837.
96 *Mohd Zafar v Passanger Tax Officer* 1994 All LJ 859.
97 *Ashok Kumar Singh v State of Bihar* (1996) 1 BLJ 869 (Pat).
98 *Hajrabi Abdul Gani v Abdul Latif Azizulla* (1996) 2 Bom CR 626.
99 Now Motor Vehicles Act 1988.
1 Ibid.
2 *Jitendra Barai v Chairman, Regional Tpt Authority* AIR 1971 Ori 120.
3 *Kulkakarni Patterns v Vasant Babu Rao Ashtekar* (1992) 2 SCC 46, 49.
4 *Oyatape Fibres Pvt Ltd v Collector of Customs* 1995 Cr LJ 1 (Cal).

If the document is properly addressed, pre-paid and sent by registered post, a presumption of due on proper service can be raised.[5]

Where a report was sent by registered post, it was presumed proper service. The delivery with acknowledgment due is not required.[6]

3. UNLESS CONTRARY IS PROVED

A reading of the section indicates that the mailer of proof to the contrary, can be limited only to proving that service had not been effected at the time the letter would have been delivered in the ordinary course of post.[7] Therefore, the mere indorsement 'left' is never sufficient to prove the contrary.[8]

Where a notice was sent to the defendant by registered post and the cover containing it was returned with the postal indorsement 'refusal', undoubtedly it is for the defendant to adduce evidence to satisfy the court that the same was not tendered to him. Once the defendant does so by making a statement on oath, and adducing other evidence, the onus will shift to the plaintiff, unless such denial is found to be prima facie incorrect. In such a situation, it would be for the plaintiff to prove the contrary by examining the postman who tendered the letter containing the notice to the defendant, or by adducing some other evidence. In the absence of such an evidence, the statement of the defendant made on oath remains uncontroverted which would amount to rebuttal of the presumption of service.[9]

No doubt s 138 of the Negotiable Instruments Act does not require that the notice should be given only by 'post'. Nonetheless, the principle incorporated in s 27 can be imported profitably in a case where the sender had despatched the notice by post with the correct address written on it. Thus, it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque, who is liable to pay the amount, would resort to the strategy of subterfuge by successful, avoiding the notice. Thus, when a notice is returned by the sendee as unclaimed, such a date would be the commencing date for reckoning the period of 15 days contemplated in cl (d) to the proviso to s 138 of the Negotiable Instruments Act. It was also further held that even if the trial is before a court of a first class magistrate in respect of a cheque which

5 *Satish Kumar v Ram Piari* 1995 (1) Sim LC 272 (HP).

6 *State of Madhya Pradesh v Trilok Chandra Goyal* 1995 Cr LJ 3470.

7 *S Bhoormal Tirupati v Addl Collector, Customs* AIR 1974 Mad 224, (1974) 1 Mad LJ 319.

8 Ibid; but see *Hare Krishna Das v Mahamayam Publishing Co Ltd* (1965) 70 CWN 262 (indorsement of 'left' in the absence of proof to the contrary held to raise presumption under s 27).

9 *Hajrabi Abdul Gani v Abdul Latif Azizullah & Anr* AIR 1996 Bom 192, 195.

covers an amount exceeding Rs 5,000, that court will have the power to award compensation to be paid to the complainant.[10]

It might appear on first sight that this section is divisible into two parts, one dealing with the mode of service and another with the time of service,[11] and there might be room for doubt whether the words 'unless the contrary is proved' apply only when the time of delivery of such document is in question. Such a doubt is founded on the mode of service as prescribed under the section, which is to send a letter by registered post after properly addressing and pre-paying it. This having been done the section declares that the 'service shall be deemed to be effected'. Interpreting the section this way, the conclusion would be that no evidence to the contrary is admissible.

Such an interpretation and conclusion were held to be erroneous by the High Court of Allahabad in *Badri Prasad v Lakshmi Narayan*.[12] The view of the High Court was based on the reasoning that the presumption as regards service is not conclusive but rebuttable. In the instant case service of a letter sent by the appellant through registered post was sought to be proved by the oral testimony of the postman who had deposed that he had taken the letter to the respondent who refused to take delivery thereof. The appellate court had, however, disbelieved the testimony of the postman. The High Court, therefore, pointed out that the question of presumption arises only in the absence of other evidence because when the sender of the letter had produced the postman whose testimony was disbelieved, there could be no question of any presumption, since to allow the sender to fall back on the presumption after the evidence adduced by him had been disbelieved, would have the effect of nullifying the finding of the court on the evidence itself which could never be the spirit of this section.

The above Allahabad case was relied on by the High Court of Bombay in *Sharad v Vishnu*,[13] wherein a landlord, sending a notice by registered post with AD (acknowledgement due) to his tenant terminating his tenancy under s 106 of the Transfer of Property Act, had made a statement in the witness-box that the acknowledgment receipt was received by him through post and it bore the signature of the tenant's wife, and the trial court had held that the tenant's wife was not present at the address given in the notice during the period relating to its alleged delivery. Justice Godgil therefore, held that the presumption is rebuttable and, if the contrary proof is given, the landlord will not be able to bank upon the presumption for the purpose of contending

10 *K Bhaskaran v Sankaran Vaidhyan Balan & Anor* AIR 1999 SC 3762, 37678, (1997) 7 SCC 510.

11 *M Adambhai v B Ramdas* AIR 1975 Guj 54, 57, (1974) 15 Guj LR 655 (FB).

12 AIR 1964 All 426; *Asa Ram v Ravi Prakash* AIR 1966 All 519–20, 1966 All LJ 421, 1966 All WR 135 (HC) (mere denial of receipt of notice not sufficient to rebut presumption).

13 AIR 1978 Bom 187, 189.

that the tenancy of the defendant should be treated as validly terminated simply because the notice was sent.

Denial by the tenant could not absolve him of the burden of rebutting the presumption of service of notice arising from the endorsement by the postal authorities on the registered cover containing the notice.[14]

When the contrary evidence, if any, has been withheld by the party, the presumption of service, by force of s 114 of the Evidence Act is doubled. When notice terminating the tenancy has been sent by registered post and the same has been received by the treasurer and secretary of the tenant company who did not produce the register of letters issued and received as maintained by the company, the notice to quit will be held as valid by adverse inference drawn against the tenant.[15]

The Patna High Court has also considered this question about presumption in *Matadin Sharma v Upendra Sharma*,[16] and following a Bench decision of the Calcutta High Court, in *Commr of Income-tax v Mul Chand Surana*,[17] had observed that it is possible for the addressee to show that in fact the notice never reached him, though the onus to prove the same would be on himself. However, a notice issued in time but served out of time was saved by s 4 of the Income Tax (Amendment) Act 1959.[18]

Since s 27 of the General Clauses Act is apparently divisible into two parts: (a) dealing with the mode of service; and (b), dealing with the time of service, it may conveniently be said, on proof of facts that a letter on which: (a) stamp has been paid properly; (b) which is properly addressed; (c) which contains the document; and (d) which was sent by registered post, a twofold presumption arises, under the section, namely:

(i) that the service shall be deemed to have been effected; and
(ii) such service would be deemed to have been effected at the time the letter would be delivered in the ordinary course of post.

However, it is possible for the addressee to prove that in fact the letter never reached him.[19] It is, then, open to the court, in each case, on its particular fact

14 *Jhanbul Ram v Dist Judge, Ballia* 1994 All LJ 961.

15 *Tide Water Oil Co (India) Ltd v KD Banerjee* AIR 1982 Cal 127, (1982) 1 Cal HCN 54, 86 CWN 456; *Gopal Krishnaji v Mohd Latif* AIR 1968 SC 1413, 1415; *T Pillai v Manicka Vascha Desika Gane Sambandha* (1917) 21 CWN 761, AIR 1917 PC 6; *Kamakhya Lal Bajoria v Anand Charan Dass* AIR 1955 NUC (Assam) 2838 (service upon manager or employee of tenant); *Kewal Chand Keshrimal v Dashrathlal Pyare Lal* AIR 1956 Nag 266–67, 1956 Nag LJ 441 (service on addressee—self or his family or servants); *MX De Noronha & Sons v Commr of Income-tax, Uttar Pradesh* AIR 1952 All 137, 139 (DB) (service on assessee firm though notice received by employee of firm).

16 AIR 1972 Pat 292, 1972 BihLJR 639.

17 AIR 1956 Cal 537, 28 ITR 684.

18 *Banarasi Devi v Income-tax Officer* AIR 1964 SC 1742, 1745–46, (1964) 2 SCJ 258.

19 *Matadin Sharma v Upendra Sharma* AIR 1972 Pat 292–93.

and circumstances, to be satisfied or not with the sufficiency of service on the return of an envelope after its refusal.[20]

The question is whether the words 'unless the contrary is proved' govern both the parts of the section.

The High Court of Mysore, in *Achamma Thomas v Fairman*,[21] has answered that these words must only refer to the conditions contained in the first part of the section. The court said:

> ...It is only to meet the contingency of a person, who is to be served with notice, trying to evade it, that the service shall be deemed to have been effected if the four conditions are fulfilled. If the contrary to be proved has reference to the actual service, then provision of section 27 could be rendered useless by the addressee's avoiding to receive the letter or even refusing the registered letter.

On the contrary, the High Courts of Calcutta[22] and Allahabad in *Re LC De Souza, Cawnpur*,[23] and in *Badri Prasad v Lakshmi Narayan*,[24] as also the High Court of Gujarat in *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badindas*,[25] have held that the above words govern both parts of the section. The High Court of Gujarat has expressly dissented from the Mysore High Court and, while relying on the view taken by the Allahabad High Court, has justified its own view on the strength of the following reasoning:

> It is true that the words 'unless the contrary is proved' come just before the words 'to have been effected at the time,' etc, but the whole import of the section seems to be that the twofold presumption arising under that section holds good unless the contrary is proved. There seems to be no reason to assume that the first part of the section containing the words 'service shall be deemed to be effected' is to be treated as a complete sentence before we read the words 'to have been effected at the time,' etc. The words of the section are such that the appropriate place, where the words 'unless the contrary is proved' can be conveniently inserted, is at the place where they are, as the intention of the legislature is that these words must govern both the parts. If the presumption of the service is to be treated as conclusive evidence to prove that in fact service had not been made would be inadmissible and that cannot be the intention of the legislature especially when the legislature was enacting such a provision in the General Clauses Act. Whenever the legislature intends

20 *Baburam Ramkissen v Bai Pemabai* 13 Bom LR 323.
21 AIR 1970 Mys 77, (1969) 2 Mys LJ 179.
22 *Commr of Income-tax v Malchand* AIR 1956 Cal 537, 540, [1955] 28 ITR 684.
23 AIR 1932 All 374, 1932 All LJ 409.
24 AIR 1964 All 426, 1963 All WR 413 (HC).
25 AIR 1975 Guj 54, 15 Guj LR 655.

to make a statutory presumption as conclusive, it ordinarily does specially say so. It is, therefore, legitimate to hold that the twofold presumption arising under section 27 of the General Clauses Act is a rebuttable one. The consequence is that the words 'unless the contrary is proved' govern both the parts of the section.

The Allahabad High Court,[26] has gone to the extent of holding that, merely because there is no evidence to show who had written the word 'refused', it is no reason to conclude that effective service was not proved. And, unless there are other circumstances to rebut the presumption, mere denial on oath of the addressee would not be sufficient to rebut the presumption.[27]

The view taken by the High Courts of Allahabad and Gujarat is the correct view, because the legislature, in enacting s 27 of the General Clauses Act, has created no bar against leading evidence that the letter was not correctly addressed, or that it was never posted, or that it contained no document, or that it was not pre-paid, in the same manner and with the same right as one could prove that the letter was not delivered, or not tendered to the addressee for delivery to him. Any construction otherwise would lead to absurd results, capable of enabling persons to play the mischief of sending empty envelopes or addressing them incorrectly and yet avail of the statutory presumption on their return by a manipulated indorsement thereon of refusal. Postal receipt not containing the full address of the addressee is not sufficient to prove the service or draw the presumption under s 27.[28]

4. PRESUMPTION ON POSTAL REFUSAL—WHETHER POSTAL PEON TO BE EXAMINED

If the notices are sent at the correct address and have reached the destination, the mere fact that the party refused to take them, would not entitle him to contend that they were not duly served.[29] At the same time, indorsement of refusal, when it is not mentioned who refused to take the delivery, is not sufficient to raise the presumption requisite under this section.[30] The service of the notice to quit shall be deemed to be effected by properly addressing,[31] pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, and to have been effected at the time the letter

26 *Bachcha Lal v Lachman* AIR 1932 All 374, 1932 All LJ 409.

27 *Madho Lal v Roop Chand* 1970 RCR 607 (Del).

28 *Dharampal Tyagi v Anil Kumar* 1986 All WC 534.

29 *Bhopal Trading Co. Kanpur v Commr of Income-tax, Uttar Pradesh* 28 ITR 478 (All), AIR 1955 NUC 1514.

30 *Commr of Sales-tax v Mukat Lal* 31 STC 532.

31 The expression 'properly addressing' includes any address for the time being: *Mushiyat Ullah v Abdul Wahab* AIR 1972 All 539.

would be delivered in the ordinary course of post,[32] and the contrary cannot be said to have been proved merely by a statement on oath of the person that the notice had not been received by him.[33] In *Jagat Ram Khullar v Battumal*,[34] it has, however, been held that bare denial of a tender and the refusal to accept delivery would be sufficient to rebut presumption. If the addressee either cannot be met or refuses to take the notice, there appears to be no reason why the notice should not be deemed to have been properly served on the addressee.[35] Even if the addressee rebuts that fact by his statement on oath, the veracity of such statement has to be considered in the light of other evidence available on record and also the conduct of the party.[36] Moreover, the postal indorsement of 'refusal' is presumed to mean the refusal by the addressee himself.[37] As observed in *Sushil Kumar Chakravarti v Ganesh Chandra Mitra*,[38] this deeming has been held to amount to a presumption which, unless rebutted, would prove the fact of service. It was further pointed out in this case that apart from the presumption under s 27 of the General Clauses Act, the presumption mentioned in Illust (e) of s 114 of the Indian Evidence Act 1872 is also of great assistance. Even if, therefore, the actual refusal by the addressee is not proved, service of notice may well be held to be proved,[39] because all that happens in the post office from the time of posting of a letter to the point of delivery to the addressee or return to the sender are official acts to which the law entitles the court to presume that official acts have been regularly performed and that the indorsement was made by the peon and made so correctly. No presumption, however, arises on an envelope sent by ordinary post and returned with indorsement of refusal, and particularly, when the postman has not been examined.[40] But, where, from the admission of the defendant or his conduct, the denial of service may be found incorrect, it is not necessary to produce the postman for evidence.[41]

Postal endorsement on exhibit B2 showed that the notice was refused. Refusal of postal communication amounts to service and by such a service

32 *B Bhoormal Triupati v Addl Collector of Customs, Madras* AIR 1974 Mad 224, 87 Mad LW 178, (1974) 1 Mad LJ 319.

33 *M Jankiram Naidu v TR Arumugha Mudaliar* (1970) 2 Mad LJ 535, 538.

34 AIR 1976 Del 111, 115, (1976) 78 Punj LR (D) 192.

35 *Ganga Ram v Phulwati* AIR 1970 All 446 (FB), 1970 All WR 198 (HC), 1970 All LJ 336, 1970 RCR 485; *Zakir v Mahommad Hussain* AIR 1977 All 476, (1977) 2 RCR 656; following *Ganga Ram v Phulwati* relied on in *Ram Autar v Savitri Devi* AIR 1976 All 515; (addressee cannot take advantage of his own refusal); *Mobarak Ali Ahmad v State of Bombay* AIR 1957 SC 857; letter properly addressed and put into the post office is presumed to have reached addressee; *Lootf Ali Meah v Pearee Mohan Roy* (1871) 16 Suth WR 223.

36 *Jamal Khan v Haji Yusuf Ali* 1978 All LJ 993, (1978) 4 All LR 870.

37 *Mohan Lal Kojriwal v Sunderlal Nand Lal, Saraf* AIR 1949 EP 295, 51 Punj LR 57.

38 AIR 1958 Cal 251, 62 CWN 193.

39 *Moti Ram v Baldev Krishna* (1979) 81 Punj LR (D) 69–70.

40 *Surinder Kumar Kapur v Sujan Singh Chadha* (1971) ILR 1 Del 672, 677–78.

41 *Achab Ali v Abdul Mutalib Majarbhuiya* (1983) 2 Gau LR 325, 330.

the addressee must be imputed with the knowledge of the contents thereof, and accordingly, the presumptions under s 27 of the General Clauses Act and s 114 of the evidence act would follow, as held by the Supreme Court in *M/s Shri Raja Lakshmi Dyeing Works v Rangaswami Chettiar*.[42] Therefore, exhibit B2 notice, which was the earliest notice in point of time offering both the demised premises as well as the adjoining shop giving an option to the tenant to occupy one of them as directed by the Division Bench of the Andhra Pradesh High Court, was held to be within the knowledge of the tenant.[43]

When a notice was required to be served by registered post with AD, issuing it by mere registered post was held not proper.[44]

The decision of Rankin CJ, and Pearson J, in *Hari Pada Dutta v Jai Gopal Mukherjee*,[45] is an established authority on the point that if a registered letter came back with an indorsement of refusal, that in itself, until explained, was 'prima facie sufficient evidence that the addressee had an opportunity to accept it. There is also a very old decision in *Lootf Meah v Pearee Mohun Ray*,[46] laying down the same principle that the addressee could not take advantage of his own refusal provided there was evidence that a letter had been forwarded to the addressee by post duly registered.[47]

The authority in *Sarkar Estate Pvt Ltd v Kusumika Iron Works Pvt Ltd*,[48] and in *Ganga Ram v Phulwati*,[49] as also in *Balbhadramal v Commr of Income-tax*,[50] would amply establish the principle that notice sent by registered post but refused by the addressee when it was tendered to him,[51] is a valid service on the person who refused to accept delivery thereof. To this may be added the principle propounded by MP Singh J in *Shyam Narayan v Raghunath*[52] that this presumption is attracted not only in respect of valid service but also of the correctness of the date of indorsement of refusal made by the postman. Not only this, the addressee must be deemed to have the knowledge of the

42 AIR 1980 SC 1253.

43 *Khaza Moinuddin v Gayatri Iron Co, Vijayawada* (1999) 2 Andh LT 464, 468–69.

44 *United Commercial Bank v Bhim Sain Makhija* AIR 1994 Del 181.

45 (1935) 39 CWN 934.

46 (1871) 16 Suth WR 223.

47 This strengthens the view taken by me in Note 1 above, that the fact of posting of the letter has to be duly proved which is in respectful disagreement from that taken by Mian Jaluddin Ag CJ in *Munshi Ram v Shakuntala Devi* AIR 1978 J&K 31, holding that the presumption extends even to the fact of posting which need not be proved (RG Chaturvedi J).

48 AIR 1961 Cal 439.

49 AIR 1970 All 446 (FB), 1970 All LJ 336; *Ram Autar v Savitri Devi* AIR 1976 All 515, 517.

50 AIR 1957 Punj 284, 31 ITR 930.

51 *Bhopal Trading Co, Kanpur v Commr of Income-tax, Uttar Pradesh* [1955] 28 ITR 478, 484, AIR 1955 NUC (All) 1514 (DB).

52 AIR 1977 Pat 154, 1976 BBCJ 569 (HC).

contents of the letter.[53] But, the court must be guided in each case by the special circumstances of that case.[54]

The authorities viewed in the above discussion would show that the High Courts of Allahabad, Calcutta, Punjab, and Patna have held it as a principle that a statutory presumption, which is, of course, a rebuttable presumption of service of notice on the addressee, can be validly raised merely on the basis of indorsement of refusal recorded on the returned registered envelope without being substantiated by any evidence adduced by examining in court the postal agent who went to effect delivery of the envelope to the addressee. The High Court of Madras,[55] also holds the postal indorsement as admissible in evidence even if the postman has not been examined. The Supreme Court,[56] takes this view with a modification that examination of the postman is not always necessary.

The Full Bench of the High Court of Gujarat has also contributed to the same view. In *Memon Adambhai Haji Ismail v Bhaiya Ramdas Bidiwdas*,[57] AD Desai J, had pointed out that from the manner in which the post office deals with the registered letter, it can be presumed by the court that the indorsement thereon was made by the postman in discharge of his official duties and the said indorsement can be relied upon to raise the presumption that the delivery of the registered letter was offered to the addressee and he refused to sign the receipt, in case where the indorsement is one of refusal. It was held:

> The court can raise such a presumption on the basis of the indorsement of refusal in spite of the fact that evidence of the authority who made the indorsement is not led in the case.

The High Courts of Nagpur, Andhra Pradesh, and Madhya Bharat have, however, taken the view that unless the indorsement on the envelope is proved in the manner in which it is capable of being proved, no presumption of service can be raised.[58] The High Court of Madhya Pradesh,[59] adds that it is for the contestant to summon the postman and rebut the presumption.[60]

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53 *Hari Charan Singh v Shiv Rani* AIR 1981 SC 1284, 1288.

54 *Gopal Raghunath v Krishna* (1901) 3 Bom LR 420.

55 *Kodali Bapayya v Yadavalli Venkataraman* AIR 1953 Mad 884, 887, (1952) 1 Mad LJ 227 (DB).

56 *Puvada Venkateswara Rao v Chidamana Ramana* AIR 1976 SC 869, 871, (1976) 1 SCJ 372.

57 AIR 1975 Guj 54, 15 Guj LR 474.

58 *Jankiram Narhari v Damodar Ram Chandra* AIR 1956 Nag 266, 1956 Nag LJ 441; *Mahboob Bi v Mvala Lachmiah* AIR 1964 AP 314, (1962) 2 Andh WR 148 and *Ganesh Das Kishanji Firm v Murlidhar* AIR 1956 MB 151, 1956 MBLJ 3; but, this Madhya Bharat view has been modified in the Madhya Pradesh view in *Shambhu Dayal v Alice Bi* 1963 Jab LJ 85; dissenting from *Jankiram Narhari Shobne v Damodhar Ram Chandra Joshi* AIR 1956 Nag 266.

59 *Bhikha v Bedaniya* AIR 1981 MP 76, 1980 Jab LJ 285, (1980) 1 MPWR 298, (1980) MPRCJ 241.

60 *Tek Chand Deviditta v Gulab Chand Chandan Mal* AIR 1957 MB 151, 153.

The High Court of Bombay appears to be swerving on the point. With reference to *Aga Gulam Hassain v AD Sasson*,[61] and *Fakir-ud-din v Ghafar-ud-din*,[62] it was observed in *Balurom v Bai Pannam Bai*,[63] that as the presumption is rebuttable, it can be shown by leading reliable evidence by the addressee that the letter was never delivered to him in fact, in which case it will be held that there was no service. The observation implies that the presumption would be available to the sender even without examining the postman in court until the addressee denies service, though there may be some cases in which the evidence of the postman becomes necessary.[64]

Again, in *Roop Chand Rangildas v Hussain Haji Mahomed*,[65] Beaman J, after referring to s 27 of the General Clauses Act, had observed that the point is actual delivery, and the defendant may not take advantage of his own refusal to accept delivery when tendered, that is to say, if the registered cover is tendered to and refused by him, he refuses at his own risk and where he disputes the actual delivery or tender of delivery, it is a mere question of fact and the onus is on him.[66]

But, in a later case in *Vaman Vithal v Khanderao Rama Rao*,[67] Beaumont CJ observed:

> In fact, the refusal was not proved, as the postman who took the letter and brought it back was not called. But in any case, even if the refusal had been proved, I should not be prepared to hold that a registered letter tendered to the addressee and refused and brought back un-opened, was well served.

In two subsequent decisions, one in *Babasaheb Appasaheb v Laxmanappa Ramappa*,[68] and the other in *Venkatrao v Vasauprabhu*,[69] the observation made by Beaumont CJ have been treated not only as merely obiter but also of doubtful authenticity, until the said observations were overruled by the Supreme Court in *Hari Charan Singh v Shiv Rani*.[70] It observed that when a registered envelope

61 ILR 21 Bom 412.

62 ILR 23 All 99.

63 (1911) ILR 35 Bom 213, 13 Bom LR 323.

64 *Saibalini Saha v Snehalata Bose* (1961) 65 CWN 690, 695–96; as explained in *Munni Devi v Puspalata Mondal* 71 CWN 282.

65 16 Bom LR 204, AIR 1914 Bom 31.

66 *Nirmala Bala Devi v Provat Kumar Basu* (1948) 52 CWN 659, 664 (indorsement of 'refused' on concise statement of plaint).

67 AIR 1935 Bom 247, 37 Bom LR 376; (since overruled in *Har Charan Singh v Shiv Rani* AIR 1981 SC 1284.

68 40 Bom LR 1015, AIR 1938 Bom 492.

69 45 Bom LR 734, AIR 1943 Bom 348.

70 AIR 1981 SC 1284, 1981 All LJ 504, (1981) 1 RLR 506, (1981) 7 All LR 206, (1981) 2 SCC 535, 1981 All WC 273, 1981 MPRCJ 90, 1981 Mah LR 139 (SC), 1981 All Ren Cas 381, (1981) 2 RCR 149; overruling *Vaman Vithal Kulkarni v Khanderao Ram Rao Sholapurkar* AIR 1935 Bom 247; approving *Nath v Saraswati Devi Jawaswal* AIR 1964 All 52; *Fanni Lal v Chironji* 1972 All LJ 499; *Ganga Ram v Phulwati* 1970 All LJ 336, AIR 1970 All 446.

is tendered by the postman to the addressee, but he refused to accept it, due service is effected upon the addressee by refusal and the addressee must be imputed with the knowledge of the contents thereof, since service means service of everything contained in the notice; and it cannot be said that before knowledge of the contents of the notice could be imputed, the sealed envelope must be opened and read by the addressee or read over to him, in case of his being illiterate, since such things do not occur when the addressee is determined to decline to accept the sealed envelope.

The decisions of the Nagpur High Court in *Janakiram Narhari v Damodar Ram Chandra*,[71] Andhra Pradesh High Court, in *Mahboob Bi v Alvala Lachmiah*,[72] and Bombay High Court in *Vaman Vithal Kulkarni v Khanderao Ram Rao Sholapurkar*,[73] had earlier been dissented from by the High Court of Gujarat in *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badindas*,[74] holding that the expression 'unless the contrary is proved' governs both the time as well as the mode of service.

It is felt that the dissenting view taken by the High Court of Gujarat in the above *Memon Adambhai's* case[75] has laid down the correct law, firstly, because it is quite in accord with the spirit of s 27 of the General Clauses Act as expressed in the words 'shall be deemed to be effected' used in the section itself; secondly, because it is in consonance with the view taken by a majority of the High Courts in India;[76] and thirdly, because there is, in its support also a Privy Council authority in *Harihar Banerji v Ramsashi Roy*;[77] holding:

> ...if a letter properly directed containing a notice to quit is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their lordships to apply with still greater force to letters which the sender has taken the precaution to register...

Section 27, General Clauses Act construes a 'presumption of law' whereas s 114 of the Evidence Act, construes only a presumption of fact. Section 27 invests the presumption with a majesty of rule, s 114 allows a discretion,[78]

71 AIR 1956 Nag 266, 1956 Nag LJ 441.

72 AIR 1964 AP 314, (1962) 2 Andh P WR 148.

73 AIR 1935 Bom 247, 37 Bom LR [illegible]; since overruled in *Hari Charan Singh v Shiv Ram* AIR 1981 SC 1284.

74 AIR 1975 Guj 54, 15 Guj LR 655.

75 Ibid.

76 Vide cases of the Allahabad, Calcutta, Punjab and Patna High Courts as cited in this heading.

77 AIR 1918 PC 102, 45 Ind App 222.

78 *Kishori Lal v Chalti Bai* AIR 1959 SC 504; relied on in *Dwarka Singh v Ratan Singh Ahuja* 1969 All LJ 849.

and is not, therefore, conclusive.[79] Further, the presumption invoked by s 27 cannot be availed of when service by affixture is required by any provisions of a statute.[80] Endorsement of 'refusal' on registered post while effecting its service is sufficient to presume service in absence of rebuttal evidence.[81]

Two cases, one from Allahabad,[82] and another from Calcutta,[83] have taken a broad view of the matter, holding that when a notice under s 34 read with s 63 of the Income Tax Act 1922 had been properly addressed and pre-paid for sending it by registered post, the fact that physical delivery of notice had been effected on a person not authorised by the addressee to receive on his behalf, would not alone prove want of proper service.

5. PRESUMPTION UNDER THIS ACT DISTINGUISHED FROM EVIDENCE ACT

Section 27 of the General Clauses Act does not say that wherever there would be any provision in any Act for sending any notice by post, it must be invariably by registered post. This section lays down that if any Act or regulation requires any document to be sent or served by post and if any document is sent by registered post by properly addressing the person concerned and by pre-paying then it would be deemed that the document in question has been effectively served unless the contrary is proved. Section 27, therefore, speaks about a presumption of service if any document is sent by registered post duly pre-paid and properly addressed. The mere fact that the letter did not come back from the dead letter office but was returned as 'refused' would not destroy the presumption,[84] and would suffice to prove that service has been effected despite the fact that it has not been effected,[85] and in such cases the point to be proved is the posting of such letter.[86] The presumption is however, rebuttable. This presumption has been sanctioned only in case of posting under registration subject to the condition mentioned in addition to the presumption under s 114 of the Evidence Act. Although the presumption under s 27 of the General Clauses Act does not apply to a case of a letter sent under certificate of posting, the presumption under s 114 of the Evidence Act would. The court will, however, be at liberty to see if such

79 *Udai Narayan v Radhe Shyam* AIR 1950 Ori 36; relied on in *Dwarka Singh v Ratan Singh Ahuja* 1969 All LJ 849.

80 *KA Abdul Khader v Dy Director of Enforcement, Information Directorate* AIR 1976 Mad 233.

81 *Laxmibai v Keshrimal Jain* 1994 JLJ 747 (MP).

82 *Giri Lal Mam Chand & Co v Income-tax Officer, Ward A, Ghaziabad* 1978 UPTC 506, 510 (DB).

83 *Commr of Income-tax, West Bengal, Calcutta v Malchand Surana* AIR 1956 Cal 537, 540, [1955] 28 ITR 684.

84 *Girish Chandra Ghosh v Kishore Mohan Das* AIR 1920 Cal 287–88 (2), 23 CWN 319 (DB).

85 *Sohan Singh v Aditya Narain* 1974 RCR 573, 576–77 (Del).

86 *Sher Afzal v Mohan Lal* AIR 1926 Lah 520–21, 94 IC 103.

presumption has been rebutted in view of the evidence on record and the fact and circumstances of the case.[87]

The legal fiction incorporated in s 27 is that when a letter prepaid and properly addressed is sent through registered post, then it shall be deemed to have been served at the time when the letter would be delivered in the ordinary course of post. When a statute enacts that something shall be deemed to have been done which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect should be given to the statutory fiction and it should be carried to its logical conclusion. The statute directs the court to imagine a certain state of affairs; it does not say that having done so the court should permit the imagination to boggle when it comes to the inevitable corrollaries of that state of affairs.[88]

The purpose why the fiction has been raised under s 27 is to do away with the proof of service and thus avoid inconvenience and expense when certain conditions are fulfilled by a sender of a registered letter. In order to achieve this purpose, the legislature enacted that when a prepaid registered letter properly addressed has been handed over to the postal authority, it must be taken that it is duly delivered as letters in the ordinary course are duly delivered. The object of s 27 of the General Clauses Act is to ease the burden on a person who sends a registered letter and fulfils the conditions laid down in that section. The legislature transfers in such cases the burden to prove non-delivery on the addressee. On the proof that the letter was properly addressed, pre-paid, registered and put into the post office,[89] the rest follows without further proof viz, that the document has been served upon and received by the addressee.[90]

On the other hand, s 114 of the Indian Evidence Act provides that the court may presume the existence of any fact which it thinks likely to have existed, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (e) to that section provides that the court may presume that Judicial and official acts have been regularly performed. Illustration (f) to that section further provides that the court may presume that the common course of business has been followed in particular cases. Such presumption having been raised once, the manner of its rebuttal cannot be confined to the instances provided in the counter-illustrations in s 114(1)(f).[91]

87 *Jitendra Nath v Bijoy Lal* AIR 1976 Cal 478.

88 *State of Bombay v Pandurang Vinayak* AIR 1953 SC 244, 1953 Cr LJ 1094; *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badiudas* AIR 1975 Guj 54, 15 Guj LR 137.

89 This further strengthens the view taken by me under the heading 'Scope' above that the fact of posting has to be duly proved and the presumption does not extend to the act of posting, per RG Chaturvedi J.

90 *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badiudas* AIR 1975 Guj 54, 15 Guj LR 137.

91 *Abdul Hussain v Dy Commr, Nawgong* AIR 1953 Assam 206–07, (1952) ILR 4 Assam 357 (DB).

So far as the refusal of a registered article is concerned, para 191 of the *Posts and Telegraphs Manual*, Vol 6, provides the manner in which the refused registered article shall be dealt with. It provides inter alia that inland registered articles or the letter mail which are refused by the addressee and which have the name and address of the sender clearly written on them should not be kept in deposit, but should be marked 'refused' and sent by the first post with the acknowledgment, if any, to the office of posting for delivery to the sender.

These provisions indicate the regular course of business in the post office. When a registered letter is handed over to the receiving post office it is the official duty of the postal authority to make delivery thereof to the addressee. There is no scope for any person to intermeddle with the letter.

The presumption which thus arises under s 114 of the Indian Evidence Act is one of fact. It is not obligatory on the courts to raise a presumption under that section. The court may refuse to do so, if the evidence on record or the circumstances of the case raise any doubt. It is not possible to lay down a general rule when the court should raise a presumption or when it should refuse to do so, and each case has to be decided on its own facts. However, if evidence is led by the sender to the effect that the registered letter had no indorsement at the time when it was posted but that the indorsement was in existence at the time when the unopened registered letter was returned to him, then such evidence will greatly assist the court in exercising its discretion of raising a presumption under s 114 of the Evidence Act.[92]

92 *Memon Adambhai Haji Ismail v Bhaiya Ramdas Badiudas* AIR 1975 Guj 54, 15 Guj LR 655; *Gopal Raghunath v Krishna* (1901) 3 Bom LR 420; *Baluram v Bai Panambai* (1911) ILR 35 Bom 213,13 Bom LR 323; *Appabhai Motibhai v Laxmi Chand Zaverchand & Co* AIR 1954 Bom 159, 55 Bom LR 916; *Bai Shanta v Khalas Ramji Bhai Chhotalal* AIR 1956 Bom 144; *Jugal Kishore Jodhalal v Bombay Revenue Tribunal* 60 Bom LR 1075, AIR 1959 Bom 81; *Shamshadi Naga Pinjari v Gunvantibai Ramsanehi* (1972) 74 Bom LR 723, 1973 Mah LJ 51; *Ganga Ram v Phulwati* AIR 1970 All 446 (FB), 1970 All LJ 336; *Ratnaq Ram v Prabhu Dayal* AIR 1930 Lah 439, 31 Punj LR 26; *Munni Devi v Puspalata Mondal* (1967) 71 CWN 282, (1967) ILR Cal 550; *Ramayya v Venkatachallamma* AIR 1950 Mad 834, (1953) 1 Mad LJ 572; *Balbhaddar Mal v Commr of Income-tax, Punjab* AIR 1957 Punj 284, (1957) ILR Punj 1170; *Achamma Thomas v ER Nariman* AIR 1970 Mys 77, (1969) 2 Mys LJ 179; *KK Das Official Receiver v Amina* AIR 1940 Cal 536–37, 44 CWN 999 (in the absence of fraud, mere non-service of summons held not sufficient to sustain subsequent suit to set aside decree); *Jogendra Chunder Ghosh v Dwarka Nath Karmokar* (1888) ILR 15 Cal 681–82 (DB); *Meghji Kanji Patel v Kundan Lal Chaman Lal Mehtani* AIR 1968 Bom 387–88, 70 Bom LR 253 (proper approach in case of summons by registered post indicated: (a) When postal cover is returned with 'refused' it is for the defendant to satisfy that letter was not tendered to him; (b) defendant can do so by making a statement on oath; (c) defendant's statement can be controverted only by summoning the postman in court; (d) if postman not summoned, defendants' uncorroborated statement would suffice to set aside decree; but see *Daveed Aseervadam v Krishna Pillai Govinda Pillai* 1970 KLT 907 (O 5, r 9(3), Civil Procedure Code, because of its silence as to indorsement of refusal, implies the exclusion of principle, whether under O 5, r 20A(2), or s 27, General Clauses Act, or s 114 of the Evidence Act); *Vinod Khanna v Bakshi Sachdev* AIR 1996 Del 32.

The difference between the presumptions under s 27 of the General Clauses Act and that under s 114 of the Evidence Act, may be stated as follows:

(a) When the conditions laid down under 27 of the General Clauses Act, that is of properly addressing, pre-paying and posting are fulfilled and proved, the presumption of service is one of law and the court is bound to presume service as would follow from the expression 'shall be deemed' used in section 27. Such presumption being raised, it is on the addressee to rebut such presumption if he can by adducing proper evidence.

(b) The presumption under section 114 of the Evidence Act is one of fact. In case the court is inclined to raise such presumption, it is on the addressee of the letter to rebut it and the sender is spared from the burden of proving the service or refusal of service. But if the court is not inclined to raise such presumption, it is the initial duty of the sender to prove service and the duty of the addressee to rebut it arises next, and if the sender leads no evidence, the addressee need not rebut anything.

(c) Section 114, Evidence Act, relates generally to the presumption about official acts whereas 27, General Clauses Act deals particularly and specifically with service by post. So, whenever, there arises a question of service by post, it is futile to resort to section 114 of the Evidence Act and reliance must be placed on the special enactment of section 27 of the General Clauses Act.

Correct address is the condition precedent for any presumption.[93] Once it is proved by the party that notice is delivered to the post office with the correct address of the addressee, the service can be presumed sufficient even if the envelope received back with indorsement 'addressee avoided service'.[94]

Whatever the case, an indorsement that 'premises found locked' does not give rise to any presumption.[95]

Where notices to the assessee as provided in s 215 of the Punjab Municipal Act 1911 were sent and returned unserved, a presumption of proper service was raised because the assessee had failed to prove non-compliance of s 215.[96] The basic law of presumption of service of notice is permitted under the provisions of s 27 of the General Clauses Act and also under the provisions of s 114 of the Evidence Act. Where notices are despatched individually at the proper address of the pawnee, it shall be presumed that notice is duly served.[97]

93 *Ranjit Singh v Nirbhayanand* 1970 All LJ 455, 459.

94 *Saladi S Murthy v K Swami Naidu* (1992) 1 Andh LT 555.

95 *CMK Ramu Mudaliar v Kanthamani Natrajan* (1979) 1 Mad LJ 346, (1979) 22 Mad LW 5, 8.

96 *Kuldip Singh Dhingra v New Delhi Municipal Committee* (1981) 20 DLT 141, AIR 1982 NOC 46 (Del).

97 *Vinod Khanna v Bakshi Sachdev* (1995) 59 Del LT 89.

6. NO PRESUMPTION ON AFFIXTURE

Service by affixture can be effectual only when it is shown that notice is affixed at the place the person ordinarily resides or carries on business and as pointed out by some other person that such residence is that of the addressee of the notice.[98]

Section 27 will apply only to a case where the letter addressed to the party had not been returned unserved. It would also apply only if a different intention does not appear from the provisions of the Act or the regulations made thereunder. The presumption normally invoked by this section cannot be invoked in a case where, by the provisions of the relevant statute, it is required that wherever service could not be effected, it will have to be done by affixing it on the outer door or some other part of the premises.[99]

Section 28. Citation of enactments—(1)In any [Central Act]or Regulation, and in any rule, bye-law, instrument of document, made under, or with reference to any such Act or Regulation, any enactment may be cited by reference to the title or short title (if any), conferred thereon or by reference to the number and year thereof, and any provision in an enactment may be cited by reference to the section or sub-section of the enactment in which the provision is contained.

(2) In this Act and in any [Central Act] or Regulation made after the commencement of this Act, a description or citation of a portion of another enactment shall, unless a different intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

This section which is similar to s 35 of the Interpreation Act 1889 of England, deals with the mode of citation of enactments. It provides the convenience of citing the enactments either by their short titles or by reference to the number and year thereof. In the case of the latter mode being adopted for citation of any enactment, it is essential that both the number as well as the year thereof have been cited.

The Indian Short Titles Act 1897, also provides for the mode of citation of certain Acts, and the schedule it contains has in the first three columns the description of each of the Acts to which it applies and then, in the fourth column, the short title for each of the Acts described in the first three columns. In accordance with s 2 of this Act, the Acts mentioned in the schedule may be

98 *CIT v Sabitri Devi Agarwalla* [1970] 77 ITR 934 (A&N).

99 *KA Abdul Khader v Dy Director of Enforcement, Information Directorate, Madras* AIR 1976 Mad 233, 89 Mad LW 111, (1976) 2 Mad sLJ 78.

cited by their short titles as therein given and such citation by short title is without prejudice to any other mode of citation.

Section 29. Saving for previous enactments, rules and bye-laws—The provisions of this Act respecting the construction of Acts, Regulations, rules or bye-laws made after the commencement of this Act, shall not affect the construction of any Act, Regulation, rule or bye-law made before the commencement of this Act, although the Act, Regulation, rule or bye-law is continued or amended by an Act, Regulation, rule or bye-law made after the commencement of this Act.

This section is similar to s 40 of the English Interpretation Act 1889 which provides :

> **40. Saving of past Acts**—The provisions of this Act respecting the construction of Acts passed after the commencement of this Act shall not affect the construction of any Act passed before the commencement of this Act, although it is continued or amended by an Act passed after such commencement.

The section is prohibitory in terms because it forbids the application of its provisions for the construction of such Acts, regulations, rules, or bye-laws, which have been made before the commencement of this Act. On the other hand, it excludes from application of this Act, all such Acts, regulations, bye-laws, or rules which if made before the commencement of this Act have continued their operation even after the commencement of this Act. In the third place, this section keeps away from the purview of this Act, all those amendments effected after the commencement of this Act, in or in relation to those Acts, regulations, rules, or bye-laws which have been enacted before but continued after the commencement of this Act.

The section has no answer to what shall be the mode of construction of any Act, regulation, rule, or bye-law which though made before the commencement of this Act, is continued after such commencement.

Rules, bye-laws etc, constitute subordinate legislation. However, the subordinate legislation, referred to in any section, do not get merged, nor do they automatically become part of the concerned Act,[1] and the presumption of date of service cannot be different from that given in the endorsement of refusal.[2]

Section 30. Application of Act to ordinances—In this Act the expression ['Central Act'] wherever it occurs, except in section 5

1 *Luvana Thakarsi v Bhatia Hirji* 12 Guj LR 397.
2 *Shyam Narayan v Raghunath* AIR 1977 Pat 155, 1976 Bih LJR 657.

and the word 'Act' in clauses (9), (13), (25), (40), (43), (52) and (54) of section 3 and in section 25 shall be deemed to include an Ordinance made and promulgated by the Governor General under section 23 of the Indian Councils Act 1861 (24 and 25 Vict, c 67) [or section 72 of the Government of India Act 1915] (5 and 6 Geo V, c, 61) [or section 42 of the Government of India Act 1935] (26 Geo V, c 2) and an Ordinance promulgated by the President under article 123 of the Constitution.

SYNOPSIS

1. APPLICABILITY AND SCOPE

The section applies to a temporary ordinance as well,[3] promulgated on occasions necessitating immediate action, and therefore, comes into operation immediately.[4] Provisions of the Punjab General Clauses Act 1898 are applicable to an ordinance published under art 213 of the Constitution of India.[5] The Coal Production Fund Ordinance of 1944 was repealed by a repealing ordinance 6 of 1974, but under s 6 of the General Clauses Act the repeal did not affect the right of the railway to recover the freight or the liability of the other party to pay the same and the remedy in respect of the right and liability. The result was that the ordinance of 1944 and the rules made thereunder must be held to continue in force in respect of the right and liability accrued or incurred before the said ordinance was repealed and the remedies available there under.[6]

There being no inconsistency between Dhoties (Additional Excise Duty) Ordinance 1953 and Dhoties (Additional Excise Duty) Act of 1953, the notification, dated 27 October 1953 was held to have

3 *Re Sundararajalu* AIR 1949 Mad 898; cf *Bansgopal v Emperor* AIR 1933 All 669: s 6 not applicable to temporary Ordinance; followed in *FC Aubrey v KM Aubrey* AIR 1947 Lah 414; *Re ANG Sundararajulu Chetty* AIR 1949 Mad 893–94; *Jogendra v Emperor* AIR 1933 Cal 516.

4 *Adarsh Bhandar v Sales-tax Officer, Aligarh* AIR 1957 All 475, 1957 All LJ 654, 1957 All WR 692 (HC) (FB); but see *SK Roy Chowdhary v King* AIR 1941 Rang 1, 42 Cr LJ 335, holding ordinances as different from Acts.

5 *Gurdial Kaur v State* AIR 1952 Punj 55.

6 *RG Fall Parsi v Union of India* AIR 1962 SC 1281.

continued in force as if made under the explanation to s 3 of the 1953 Act, by virtue of ss 24 and 30 of the General Clauses Act.[7] In *Re PA Raju Chettiar*[8] an ordinance framed under s 72 of the Government of India Act read with s 317 of the Government of India Act 1935 has been held to be a central Act.

The Orissa Agency Rules along with Ganjam and Vizagapatnam Act 1889 had been repealed by s 2 of the Koraput and Ganjam Agency Repealing and Extension of Laws Regulation of 1951, introducing the Code of Civil Procedure 1908 along with the Bengal, Assam and Agra Civil Courts Act 1887 in the district of Koraput and, in consequence, substituting the agency courts by civil courts. The said regulation, despite its saving clause, was held not to warrant the continuance of the proceedings in the agency courts.[9]

2. COMMENCEMENT OF ORDINANCE

On the question when the Uttar Pradesh Sales Tax Act (Amendment) Ordinance came into operation in *Adarsh Bhandar v Sales-tax Officer*,[10] the majority, Raghubar Dayal and Srivastava JJ, held:

> An ordinance promulgated by the governor of Uttar Pradesh will come into operation from its first publication in the gazette unless it be definitely mentioned in the ordinance that it will come into force from any subsequent date.
>
> The word 'Act' or 'ordinance' must refer to the entire piece of legislation described by that word. It does not mean individual enactments (vide definition in section 4(14) of the General Clauses Act) or sections or paragraphs of the Act...
>
> It is the coming into force of the entire ordinance that we have to look to. The entire ordinance as such is not expressed to come into force on any particular day and, therefore, must be held to have come into force on the 31 March 1956, when it was first published in the UP Gazette.
>
> Section 1 and sub-section (3) of section 3...came into operation at once. The amendments made by sections 2 to 13 were to have effect on and from the 1 April 1956. This does not necessarily mean that these sections 2 to 13 had not come into force along with the other provisions on the 31 March 1956, when the Ordinance was published. The amendments made to the Act by these sections were to have effect from the 1 April 1956. They must have been made before they could have effect...the ordinance would be deemed to have come into force at once and its provisions which were to

7 *Bihar Cotton Mills v Union of India* AIR 1956 Pat 131, 134, 1955 BLJR 679 (DB).
8 AIR 1946 Mad 254-55, 47 Cr LJ 698, (1946) 1 Mad LJ 145 (DB).
9 *P Ramamurthy v Dhuba* (1954) ILR Cut 607, 613 (DB).
10 AIR 1957 All 475 (FB).

take effect later were to do so on account of the ordinance itself and not on account of the fact that the ordinance had not come into force.

Mootham CJ, in his dissenting judgment said:

Sections 1 and 3(3) came into force on the day on which the ordinance was first published in the *Official Gazette*, and that the remaining provisions of the ordinance came into force on the following day...I am, therefore, unable to hold that because one or more sections of an Act have come into force on the day the Act was published, it necessarily follows that the Act came into force. Whether it has done so or not must depend on the intention of the legislature to be derived from the enactment itself.

An ordinance promulgated under s 41 or 42 of the Government of Burma Act 1935 has been held to have the same force as an Act of the Legislature of Burma.[11]

3. EXCEPTION IN CASE OF SECTION 5

Section 5 of the General Clauses Act deals with the coming into operation of enactments stating that where any central Act is not expressed to come into operation on a particular day, then, in the case of the central Act made before the commencement of the Constitution, it shall come into operation on the day on which it receives the assent of the Governor-General, and in the case of an Act made by the Parliament for the Union of India, then it shall come into operation on the day on which it has received the assent of the President. Section 5 further provides that unless the contrary is expressed, a central Act or regulation shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.[12]

What s 30 does is to preclude, in relation to ordinances, the application of the provisions of the General Clauses Act so far as the phenomenon of coming into operation of enactments, as contemplated under s 5 of the Act, is concerned. Section 30, in terms, means that for purposes of s 5, the term 'central Act' shall not be deemed to include an ordinance. In other words, the principles enunciated under s 5 of the Act shall not apply to ordinances, though s 5 has declared itself to be applicable to regulations to the extent that a regulation, too, shall be construed as coming into operation, unless the contrary is expressed, on the expiration of the day preceding its commencement.

A few cases on the non-applicability of s 5 to orders have come from Allahabad High Court.

11 *U Lun v V Chit Haing* AIR 1941 Rang 49–50, 1941 Rang LR 101 (DB).

12 For a distinction between the expression 'coming into operation' and 'commencement', please refer to s 5, heading: 'Commencement of Act Distinguished from Coming into Operation of Act'.

In the case of *Harpal Singh v State of Uttar Pradesh*,[13] a Division Bench of the Allahabad High Court held that the Preventive Detention (Extension of Duration) Order passed by the President under art 22(7) read with art 373 of the Constitution does not amount to an Act of Parliament and does not, therefore, come within the definition of 'central Act or regulation' and as such s 5 of the General Clauses Act can have no application in determining the time from which the order has to come into effect.

On 1 March 1963, the Central Government promulgated an order called the Essential Articles (Price Control) Order 1963, which inter alia provided that:

> Every dealer shall cause to be prominently displayed on a special board to be maintained for this purpose at or near the entrance to the place of sale:
>
> (a) a list of essential articles held by him from time to time in stock for ready delivery;
> (b) the past price of each such article; and
> (c) the price at which he proposes to sell that article.

On 25 March 1963, under a warrant, issued by a magistrate, the shop of the respondent, who was a dealer in vegetable products and washing soaps etc, was searched and it was found that he had stocked a number of *Dalda* tins and sticks of washing soaps in his shop but had not displayed a price list of those articles as required under the aforesaid order. The respondent was, therefore, arrested and sent for trial for contravening cl 4 of the aforesaid order.

On appeal by the state against the acquittal of the respondent from the court of sessions, the question before the High Court was whether the aforesaid order had been in operation on the 25 March 1963. Speaking for the Bench, HCP Tripathi J, held:

> The order as such does not give any date on which it was to come into force. Even then, clause 3 has provided that the provisions were to be applicable only with effect from the commencement of the order. This, in our opinion, envisages that a date was to be fixed for the commencement of the order, otherwise it would have mentioned in the order itself that it would come into force at once or from a notified date. As there is nothing on the record to show that the order had come into force on 25 March 1963, when the premises of the respondent was searched, it is not possible to hold that he had contravened any provision of this order.[14]

It may be noted that a government order becomes a notification when: (a) it has been published in the *Gazette*; and (b) such publication is under the proper authority.[15]

13 AIR 1950 All 562.
14 *State of Uttar Pradesh v Ratan Chand* AIR 1966 All 526, 1966 All LJ 89, 1966 Cr LJ 1120.
15 *Bhikam Chand v State* AIR 1966 Raj 142.

In exercise of the powers conferred by s 3(1) of the Defence of India Act 1962, the Central Government was empowered, by issuing a notification, in the *Official Gazette*, to make such rules as appeared to it necessary or expedient, inter alia, for maintaining supplies essential to the life of the community. The Central Government accordingly framed rules known as the Defence of India Rules 1962. By r 125 of the rules, the Central Government, as well as the state government, were empowered to make such orders as they might consider necessary or expedient for securing equitable distribution and availability of any article or thing at fair prices. In pursuance of the powers conferred by sub-rr (2) and (3) of r 125, the Central Government made an order called the Essential Articles (Price Control) Order 1963, which was published in the *Gazette of India (Extraordinary)* dated 1 March 1963. Clause 3 of the order which had laid down that 'no wholesale dealer, as the case may be, shall, with effect from the commencement of this order, sell any essential article to any person at a price which is in excess of the control price,' was later amended by the Central Government and the amended order was published in the *Gazette of India* on 6 March 1963, and the effect of the amendment was that the words 'with effect from the commencement of this order' were deleted.

The argument advanced on behalf of the state was that the order, having been published in the *Gazette* on the 1 March 1963, should be deemed to have come into force from that date. It was said that the principle underlying s 5 of the General Clauses Act was applicable to the order, even though it was not applicable in terms to the orders of this kind but only to Central Acts and regulations.

Dealing with the above argument, in *State v Banshidhar*,[16] DP Uniyal J, had this to observe:

> The question as to how, when and where an order issued under the Defence of India Rules will take effect cannot be left to conjecture; it must appear clearly on the face of the order that it is to operate with immediate effect or from some future date. Where there is no such indication in the order itself it does not become effective and cannot come into operation. In my opinion, it is not permissible to hold by analogy with regard to the construction of statutes that orders of this kind take effect immediately on publication in the *Official Gazette*. Such a construction, in my view, would be nothing short of legislating by the courts. There is a fundamental difference between an Act of Parliament and an order made under the DIR. Acts of Parliament are passed after a public debate in which the accredited representatives of the people have opportunity for free and full discussion of the issues involved. They are also given wide publicity in the press and over the radio. Everyone has opportunity to know or find out what the law is to be,

16 AIR 1969 All 184, 1968 All WR 204 (HC), 1968 All Cr R 134, 1968 All LJ 476, 1969 Cr LJ 456 (2).

> but not so in the case of orders issued by the executive or administrative authority. The decisions are made in the secret recesses of a chamber to which the public has no access and of which they can have no means of knowledge. It would be shocking to the judicial conscience if orders made in such circumstances and likely to affect the life and liberty of the subject were allowed to operate from the moment of their publication in the *Official Gazette*.

Uniyal J, had noticed, in this connection, the case of *Johnson v Sargent & Sons*,[17] in which the difference between a statutory order of this kind and an Act of Parliament was stressed. In connection with the enforceability of the order, it was held in that case as follows:

> While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they came into operation which is absent in the case of many orders...In the absence of authority, I am unable to hold that the order came into operation before it was known.

In an earlier Bench decision of the Allahabad High Court,[18] the judges had observed, in the same context thus:

> Mere removal of the expression 'with effect from the commencement of this order', which took place by the notification of the 6 March 1963, without enforcement of the order, cannot be tantamount to enforcement of the order which had not till then been enforced. The result was that clause 3 of the order cannot be deemed to have come into force even on the 6 March 1963...

One need not forget, in this connection, the dictum of the Supreme Court, in *Haria v State of Rajasthan*:[19]

> ...Natural diligence requires that before a law can become operative, it must be promulgated and published. It must be broadcast in some recognisable way so that all men may know what it is.

In *Adarsh Bhandar v Sales-tax Officer*,[20] the word 'Act' or 'ordinance' was construed to refer to the entire statutory legislation coming under the description of that word rather than to its sections or paragraphs only.

17 [1918] 1 KB 101, 87 LJKB 122.
18 *State of Uttar Pradesh v Mahavir Prasad* 1966 All LJ 796, 1966 All WR 316 (HC).
19 AIR 1951 SC 467, 1952 Cr LJ 54.
20 AIR 1957 All 475.

4. ARTICLE 123 OF THE CONSTITUTION

An ordinance promulgated by the President of India, under art 123 of the Constitution, shall be deemed to be an 'Act' for the following purposes of the General Clauses Act, namely:

(i) Clause (9) of section 3, defining the word 'Chapter';
(ii) Clause (13) of section 3, defining the word 'Commencement';
(iii) Clause (25) of section 3, defining the words 'High Court';
(iv) Clause (40) of section 3, defining the word 'Part';
(v) Clause (43) of section 3, defining the words 'Political Agent';
(vi) Clause (52) of section 3, defining the word 'Schedule';
(vii) Clause (54) of section 3, defining the word 'Section'; and
(viii) Section 25, providing for the recovery of fines, by issuing and executing the warrants for the levy of fines imposed under any Act, rule, regulation, or bye-law.

Article 123 of the Constitution of India, empowering the President of India to promulgate Ordinances during recess of Parliament, may be reproduced for ready reference:

Section 123. (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action he may promulgate such ordinances as the circumstances appear to him to require.
(2) An ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such ordinance:
(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if, before the expiration of that period, resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
(b) may be withdrawn at any time by the President.

Explanation—Where the Houses of Parliament are summoned to re-assemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an ordinance under the article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

Clause (3) above makes it abundantly clear that the power of the President to legislate by ordinances, is co-extensive with the power of the Parliament to enact laws.

It follows that in order that an ordinance may be construed as an Act of Parliament, for the purposes of s 30 of the General Clauses Act, the ordinance must have compiled with two conditions:

(i) The provisions made in the ordinance are such as the Parliament, under the Constitution,[21] had the power to enact; and
(ii) . The President must have been satisfied that circumstances exist which render it necessary for him to take immediate action.

An occasion to define the extent of jurisdiction of the Supreme Court to examine whether the conditions relating to satisfaction of the President was fulfilled, had although come in the famous *Bank Nationalisation* case,[22] when the Constitution Bench of the Supreme Court was sitting to consider the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969 followed by the Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969. But since the Ordinance 8 of 1969 had been repealed by Act 22 of 1969, the question of its validity had remained only academic, and since the Act which followed, was also found to be invalid, the Supreme Court had declined to express any definite opinion in this regard. However, the obiter per the majority of the Supreme Court may appear to be relevant in this connection. The court observed in paras 22 and 23 of the judgment as follows:

> Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his council of ministers, Whether in a given case, the President may decline to be guided by the advice of his council of ministers is a matter which need not detain us. The ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his council of ministers and on their satisfaction. The President is, under the Constitution, not the repository of the legislative power of the Union. But with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating ordinances.
>
> Power to promulgate such ordinances as the circumstances appear to the President to require is exercised: (a) when both Houses of Parliament are not in session; (b) the provision intended to be made is within the competence of the Parliament to enact; and (c) the President is satisfied

21 For legislative competence of Parliament, see arts 250–55 of the Constitution of India, Ch 1, Pt 11.

22 *RC Cooper v Union of India* AIR 1970 SC 564, (1970) 1 SCC 248, 1970 Mer LR 42, 40 Com Cas 325, (1970) 1 SCJ 564, (1970) 1 Com LJ 244, (1970) 2 SCA 37.

that circumstances exist which render it necessary for him to take immediate action. Exercise of the power is strictly conditioned. The clause relating to the satisfaction is composite—the satisfaction relates to the existence of circumstances as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final.

By reading s 30 with s 6, it was held in *Re ANG Sundararajalu Chetty*,[23] that the repeal of s 7 of the War Risks (Goods) Insurance Ordinance 1940, did not prevent the prosecution and trial of an offence committed at time when the ordinance was in force.

Section 30A. Application of Act to Acts made by the Governor-General—*[Repealed by the AO 1937].*

Section 31. Construction of reference to Local Government of a Province—*[Repealed by the AO 1937].*

23 AIR 1949 Mad 893, (1949) 1 Mad LJ 605.

THE SCHEDULE

Enactments Repealed—*[Repealed by the Repealing and Amending Act 1903 (1 of 1903), s 4 and Sch III].*

APPENDICES