

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2015

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Crl.R.C.Nos.183 to 186 of 2015

M.P.Nos.1, 1, 1 and 1 of 2015

Sunitha Venkatram
rep.by his Power Agent
K.Sridharan

...Petitioner in Crl.RC.Nos.183 & 185/2015

Ashwant Akula Venkatram
Rep.by his Power Agent
Sangaranarayanan

...Petitioner in Crl.RC.Nos.184 & 186/2015

Vs

Ms.Divya Rayapati

...Respondents in all Crl.R.Cs.

Criminal Revisions filed under sections 397 r/w 401 of Criminal Procedure Code, to set aside the order passed by the Principal Sessions Judge, Chennai, dated 16.02.2015 in Tr.Crl.M.P.No.20169 of 2014 and Tr.Crl.M.P.Nos.816, 820 and 818 of 2015 in C.A.Nos.177, 142, 176 and 144 of 2014, respectively.

For Petitioner : Mr.C.Prabhakaran,
for M/s.M.A.Gouthaman

For Respondent : Mrs.Sudharshana Sundar

Mr.P.Govindarajan
Additional Public Prosecutor

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COMMON ORDER

Material on record discloses that the respondent/Mrs.Divya Rayapati, has filed a petition, under Section 12 of the Protection of Women from Domestic Violence Act, 2005, claiming various reliefs, under Sections 18, 19 and 22 of the said Act, and that the said petition has been taken on file in M.C.No.70 of 2013, on the file of the 23rd Metropolitan Magistrate, Saidapet, Chennai-15.

2. Mr.Ashwant Akula Venkatram is the husband of the respondent and the revision petitioner in Crl.R.C.Nos.184 and 186 of 2015, respectively. He is represented by his Power of Attorney, Mr.Sankara Narayanan. Crl.R.C.Nos.183 and 185 of 2015, are filed by Mrs.Sunitha Venkatram, W/o.Mr.Venkatram Akula, represented by her Power of Attorney. She is the mother of Mr.Ashawant Akula Venkatram.

3. Material on record further discloses that pending M.C.No.70 of 2013, on the file of the 23rd Metropolitan Magistrate, Saidapet, Chennai-15, M.P.No.4523 of 2013, has been filed by the respondent/wife, under Section 19(1)(a)(c)(e) of the Protection of Women from Domestic Violence Act, 2005, for the following reliefs,

(a) Restraining the respondents 1 to 3, viz., Mr.Ashwant Akula Venkatram and his parents, their men, agents, servants, from in any manner, attempting to disturb the petitioner's possession of the shared household at 3rd Floor, La Terrazo Apartment, No.11-B, Ranjith Road, Kotturpuram, Chennai 600 085; and

(b) Restraining the respondents 1 and 2/petitioners herein, from dealing with, alienating or disposing off or renouncing their rights of the shared household at the 3rd Floor, La Terrazo Apartment, No.11-B, Ranjith Road, Kotturpuram, Chennai 600 085, except with the leave of the Court, pending disposal of the criminal case.

4. After considering the averments made in M.C.No.70 of 2013, counter affidavit, evidence and records, vide order, dated 17th March, 2014, in M.P.No.4523 of 2013, the learned 23rd Metropolitan Magistrate, Saidapet, Chennai-15, has allowed the prayer sought for, and thus, restrained the respondents 1 to 3 therein, and their men, agents, servants, from in any manner, attempting to disturb the wife's possession of the shared household at 3rd Floor, La Terrazo Apartment, No.11-B, Ranjith Road, Kotturpuram, Chennai 600 085, till disposal of the main case.

5. The learned Judge has also passed an order, restraining the

respondents 1 and 2/petitioners herein, from alienating or encumbering the shared household, by affecting the residence right of the petitioner, till the disposal of the main case.

6. Aggrieved by the same, Mrs.Sunitha Venkatram and Mr.Ashwant Akula Venkatram, revision petitioners herein, have filed Appeal Nos.142 and 144 of 2014 , respectively, on the file of the learned IInd Additional City Civil Court, Chennai.

7. Material on record further discloses that pending appeal, the revision petitioners have filed an affidavit to M.C.No.70 of 2013, stating that they are residing abroad and hence, they could not appear before the trial Court. They have denied all the allegations made in M.C.O.No.70 of 2013. Before the lower Court, the respondent/wife has examined herself as PW.1 and marked as many as 15 documents.

8. The learned 23rd Metropolitan Magistrate, Saidapet, Chennai, observed that though eight months were over from the date of filing of an application, under Section 12 of the Domestic Violence Act, the revision petitioners have neither appeared before the Court nor produced any documents, in support of their case. The learned Magistrate, has ordered as follows:

- "1) The first respondent (Revision Petitioner in Crl.R.C.Nos.184 and 186 of 2015) is restrained for,
- (a) Committing any act of domestic violence.
 - (b) Aiding or abetting in the commission of acts of domestic violence.
 - (c) Alienating any assets, held by my husband.
 - (d) Prohibiting her husband, ie., first respondent from causing violence to her and her family members.
- (2) The first respondent (Revision Petitioner in Crl.R.C.Nos.184 and 186 of 2015), is directed to provide the petitioner her right of residence at La Terrazo Apartments, 11-B, Ranjith Road, Kotturpuram, Chennai-85.
- (3) The first respondent (Revision Petitioner in Crl.R.C.Nos.184 and 186 of 2015) to give petitioner (respondent herein) a sum of Rs.49,56,04,115/- as compensation."

9. Being aggrieved by the same, Mrs.Sunitha Venkatram and Mr.Ashwant Akula Venkatram, revision petitioners have filed Crl.A.Nos.176 and 177 of 2014, respectively. When the abovesaid four appeals were pending, contending inter alia that the learned 2nd Additional Sessions Judge, Chennai/Presiding Officer, has refused the

request of the revision petitioners to raise additional grounds, in the criminal appeals and in a pre-determined manner, proposed to pass judgments, in the above criminal appeals, and if the appeals were to be disposed of, by the said Presiding Officer, the revision petitioners would not get fair justice and on the other grounds, Mr.Ashwant Akula Venkatram (Revision Petitioner in Crl.R.C.Nos.184 and 186 of 2015), husband of the respondent, has filed Crl.M.P.No.20169 of 2014 and 818 of 2015 in C.A.Nos.177 and 144 of 2014, under Section 24 of the Code of Civil Procedure, seeking for transfer of the appeals in C.A.Nos.177 and 144 of 2014, on the file of the learned IInd Additional Judge, City Civil Court, Chennai.

10. Similarly, Mrs.Sunitha Venkatram (Revision petitioner in Crl.R.C.Nos.183 and 185 of 2015), W/o.Mr.Venkatram Akula and mother of Mr.Ashawant Akula Venkatram, has filed Crl.M.P.Nos.816 and 820 of 2015 in C.A.Nos.142 and 176 of 2014, under Section 408 of Code of Criminal Procedure, seeking transfer of the appeals in C.A.Nos.142 and 176 of 2014, on the file of the IInd Additional Judge, City Civil Court, Chennai.

11. On the side of the respondent-wife, objections have been made, stating that elaborate arguments, advanced on behalf of the parties, were heard and reply arguments, advanced on the side of the revision petitioners, were also heard by the learned Presiding Officer and only when the cases were posted for judgment, to frustrate and delay the passing of the orders in the appeal, transfer petitions have been filed. According to the respondent-wife, allegations made against the Presiding Officer, were without any basis or truth.

12. On the allegations made against the learned 2nd Additional Judge, City Civil Court, Chennai, a report seemed to have been called for, by the Sessions Judge. The Presiding Officer, in his remark, has stated that, "none of their arguments were curtailed by him." He has denied the allegations made against him and stated that it has been made with ulterior motive. However, he has also stated that he has no objection in transferring the appeals to some other Court.

13. On the allegations made against the Presiding Officer, the learned Principal Sessions Judge, Chennai, has observed as follows:

"Admittedly, after hearing the arguments, the appeals have been reserved for delivery of Judgments on 16.12.2014. Thereafter, on 15.12.2014, transfer petitioner has been filed."

14. Thereafter, when the revision petitioners relied on the judgments of Madhya Pradesh High Court in Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, Gauhati High Court in Jamuna Devi v. District and Sessions Judge reported in 2007 (1) GLR 560 = 2007 (1) GLT 148 and Kerala High Court in Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, in support of their contention that a Sessions Judge, is empowered to transfer a part-heard case, from the Court of Additional Sessions Judge to other competent Court and also placed reliance on Rattiram and others v. State of M.P., reported in 2012 (4) SCC 516, contending inter alia that the Sessions Judge need not follow any decision, if he is satisfied that the decision is per incuriam, the learned Principal Sessions Judge, Chennai, following a Full Bench decision of this Court in R.Rama Subbarayalu Reddiar v. Rangammal reported in 1962 (II) MLJ 318, on the aspect of binding effect on the Courts, subordinate to the High Court and taking note of the judgment in Devarasu v. State, rep., by the Station House Officer, Kottucherry Police Station, Karaikal reported in 1998 (2) ALD (Cri.) 212 : 1998 (1) LW (Cri.) 128, held the petitions for transfer are not maintainable. Answering accordingly, all the transfer petitions were dismissed. The Criminal Revision Cases are directed against the orders passed in the transfer petitions.

15. Mr.S.Prabhakaran, learned counsel for the petitioners submitted that the learned Sessions Judge has failed to consider that the Sessions Judge, can himself take cognizance of a case pending in his sessions division morefully described under the statute. The learned Sessions Judge has also failed to know his own powers regarding to transfer under Section 408 Cr.P.C. and had a doubt about his jurisdiction conferred under Section 408 of Cr.P.C. The learned Sessions Judge has passed an order, contrary to the statute and erred in observing that he does not require to follow any other decisions rendered by other High Courts, even if it is a Full Bench or Division Bench judgment. Ultimately, the learned Sessions Judge has failed to appreciate the law of per incuriam.

16. Learned counsel for the petitioners further submitted that the order passed by the learned Sessions Judge is against the principles laid down in judgments Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, Jamuna Devi v. District and Sessions Judge reported in 2007 (1) GLR 560 = 2007 (1) GLT 148 and Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, wherein, a specific point with regard to transfer of cases by the Session Judge has been dealt and law has been laid down, by the said Courts, about

the powers of transfer, under Section 408 of Cr.P.C. According to him, all the decisions stated supra had positively concluded, confirming the powers of a Session Judge under Section 408 with regard to transfer. Though the decisions cited supra, have been brought to the attention of the learned Sessions Judge, he has simply concluded by stating, that there is a judgment passed by this Court in Devarasu v. State reported in 1998 (2) ALD (Cri.) 212 :1998 (1) LW (Cri.) 128 and further observed that he can follow only the judgments passed by this Court, to which, he is a subordinate.

17. Learned counsel for the petitioners further submitted that the order passed by the learned Sessions Judge is contrary to the legal principles. The learned Sessions Judge has failed to appreciate that statute is above any legal principles or orders passed by any court and unless and until, the above judgments are set aside, the learned Principal Sessions Judge, ought to have applied the decisions in Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, Jamuna Devi v. District and Sessions Judge reported in 2007 (1) GLR 560 = 2007 (1) GLT 148 and Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, to the facts of this case, than the decision in Devarasu's case (cited supra).

18. Learned counsel for the petitioners further contended that the order passed in Devarasu's case (cited supra) is only a suggestion, which may lead to a debate to the colleagues of the concerned Judge, who passed the order in Devarasu's case (cited supra), whereas, the orders of the other High Courts relied on by the petitioners have laid down the law. According to him, the decision made in Devarasu's case (cited supra), is per incurim.

19. Learned counsel for the petitioners further submitted that initially, remarks were called for, by the learned Sessions Judge from the concerned Court for transfer of appeals, pending before the II Addl. Sessions Judge, which act is in conformity with the powers under Section 408 of Cr.P.C., but at a later stage, the learned Principal Sessions Judge, has passed an order, contra to the views initially taken by him. Hence, he submitted that the order passed by the learned Principal Sessions Judge, Chennai, is devoid of merits and contrary to the principles laid down by other High Courts, and the decision of the Sessions Judge is against the statute under Section 408 of Cr.P.C., in and by which, powers conferred on the Principal Sessions Judge.

20. It is the further contention of the learned counsel for the petitioners that the learned Sessions Judge has failed to appreciate

the fact that powers conferred under Section 408 Cr.P.C., is not an administrative power and that the power conferred on the Sessions Judge to transfer of criminal case from one criminal court to another criminal court in his sessions division, could be exercised, when it is expedient for the ends of Justice and thus, it does not require an elaborate discussion to hold that it is a judicial exercise of power.

21. Learned counsel for the petitioners further contended that admittedly, when there is an application by the interested party and based on the application, initially, when the Sessions Judge rightly sought a report from the II Additional Sessions Judge, thereafter, seemed to have raised a doubt and got confused about the powers conferred on the Principal Session Judge. He sought for a clarification from the learned counsel of the petitioner, in that regard, legal submissions were made explaining the powers under section 408 to the Sessions Judge stating that the Principal Sessions Judge is empowered to transfer or withdraw any case, which he has made over to the additional sessions Judge. But the learned Sessions Judge has failed to advert to the same.

22. It is the further contention of the learned counsel for the petitioners that the learned Sessions Judge has failed to consider the decision rendered by a Full Bench of Allahabad High Court in Radhey Shyam and another Vs. State of U.P. (ALL.) 1984 (2) Crimes 50, wherein the Hon'ble Full Bench has upheld the powers conferred under Section 408 of Cr.P.C. and further confirmed the powers of transfer of Sessions Judge under Section 408 of Cr.P.C. Therefore, Mr.S.Prabhakaran, learned counsel for the petitioners contended that the learned Sessions Judge has failed to note that when an application is made under Section 408 of Cr.P.C., he can transfer a case including revisions and appeals, at any stage from the court of an additional sessions judge, when it is expedient for ends of justice. For the reasons, stated supra, learned counsel for the petitioners prayed to set aside the impugned order.

23. Per contra, Mrs.Sudharsana Sundar, learned counsel for the respondent in all the revision cases, submitted that the decision of this Court in Devarasu's case (cited supra), has the binding effect on all the Subordinate Courts, within the territorial jurisdiction of this Court and the judgments of other High Courts, whether, be of same strength, or of higher composition of the Bench, are not binding on any subordinate Courts, within the territorial jurisdiction of this State.

24. Inviting the attention of this Court to the several passages in Devarasu's case (cited supra), learned counsel for the respondent submitted that the learned Judge has considered the issue, as to whether, a case can be transferred from one Criminal Court to another, in the same Sessions Division, with reference to Sections 407(2) and 408 Cr.R.C., and after considering a plethora of decisions and various statutory provisions, ultimately, summarised the law on the point, holding that the Sessions Judge has no powers to transfer the case from the file of Additional Sessions Judge, to any of the Court, having equal jurisdiction. It is also her contention that the well considered judgment of the learned Judge, cannot be termed as per incuriam. She also placed reliance on a decision of this Court in Kumar v. Superintendent of Police [Crl.R.C.No.740 of 2005, dated 12.02.2007] and Appukuttan v. Z.Thomas Zakaria [Crl.O.P.(MD)No.18201 of 2012, dated 09.12.2014] and prayed for dismissal of the revision cases.

25. Mr.P.Govindarajan, learned Additional Public Prosecutor, submitted that the judgment in Devarasu's case (cited supra), has settled the law, on the powers of the Sessions Judge and it is binding on all Courts, subordinate to this Court. He further submitted that cases pending on the file of the lower Courts alone, can be transferred, in exercise of the powers, under Section 408 Cr.P.C.

26. Inviting the attention of this Court to the Constitution of the Special Courts, under the Special enactments, learned Additional Public Prosecutor, submitted that if the interpretation of the learned counsel for the petitioners, is accepted, then it would be construed that a power is conferred on the Sessions Judge, to transfer those cases also, which is not the scheme of the Code.

27. Learned Additional Public Prosecutor further submitted that the procedure followed by the Sessions Judge, in following the earlier judgment in Devarasu's case (cited supra), decided by this Court, is in conformity with the principles on law of precedents. Thus, he prayed for dismissal of the revision cases.

Heard the learned counsel for the parties and perused the materials available on record.

28. Before adverting to the submissions of the learned counsel, let me have a cursory look at some of the provisions of the Code of Criminal Procedure,

6.Classes of Criminal Courts.-

Besides the High Courts and the Courts constituted

under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

- (i) Courts of Session;
- (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;
- (iii) Judicial Magistrates of the second class; and
- (iv) Executive Magistrates.

9. Court of Session.-

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation.- For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment,

posting or promotion is required to be made by Government.

10. Subordination of Assistant Sessions Judges.-

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application.

194. Additional and Assistant Sessions Judges to try cases made over to them.- As Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try.

406. Power to Supreme Court to transfer cases and appeals:-

(1) Whenever it is made to appear to the Supreme Court that an order under this section expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as

it may consider appropriate in the circumstances of the case.

407. Power of High Court to transfer cases and appeals.-

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197.

408. Power of Sessions Judge to transfer cases and appeals.-

(1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-

section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted.

409. Withdrawal of cases and appeals by Sessions Judges.-

(1) A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

410. Withdrawal of cases by Judicial Magistrates.-

(1) Any Chief Judicial Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(2) Any Judicial Magistrate may recall any case made over by him under sub-section (2) of section 192 to any other Magistrate and may inquire into or try such case himself.

412. Reasons to be recorded.-

A Sessions Judge or Magistrate making an order under section 408, section 409, section 410 or section 411 shall record his reasons for making it.

29. In *Surendra Kumar v. Vijayan* reported in 2005 (4) KLT 475, on reference, a Hon'ble Division Bench of Kerala High Court, considered the following questions of law,

"(1) Whether a Sessions Judge has power under Section 408 of the Code of Criminal Procedure, 1973, to transfer a case after commencement of trial or a part heard appeal from the court of Additional Sessions Judge to another competent court within the sessions division is the crucial and main question that arises for consideration in this case.

(2) Whether a litigant as a matter of right can approach the Sessions Judge for invocation of power under Section 409 for withdrawing or recalling a case which is already made over to an Additional Sessions Court.

(3) Whether a litigant should necessarily exhaust his remedy before the Sessions Court under Section 408 or 409 before approaching the High Court under Section 407 for the transfer."

30. In Surendra Kumar's case, the Hon'ble Division considered the correctness of a learned Single Judge decision in State of Kerala v. Reny George and others reported in 1981 KLT 557. Earlier, the Kerala High Court in Reny George's case (cited supra), held that an application for transfer of a case can be entertained only in a court of superior jurisdiction. The Court of Sessions Judge not being a court of superior jurisdiction qua that of an Additional Sessions Judge. In Reny George's case (cited supra), the learned single Judge took the view that invoking Section 408 of the Code is not possible; the only resort being Section 407 before the High Court. The view taken in Reny George's case (cited supra) is that the proviso would apply only to cases where the Sessions Judge has power to transfer, viz., for transferring cases from and to courts subordinate to the court of a Sessions Judge.

31. There cannot be any quarrel over the submission of Mr.S.Prabhakaran, learned counsel for the petitioners that the Sessions Judge of the Division, is the administrative head of the decision, exercising administrative powers, in the matter of distribution of work, to other Judges, dealing with Sessions Cases, which includes an Assistant Sessions Judge.

32. In Surendra Kumar's case, the Hon'ble Division Bench of the Kerala High Court, discussed the issue, as hereunder:

"As per Section 194 of the Code, an Additional Sessions Judge is to handle only those cases which are made over to him by the Sessions Judge of the division. Under Section 409 of the Code, the Sessions Judge who made over the cases to the Additional Sessions Judge is empowered to withdraw

any case or appeal before the trial of the case or the hearing of the appeal has commenced. Being the Sessions Judge, he has to take over the administration of criminal justice in his sessions division and hence in the exigencies of such administration, he has to make over, withdraw or recall cases and appeals and make over the same appropriately for the proper streamlining of the administration of criminal justice in the sessions division."

33. The Hon'ble Division Bench of the Kerala High Court held that a combined reading of Section 194 read with Section 409(2) makes it clear that the powers conferred on the Sessions Judge of a Division, is administrative in nature. As per Section 9 of the Code, there is only one Court of Session for every sessions division and that it is to be presided over by a Sessions Judge. However, there could be Additional Sessions Judges, as provided under Sub-section 3 of Section 9. The courts manned by such Additional Sessions Judges are known and described as courts of Additional Sessions Judges. Such courts manned by Additional Sessions Judges in a sessions division are also criminal courts, as far as Chapter XXXI of the Code is concerned. Chapter XXXI deals with Transfer of Criminal Cases. Section 406 deals with the power of the Supreme Court and Section 407 with that of the High Court. While dealing with the powers of the High Court, it is provided that the High Court may exercise its power under Section 407 in three modes, viz., (1) on the report of the lower court, (2) on the application of a party interested and (3) suo motu.

34. At Paragraph 8 of Surendra Kumar's case (cited supra), the Hon'ble Division Bench of Kerala High Court, held as follows:

"8. Section 408 is captioned as Power of Sessions Judge to transfer cases and appeals. It is not a power on the Court of Session. It is a power conferred on the Sessions Judge presiding over the Court of Session. Section 408 provides that the power of transfer of a criminal case from one criminal court to another criminal court in the sessions division is to be exercised only if it is expedient for the ends of justice. It does not require an elaborate discussion to hold that it is a judicial exercise of power. The power under Section 408 can be exercised in three modes; (1) on the application of an interested party, (2) suo motu, (3) on the report of the lower court. There is no quarrel for the proposition that the Sessions Judge is empowered to transfer any case or appeal at any stage

pending before the Assistant Sessions Court. But should that power be limited to transfer of cases in the inferior criminal courts only? 'Inferior criminal court' is an expression used only under Section 397 while dealing with the powers of revision. It is pertinent to note that the expression "subordinate" is conspicuously absent under Section 408. The Additional Sessions Judge is not subordinate to the Sessions Judge also. But it has to be noted that the Additional Sessions Judge gets jurisdiction to deal with a case only if such a case or appeal is made over to him by the Sessions Judge. Any time prior to the trial or hearing of the case or appeal as the case may be, the Sessions Judge is also empowered to withdraw such cases. Thus, though the Court of Additional Sessions Judge is not inferior and though the Additional Sessions Judge is not subordinate to the Sessions Judge, as far as administration of criminal justice in the sessions division is concerned, there is an administrative subordination in the sense that the Additional Sessions Judge gets jurisdiction only in respect of the cases made over to him and such cases are liable to be withdrawn also before commencement of the trial or hearing. It appears that the legislature had advisedly used the expression 'lower' and not 'subordinate or inferior' to ensure that the power under Section 408 can extend to issue of directions for transfer of a case pending before the Additional Sessions Court. As already noted above, the Court of an Additional Sessions Judge is also a criminal court in the sessions division. Under the proviso to Section 407(2) in the matter of transfer of a case on the application of an interested litigant before the High Court, such application would lie only if a motion had already been made before the Sessions Judge and rejected by him. That power conferred on the Sessions Judge is meant in the interests of the litigant public as also for lessening the burden of the High Court, lest for every transfer of a criminal case or appeal in a sessions division, the litigant public will have always to approach the High Court. Since the power under Section 408 is judicially exercised and since reasons are to be recorded as provided under Section 412, any party aggrieved can always take recourse to the revisional remedy under Section 397. So much so, the conferment of the power of the Sessions Judge to transfer a criminal case at any stage from the Court of one Additional Sessions Judge will not cause any irreparable injury to a party to the litigation."

35. The Hon'ble Division Bench of Kerala High Court in Surendra Kumar's case (cited supra), has suo motu considered the general powers of transfer and withdrawal, under Section 24 of the Code of Criminal Procedure, which is extracted hereunder:

"24. General power of transfer and withdrawal.--

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under Sub-section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section.--

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it."

36. The Hon'ble Division Bench of Kerala High Court has also drawn the analogy on the exercise of jurisdiction by the Sessions Judge, on the civil side, as follows:

"The Presiding Officer of a District Court is the

District Judge. The District Judge on the civil side is empowered to transfer any case at any stage from one Additional District Court. If so why should there be a restricted meaning for transfer on the criminal side for the only reason that a provision akin to Section 24(3) regarding subordination is not expressly provided under the Code of Criminal Procedure? Should not that enabling provision be read into under Section 408 since Section 408 appears under Chapter XXXI of the Code dealing with the transfer of criminal cases and since Section 408 itself is captioned as power of Sessions Judge to transfer cases and appeals from one criminal court to another criminal court and in view of the bar under the proviso to Section 407(2) of the Code? It has also to be noted that the power under Section 408 is to be exercised only if it is expedient for the ends of justice and not for any other reason."

37. In Surendra Kumar's case (cited supra), decision in Radhey Shyam v. State of U.P., reported in 1984 (2) Crimes 50, of the Hon'ble Full Bench of the Allahabad High Court, has been considered. The Hon'ble Full Bench, at Paragraphs 8, 9 and 15, held as follows:

"8. The reason for imposing a bar on a direct application to the High Court by the proviso to Sub-section (2) of Section 407 Criminal Procedure Code appears to be the conferment of concurrent power of transfer on the Sessions Judge of case from one Criminal court to another Criminal court in his sessions division if it is expedient for the ends of justice under Section 408(1), Criminal Procedure Code and the exercise of this power on an application of a party interested under Section 408(2), Criminal Procedure Code. A party interested is thus required to move such an application before the Sessions Judge first and only after it is rejected that such an application is maintainable in the High Court under Section 407(2), Criminal Procedure Code. It may be mentioned that in view of Section 412, Criminal Procedure Code reasons have to be given by the Sessions Judge for rejecting an application under Section 408, Criminal Procedure Code. It, therefore, follows that the Sessions Judge is empowered under Section 408(1), Criminal Procedure Code to transfer a trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not an application by

a party interested if it is expedient in the interest of justice.

The Hon'ble Full Bench further held that,

"9. It is significant to note that the proviso to Sub-section (2) of Section 407, Criminal Procedure Code only bars an application by a party interested to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division unless such an application for transfer has been made to the Sessions Judge and rejected by him. It does not impose any bar on the power of the High Court under Section 407(1), Criminal Procedure Code to transfer a case from one Criminal Court to another Criminal Court in the same sessions division, either on the report of the lower court or on its own initiative under Section 407(2), Criminal Procedure Code.

At Paragraph 15, the Hon'ble Full Bench has further held that,

"15. The power conferred on the Sessions Judge under Section 408(1) Criminal Procedure Code to transfer a case or an appeal pending in the Court of an Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not, is thus an independent judicial power which is not subject to the bar imposed by Section 409(2) Criminal Procedure Code on the administrative power of the Sessions Judge of recalling a case or an appeal from an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced."

38. In Avinash Chander v. State reported in 1993 CrL.J. 595, relied on in Surendra Kumar's case (cited supra), the Delhi High Court, held that,

"I have not been able to quite see how, having once said that the Court of Addl. Sessions Judge is a Criminal Court, does it then cease to be so under Section 408, Cr.PC and limit the power of the Sessions Judge exercisable under that Section? It is not possible by any principle of interpretation to have read Sub-section (1A) as a proviso or qualification to the powers available under Sub-section (1C) of Section 528 (of the old Code). The new Code has split Section 528 into Section 408 [old Section 528 (1C)] and Section 409 fold Section 526 (1A)]. That can not be and is not without any significance. Section 408 is the general power to be exercised for the ends of justice while Section

409 provides for a power more of an administrative nature given to the Sessions Judge or withdraw any case or appeal or appeal made over by him to the Addl. Sessions Judge."

39. At Paragraph 12, in Surendra Kumar's case (cited supra), the Hon'ble Division Bench of Kerala High Court, has summed up, as follows:

"(1) An interested litigant is entitled to invoke Section 409 of the Code before the Sessions Judge for the purpose of withdrawing or recalling cases including revisions and appeals already made over to an Additional Sessions Judge, provided the trial or hearing of the cases or revisions or appeals as the case may be, has not commenced. It is an administrative exercise of power by the Sessions Judge.

(2) An interested litigant is entitled to move the Sessions Judge for transferring cases including revisions and appeals at any stage from the court of an Additional Sessions Judge, if such transfer is expedient for the ends of justice.

(3) Unless the litigant thus first moves the Sessions Judge, an application for transfer under Section 407 before the High Court is not maintainable.

(4) The Additional Sessions Judge concerned is entitled to make a report to the Sessions Judge for transferring any cases including revisions and appeals pending before him irrespective of the stage of such matters."

40. In Jamuna Devi v. District and Sessions Judge reported in 2007 (1) GLR 560 = 2007 (1) GLT 148, the Gauhati High Court, took up a suo-motu revision, against an order, passed by the Sessions Judge, Tinsukia, in a transfer petition, wherein, a Sessions case was withdrawn and transferred. Trial was pending, on the file of the Additional Sessions Judge, Fast Track Court No.2. Certain allegations were made against the trial Judge. Accused persons filed applications for transfer. The learned Sessions Judge transferred the case. Company, party to the lis, filed an application to the High Court, contending that the transfer is against the decision, rendered in Subrata Paul v. Smti Ratna Gope reported in 2002 (1) GLJ 421. On the exercise of administrative power of withdrawal and transfer of a Sessions case and considering the provision of Section 409(2) of the Code, the Gauhati High Court, held that,

"the learned Sessions Judge had no authority or jurisdiction to withdraw the case as the power under

Section 409(2) can be exercised at any time, before the trial court of the case or hearing of appeal has commenced. We find that the learned Sessions Judge did not exercise any power under Section 409 Cr.P.C."

41. On the question of exercising the powers, under Section 408 of the Code, the Gauhati High Court in Jamuna Devi's case (cited supra) held that,

"6. Now, coming to the question of exercise of power under Section 408 Cr.P.C, we find that it empowers the Sessions Judge to transfer a case from one criminal court to another when it is expedient for the end of justice and the words used in Section 408 provides "whenever it is made to appear to a Sessions Judge". Thus, the power can be used on application of a party or even suo motu. The power of Sessions Judge under Section 408 Cr.P.C. is identical to that of the High Court under Section 407 Cr.P.C. except certain modifications. This court in the case of Subrata Paul (supra) held -

"7. From the aforesaid discussions of statutory provisions, I am of the considered opinion that the learned Sessions Judge has been vested with unconditional power of withdrawal or transfer any criminal case from any criminal court in his Session Division which are not covered by Section 409 Cr.P.C. and transfer the same to other criminal court of competent jurisdiction under him in view of Section 408 Cr.P.C. Similarly, the learned Sessions Judge in a Session Division has been vested with the power to withdraw or recall the cases be made over to the Assistant Sessions Judge or any case from the file of Chief Judicial Magistrate subordinate to him at any stage of the inquiry or trial or appeal, but recalling a case (not withdrawing) which he has made over to the learned Additional Sessions Judge, power is to be exercised, if so required, before commencement of trial of a case or as the case may be hearing of an appeal. In case, in the opinion of the learned Sessions Judge any case requires to be recalled from the file of the learned Additional Sessions Judge even after the commencement of the trial or hearing, he must report to the High Court with his own reasoning justifying such recalling of the case as permissible under Sub-section (2) of Section 407 Cr.P.C."

7. It seems that the observation of this court in later part of the above paragraph has let the informant to prefer the present application. Provisions of Section 408

are concurrent to provision of Section 407(2) Cr.P.C. Section 407(2) Cr.P.C. reads as follows:

"407(2) The High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

8. The issue whether that the Sessions Judge should report to the High Court of his reasonings, may arise only in a case where the Sessions Judge takes a suo motu action. But, so far rejection is concerned; the court is required to pass a reasoned order, so that the aggrieved party can approach the High Court under Sections 407 Cr.P.C. In the instant case, the transfer was allowed on an application filed by the accused in a judicial proceeding and that too after hearing both the sides. We, therefore, find that there is no requirement of law that the Sessions Judge is to report to the High Court where such an application is' allowed. A conjoint reading of Section 408 and 409 Cr.P.C. shows that so far as the provisions of Section 409 are concerned, these are more or less administrative provisions for transfer or distribution of cases amongst various courts, that is to say, a rider has been provided that such distribution or withdrawal shall not take place once hearing has commenced. On the other hand, provisions of Section 408 Cr.P.C. are legal provisions where the aggrieved party may approach the Sessions Judge for transfer of a case for the ends of justice. In this connection we may also refer to a Full Bench decision of the Allahabad High Court in Radhey Shyam v. State of U.P., 1984 (2) Crimes 50, which reads as follows:

"For the reasons given above our answer to the question referred to us is that the Sessions Judge is empowered under Section 408 Criminal Procedure Code to transfer a part heard case or appeal from a court of an Additional Sessions Judge to another competent Court within his sessions division if it expedient in the interest of justice and the limitations imposed under Section 409(2) Criminal Procedure Code are not applicable in exercise of the power of transfer conferred under Section 408 Criminal Procedure Code."

9. In view of the above, we find that the learned

Sessions Judge, Tinsukia had power and jurisdiction to consider the application for transfer in his judicial side and the impugned order does not suffer from the vires of lack of jurisdiction."

42. In Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, a Hon'ble Division Bench of the Madhya Pradesh High Court, has considered a case, wherein, the District & Sessions Judge, Raisen, has forwarded a list of part-heard cases pending on the file of the Fast Track Court, Raisen, with a request to transfer them to some other Court, as the Presiding Officer of that Court has resigned from the post and no other Judicial Officer was appointed in his place.

43. Noticing the divergent views, as regards the power of the Sessions Judge to recall or make over cases to other Additional Judges, the Hon'ble Division Bench of the Madhya Pradesh High Court, posed two questions, for its consideration,

(i) A part-heard Sessions Trial pending in the Court of an Additional Sessions judge can be transferred to another Additional Sessions Judge in the same Sessions Division only by the High Court in exercise of powers under Section 407(1) of the Code of Criminal Procedure, 1973 (for short 'the Code') and not by the Sessions Judge in exercise of powers of transfer under Section 408 of the Code.

(ii) Where the Court of Additional Sessions Judge becomes vacant, the Sessions Judge may transfer the part-heard cases to another Additional Sessions Judge in exercise of power under Section 409(2) of the Code.

44. Decision in Deepchand v. State of M.P., [1998 (2) MPLJ 670], considered by the Hon'ble Division Bench of the Madhya Pradesh High Court in Re: District and Sessions Judge's case (cited supra), is reproduced hereunder:

"6. Both these Sections are different in their scope. While Section 408 relates to transfer of a case from one Criminal Court to another Criminal Court within the same Sessions Division, Section 409 empowers the Sessions Judge subject to the limitation contained in Sub-section (2), to withdraw any case or appeal which he had made over to any Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate and either to try/hear the case/appeal himself or make it over to another Court for trial/hearing. These provisions are clearly intended to deal with two different situations. Section 409 obviously deals with a

case or an appeal which though originally instituted in the Court of Sessions, has been made over by the Sessions Judge to an Additional Sessions Judge or Assistant Sessions Judge or Chief Judicial Magistrate and which in the opinion of the Sessions Judge is, for any reason administrative or judicial, required to be tried or heard either by himself or by some other Court. Transfers of all other cases from one Criminal Court to another Criminal Court in the same Sessions Division are to be regulated by Section 408.

The Additional Sessions Judge or Assistant Sessions Judge does not constitute a separate Court but as provided by Section 9 of the Code, they exercise jurisdiction in the Sessions Court itself which is presided over by a Sessions Judge. They can only try such cases and hear such appeals as may be made over to them by general or a special order, by the Sessions Judge. So transfer of any such case or appeal from their file by the Sessions Judge can be made only under Section 409. Sub-section (2) of Section 409 deals with the withdrawal of cases from an Additional Sessions Judge and places a restriction that any such withdrawal can be made only before the trial of the case or hearing of appeal has commenced. Under the scheme of things, Section 408 has no application when transfer of a case is required to be made by the Sessions Judge from one Additional or Assistant Sessions Judge to another Additional or Assistant Sessions Judge in the same Sessions Division."

45. On the powers of the Apex Court, High Court and Sessions Judge to transfer cases, the Hon'ble Division Bench of the Madhya Pradesh High Court, held as hereunder:

"(i) Sections 406, 407 and 408 use the words "whenever it is made to appear" while referring to the power of the Supreme Court, High Court or the Sessions Judge to transfer cases. Sections 409, 410 and 411 significantly do not use these words.

(ii) The captions of Sections 406, 407 and 408 speak of exercise of 'power' to transfer, whereas Sections 409, 410 and 411 do not speak of 'power' but merely refer to 'withdrawal' or 'recalling'.

(iii) Sections 406, 407 and 408 contemplate the 'power to transfer' being exercised on an application by a 'party interested' (Sections 407 and 408 also contemplate the 'power to transfer' being used on a report of the Lower Court or suo motu; and Section 406 contemplate the power of transfer being used on an application by the Attorney

General). These Sections clearly imply a need for hearing before transfer. On the other hand, Sections 409, 410 and 411 contemplate exercise of the power of withdrawal/recalling cases in a routine manner in the day to day administration. They do not contemplate any hearing to the parties interested."

46. The Hon'ble Division Bench of Madhya High Court in Re: District and Sessions Judge's case (cited supra), held that,

"It is clear from the above that the power to be exercised under Sections 406, 407 and 408 is judicial power to be invoked and exercised in the manner stated therein. On the other hand, the power of withdrawing or recalling of cases under Sections 409, 410 and 411 is an administrative power, complementary to the administrative power of making over cases vested in the Chief Judicial Magistrate/Magistrate and the Sessions Judge under Sections 192 and 194 of the Code.

9. It is also clear that the power conferred in the Sessions Judge under Section 408 is on the same level as the power conferred in the High Court under Section 407 and the power under the two sections is identical (except for two matters which are not relevant for our purposes the first is while the power of the High Court extends over all Criminal Courts sub-ordinate to its authority, the power of Sessions Judge is confined to Courts within its own Sessions Division; and the second is in regard to the limit of compensation awardable for frivolous applications). Therefore, if High Court has the power to transfer 'part-heard' cases under Section 407, the Sessions Court also will have the power to transfer 'part-heard cases', as the wording of the two sections are the same. In fact, Sub-section (2) of Section 407 places an embargo on an application for transfer being filed before the High Court unless an application for such transfer has been made to the Sessions Judge under Section 408 and rejected by him.

10. The view taken in Deepchand is that Section 409 deals with withdrawal/recalling of those matters originally instituted in the Court of Session and made over by the Sessions Judge to Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate, whereas Section 408 deals with transfer of other cases (which were not instituted in the Court of Sessions) from one Criminal Court to another. This would have the effect of restricting the term 'Criminal Court' used in Section 408 to only Criminal

Courts other than Additional Sessions Judges and Assistant Sessions Judges. Such an interpretation is unwarranted. Section 6 of the Code classifies Criminal Courts as Courts of Sessions, Judicial Magistrates of the First Class/Metropolitan Magistrates, Judicial Magistrates of the Second Class and Executive Magistrates. When Section 408 states that a Sessions Judge may transfer a case from one Criminal Court to another Criminal Court in his Sessions Division, it would certainly include the Additional Sessions Judges and Assistant Sessions Judges also, as they fall under 'Courts of Sessions'. Therefore, there is no impediment for a Sessions Judge to transfer any case from the Court of any Additional Sessions Judge in his Sessions Division to any other Additional Sessions Judge in his Sessions Division. For exercise of power under Section 408, the question whether the trial has commenced in the case or not is irrelevant.

11. We are, therefore, in respectful agreement with the view expressed by the Delhi High Court in Avinash Chander and the Allahabad High Court in Radhey Shyam and consequently over-rule the decision of the learned Single Judge of this Court in Deepchand. The first point is therefore answered in the affirmative."

47. On the scope of Section 409(2) of the Code, the Hon'ble Division Bench of Madhya Pradesh High Court, discussed as follows:

"12. We will now consider the scope of the administrative power under Section 409(2) of the Code, which confers the power to recall any case or appeal which he had made over to an Additional Sessions Judge, at any time before the trial of the case or the hearing of the appeal has commenced before such Additional Sessions Judge. By implication, it is clear that a Sessions Judge, in exercise of the administrative power under Section 409(2) recall any case or appeal made over by him to an Additional Sessions Judge, once the trial of the case or hearing of the appeal has commenced. It is well settled that 'trial' of a Sessions case commences with the framing of the charge. But what is the position if the Additional Sessions Judge to whom the case has been made over and before whom the trial of the case or hearing of the appeal has commenced, is transferred to another Sessions Division or has retired from service before the completion of the trial?"

48. As regards Section 409(2) of the Code, the Hon'ble Division Bench has considered a judgment of Abdul Hamid v. State of U.P., [1982 Allahabad Law Journal 1448], wherein, it has been held that,

"The intention of the Legislature seems to be that if a trial has been commenced by a particular Sessions Judge and is continuing before him, the case which is part heard by him may not be transferred by the Sessions Judge.

It is not a mere commencement of a trial but the commencement of it before a particular Sessions Judge which attracts the provisions of Sub-section (2) of Section 409. The provision does not merely say "at any time before the trial of the case or the hearing of the appeal has commenced"; but states further that it is before the Additional Sessions Judge. This clearly contemplates the presence of the Addl. Sessions Judge to continue the case. If the particular Addl. Sessions Judge before whom the case had commenced has either been transferred outside the Sessions Division or has died, the restriction imposed by Sub-section (2) of Section 409 would not come into play.

Sub-section (2), Section 409 which deals with the power of the Sessions Judge to recall a case from the Court of an Additional Sessions Judge, by its first part, places a restriction on that power which otherwise is absolute. The second part of Sub-section (2) of Section 409 gives the power of recall to the Sessions Judge and states "a Sessions Judge may recall a case at any time" which is hedged in by the restriction contained in the first part which states "before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge". The Sessions Judge thus can recall a case at any time before an Additional Sessions Judge has commenced the proceedings and is available to continue it. It is not only the commencement of the proceedings but the seizing of it by the Additional Sessions Judge which attracts the restriction contained in Sub-section (2). In the instant case, the Judge who commenced the proceedings died. His successor did not commence any proceeding. The Sessions Judge was thus fully competent to transfer the case to another Court."

49. Ultimately, the Hon'ble Division Bench of Madhya Pradesh High Court in Re: District and Sessions Judge's case (cited supra), at Paragraph 19, summarised as hereunder:

"(a) A Sessions Judge in exercise of judicial power under Section 408 of the Code may transfer any case pending

before any Criminal Court in his Sessions Division to any other Criminal Court in his Sessions Division. That would mean that he can transfer even those cases where the trial has commenced from one Additional Sessions Judge in his Sessions Division to another Additional Sessions Judge in his Sessions Division. The transfer of a case under Section 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further, the reason or reasons why it is expedient for the ends of justice to transfer the case, has to be recorded.

(b) The judicial power under Section 408(1) and the administrative power under Section 409 (1) and (2) are distinct and different and Section 408 is not controlled by Section 409(2). A Sessions Judge in exercise of his administrative power under Section 409 may :

(i) withdraw any case or appeal from any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him;

(ii) recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate sub-ordinate to him;

(iii) recall any case or appeal which he has made over to any Additional Sessions Judge, before trial of such case or hearing of such appeal has commenced before such Judge. and try the case or hear the appeal himself or make it over to another Court for trial or hearing in accordance with the provisions of the Code. No hearing need be granted to any one before exercising such power. But the reason therefor shall have to be recorded having regard to Section 412.

(c) A Sessions Judge in exercise of his administrative power under Section 409, may also recall any case where trial of the case or hearing of an appeal has commenced before an Additional Sessions Judge (for the purpose of trying/hearing it himself or for being made over to another Additional Sessions Judge), if such Judge before whom it became part-heard has retired, resigned, died or is transferred outside the Sessions Division. No hearing need be given for such recalling though the reason should be recorded. It is not necessary to refer such matters to the High Court for transferring them by exercise of power under Section 407 of the Code."

50. In *Devarasu v. State* reported in 1998 (2) ALD (Cri.) 212 = 1998 (1) LW (Cri.) 128, on the provision under Section 10(3), 194 and 381(3), the Hon'ble Mr. Justice M.Karpagavinayagam, has observed as

follows:

“(60) Section 10(3) Cr.P.C., would enable the Sessions Judge presiding over the Court of session to make provision for disposal of application by an Additional or Assistant sessions Judge. Section 194 Cr.P.C. provides that the Sessions Judge of the Division may make over the Sessions Case to the Additional and Assistant Sessions Judges to try the same. Under Section 381 (2) Cr.P.C., the Sessions judge can make over the appeals for hearing to the Additional Sessions Judge, Assistant sessions Judge or Chief Judicial Magistrate. The combined reading of these provisions would go to show that the Sessions Judge has got some administrative control over these courts, namely, the Court of Additional or assistant or Chief Judicial Magistrate. As such, the Additional or Assistant Sessions judges do not have the original jurisdiction for receiving the complaint or entertaining the appeal for the purpose of trial or hearing, as the Sessions Judge alone does have the power to do so. Therefore, there is no difficulty in coming to the conclusion, on perusal of these provisions, that both Additional and Assistant sessions Judges are the Criminal Courts in the same Sessions Division, but without any original jurisdiction.”

51. On the aspect, as to the powers of the Sessions Judge, having administrative power of distribution of work, recalling or withdrawal of cases, made over, the Hon'ble Mr. Justice M.Karpagavinayagam, after considering Sections 10 and 409 Cr.P.C., has held as follows:

“(67) Under Section 10 (1), Cr. P. C. all the assistant Sessions Judges shall be subordinates to the Sessions Judge. Under section 15, every Chief Judicial Magistrate shall be subordinate to the Sessions Judge. Under Section 19, the Chief Metropolitan magistrate and every Additional Chief metropolitan Magistrate shall be subordinate to the Sessions Judge. Section 409 (1) provides that the Sessions Judge may withdraw or recall any case or appeal, which was made over to any Assistant Sessions Judge or Chief Judicial magistrate subordinate to him. But, none of these sections would provide subordination of Additional Sessions Judge to the Sessions judge, whereas various provisions under the Code would show that both Sessions judge and Additional Sessions Judge are equal in the exercise of jurisdiction in the court of Session.

(68) Though under Section 10(3) Cr.P.C., the Sessions

Judge could make provisions for disposal of the urgent applications by the additional or Assistant Sessions Judges or by the Chief Judicial Magistrates, under sections 10 (1), 15 (1) and 19 (1), the Assistant sessions Judges, Chief Metropolitan magistrates and Chief Judicial Magistrates alone are the subordinates to the Sessions judge.

(69) Furthermore, the reading of subsections (2) and (3) of Section 409 would also go to disclose that the Additional Sessions judge is not subordinate to Sessions Judge, whereas Assistant Sessions Judge and Chief judicial Magistrate alone are made as subordinates to Sessions Judge.

(70) Under Section 409 (1), the Sessions judge may withdraw any case or appeal from the Assistant Sessions Judge or Chief Judicial magistrate subordinate to him, at any stage. But, under Section 409 (2), the Sessions Judge can withdraw or recall only before the commencement of trial."

52. The learned Judge of the Madras High Court, has further held that an Additional Sessions Judge, cannot be considered as a subordinate Court or lower Court and at Paragraph 70, held as follows:

"The reason being that once the Additional Sessions Judge commences the trial, there should not be any impediment to the progress of the trial and as such, the legislature did not incline for the Sessions judge to interfere in the proceeding before the Additional Sessions Judge after the trial is commenced. So, for all purposes, in the light of these provisions, it can be concluded that the Court of Additional Sessions Judge, though it is a criminal Court in the same sessions division, cannot be considered to be a subordinate Court or lower Court."

53. With reference to the words, "particular case", used in Section 408 Cr.P.C., and on the power of the Sessions Judge, to transfer the case, to himself, the learned Judge has held that, "Under Section 408 (1), the Sessions judge could transfer a particular case from one Criminal Court to another Criminal Court. It does not provide for transferring the case from that Court and for posting and trying the case in his own Court. At the most he can take out a case from the file of one Criminal Court and send it to another Criminal Court for the purpose of trial. Therefore, the words "any particular case" as contained in Section 408 cr. P. C. would not at

all mean the Sessions case, which was made over by the Sessions judge to the Additional Sessions Judge under Section 194 Cr. P. C. In other words "particular case" referred in Section 408 would mean the cases other than the sessions cases which are triable by the sessions Judge. That is the reason, the provision is not made in Section 408 (1) like that of Section 409 (3) for posting the case before himself for the trial."

54. The learned Judge has held that, a case to be transferred, would not mean a sessions case. As regards the bar, under Section 407 (2) Cr.P.C., the learned Judge, at Paragraph 77, held as follows:

"It is a normal rule that for the transfer of the case pending in a Court, an application for transfer has to be filed in a Court of superior jurisdiction. In other words, a Court has power only to transfer a case pending in a Court subordinate to it. If the Additional Sessions court and Sessions Court are held to be the courts of equal jurisdiction as indicated earlier, Section 408 cannot be invoked for the transfer of a Sessions case from an Additional sessions Judge to a Sessions Judge. Therefore, the prohibition in the proviso to sub-section (2) of Section 407, in my view will have application only in cases where the Sessions judge has power to transfer. In other words, in a case where the Sessions Judge has no power to transfer, the question of moving the sessions Judge for a transfer does not arise. Such being the situation, for transfer of a sessions Case made over to an Additional sessions Judge, the party concerned shall only approach High Court under Section 407, as the same will not be hit by the proviso to section 407 (2)."

55. On the aspect, as to whether, the Sessions Judge and the Additional Sessions Judge, exercise the same jurisdiction, the learned Judge, held thus,

"though the Court of Additional Sessions Judge cannot be considered to be the Court of original jurisdiction, in the matter of taking the case on file committed to it by the Magistrate, in all other respects, an Additional Sessions Judge and a Sessions Judge are exercising the same jurisdiction in the Court of Session. The only difference, as indicated above, is that the sessions Judge can receive the case on committal and try or make over the same for trial to the Additional Sessions Judge, whereas the Additional Sessions Judge can try the case only on the same being made over to him for trial by the Sessions Judge.

Therefore, it is clear that both Sessions Judge and Additional sessions Judge exercising the same jurisdiction are equal, as neither the Court of Additional sessions Judge is a lower Court nor the additional Sessions Judge as subordinate to the Sessions Judge."

56. The learned Judge, further added that, "As indicated earlier, the transfer can be directed from a lower Court only, in view of the wordings contained in sub-Section (2) of Section 408, which provides that Sessions Judge may transfer a case of the report of the lower Court, the Sessions Judge cannot transfer a case from the Court of Additional Sessions Judge, which is not a lower Court."

57. After considering in Re P.Nanjappa [AIR 1961 AP 471], the learned Judge further held as follows:

"It is true that an Additional Sessions Judge is not a lower Court as he exercises jurisdiction in the same Court of Session in which the Sessions Judge exercises jurisdiction. Thus a report by an Additional Sessions Judge for the transfer of a case to another Additional Sessions Judge in the same sessions division is not maintainable by the Sessions Judge."

58. In the matter of exercising administrative jurisdiction under Section 409, considering the provision under Section 412 Cr.P.C., the learned Judge said that,

"Section 412 provides that the sessions Judge, while making an order of transfer or withdrawal under Sections 408 and 409, shall record his reasons for making it. This would show that the exercise of the power under Section 409 is not merely an administrative function, but the orders passed under Section 409 must be considered to be judicial, as the Sessions Judge has to give reasonings for invoking the said section, which could be reviewed by the superior Court, namely. High Court. The ground of expediency for the ends of justice also could be one among the grounds for consideration of withdrawal of a case by the Sessions Judge while invoking section 409 (1) Cr.P.C."

59. The learned Judge has further held that Courts mentioned in Sections 408 and 409 Cr.P.C., are different. To put it precisely, Section 408 deals with only the lower Court. At Paragraphs 90, 91, 92 and 94, this Court held as follows:

"(90) Section 412 Cr.P.C. mandates for recording of

reasons, while Sessions Judge passing an order of transfer under Section 408 or for the withdrawal of the case under section 409. Therefore, it is clear that the cases to be covered with under Section 408 Cr.P.C. are entirely different from the cases to be dealt with under Section 409 Cr.P.C.

(91) Moreover, Section 409 Cr. PC deals with case or appeal, whereas Section 408 deals with only case. Therefore, both the sections are independent dealing with the different cases and different Courts.

(94) AS discussed earlier, both the sessions Judge and the Additional Sessions judge have been appointed by the High Court to exercise equal jurisdiction in a Court of sessions. Therefore, the Court of the Sessions judge and the Court of the Additional Sessions judge are not different Courts. There are one and the same. In the light of this, we have already found in the earlier paragraphs, the case cannot be transferred from his own Court to his own Court. But. the term 'sessions judge' instead of 'court of Session' like that of Sections 406 and 407 would give some indication that the Sessions Judge and the additional Sessions Judge are not equal in some respects."

60. On the exercise of administrative powers and equal jurisdiction by the Sessions Judge and that of the Additional Sessions Judge, in trying a Sessions Judge, made over to him and whether the Additional Sessions Judge, could be considered as subordinate or lower to the Sessions Judge, at Paragraphs 95, 96, 97, 100, 103, 104, 114, 115 and 116, the learned Judge held as follows:

"(95) The combined reading of sections 193 and 194 Cr. P. C. would disclose that the Sessions Judge, who is appointed by the High Court to preside over the Court of Session, alone is competent to take cognizance of any offence as a Court of original jurisdiction on the case being committed to him. In other words, the magistrate under this Code could commit the case triable by the Sessions Judge only to the sessions Judge and not to the Additional sessions Judge.

(96) Section 194 Cr.P.C. empowers only sessions Judge to make over the cases to the additional Sessions Judge for trial. Therefore, though the Court of Additional Sessions Judge is exercising equal jurisdiction as that of the court of Sessions Judge, the Additional sessions Judge is not competent to receive the case on committal directly from the magistrate.

(97) Section 381(2) Cr.P.C. also would provide that the Additional Sessions Judge shall hear only such appeals as the Sessions Judge of the division may make over to him. This also would make it clear that the appeal could be filed only before the Sessions Judge and not before the Additional Sessions Judge, though he has got jurisdiction to dispose of the appeal, when it is placed before him as per the order of Sessions Judge.

(100) In order to make the Sessions Judge as administrative head for the purpose of distribution of the business of making over cases to various additional Sessions Judges, the word 'sessions Judge' has been correctly employed in Section 408 Cr. P. C. Merely because the word 'sessions Judge' is used, the additional Sessions Judges cannot be considered to be inferior nor subordinates to the Sessions Judge, since both of them are exercising the same and equal jurisdiction in the Court of Session. At the most, the Sessions judge could be called to be first among equals or chief among equals. But, there Section 194. 381 and 400 would never indicate that the additional Sessions Judges are subordinates to the Sessions Judge.

(103) The caption of Section 10 Cr.P.C. is subordination of Assistant Sessions Judges. Under Section 10 (1), all the Assistant Sessions judges shall be subordinates to the Sessions judges. There is no reference about the subordination in respect of the Additional sessions Judges, even though both Additional sessions Judges and Assistant Sessions Judges are appointed by the High Court to exercise jurisdiction in a Court of Session, under section 9 (3) Cr.P.C.

(104) Section 15 also states that every chief Judicial Magistrate shall be subordinate to Sessions Judge. Here also, there is no reference about the Additional Sessions Judge. Section 19 says that Chief Metropolitan magistrate and every Additional Chief metropolitan Magistrate shall be subordinate to Sessions Judge. Reference about the additional Sessions Judge in this section also is absent.

(114) One more aspect can be usefully referred in this context, in order to hold that both Sessions Judge and Additional sessions Judge are exercising the equal jurisdiction.

(115) Under Section 374 (2) Cr.P.C. any person convicted on a trial held by a Sessions judge or an Additional Sessions Judge may appeal to the High Court. Under section 381 (1). an appeal to the Court of sessions

or Sessions Judge shall be heard by the Sessions Judge or by the Additional sessions Judge.

(116) Under Section 9 (4) Cr.P.C. the sessions Judge of one sessions division may be appointed by the High Court to be also an additional Sessions Judge of another division. Section 28 (2) provides that a Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. So these provisions would reveal that both sessions Judge and Additional Sessions Judge are equal and the Additional Sessions Court and the Sessions Court are the Courts of equal jurisdiction. Therefore, both Sections 408 and section 407 (2) would not apply to the cases where the transfer is sought from the Additional Sessions Judge to any other court."

61. While considering the applicability of Section 24 C.P.C., and the procedure contemplated in the Code of Criminal Procedure and as regards, the Magistrate making over a case to the Sessions Judge, who in exercise of administrative jurisdiction, making over a case, the learned Judge, at Paragraph 102, held as follows:

"The learned Public Prosecutor for pondicherry, while submitting that the additional Sessions Judges are subordinates to the Principal Sessions Judge, pointed out section 24 of the Code of Civil Procedure, in which it is referred that the District Court at any stage withdraw any case from any Court subordinate to it and transfer the same to any subordinate Court and for the purpose of the section, the Additional Sessions Judges shall be deemed to be the subordinate Judges to the district Court. Therefore, it is submitted that the Additional Judges who are subordinates to the Sessions Judges as per C.P.C. shall also be deemed to be subordinate Judges to the principal Sessions Judge under Cr.P.C., since the provisions relating to this are analogous. This again has no basis as it can be stated that the provision in Cr. P. C. relating to exercise of jurisdiction by the Sessions Judges and the assistant Sessions Judges as explained above are totally different from Section 24 of C.P.C.

62. Ultimately, at Paragraph 174, the learned Judge, summed up, as follows:

"(1) The Court of Additional Sessions Judge is not a subordinate Court or a lower court to the Court of Sessions

Judge. Both the Judges are exercising the same and equal jurisdiction in the disposal of cases.

(2) Section 408 (1) Cr.P.C. would relate to the only cases pending in the criminal courts or original jurisdiction. Additional Sessions Judges do not exercise the original jurisdiction. So, the words "any particular case" contained in Section 408 (1) would relate to the cases pending in Criminal Court, which could take cognizance it would not refer to the cases already made over by the Sessions Judge to the Additional sessions Judge.

(3) The Sessions Judge being the administrative head presiding over the court of Session could distribute the cases or make over the cases to various additional Sessions Judges.

(4) For the cases pending before the additional Sessions Judge, the High court can be straightaway moved, since the bar under Section 407 (2) would not be applicable to those cases.

(5) Since the word 'lower Court' is used in sub-section (2) of Section 408. like the word 'subordinate' is used in Section 407 (2), it must mean that the Criminal Court as referred in section 408 (1) must be necessarily a lower Court. Section 408 (2) is a new introduction.

(6) A Sessions Judge has got jurisdiction to receive a case, take on file. hear, take cognizance and then make over the same to the Additional Sessions judge. An Additional Sessions Judge gets jurisdiction to deal with such matter only when it is placed before him under the orders of the Sessions Judge of the same division.

(7) The Court of the Additional Sessions judge is not a separate Court, but a part of the Court of Session or the Court of Session itself. Therefore, the Sessions judge cannot transfer a case from his own Court to his own Court.

(8) The actual distinction between 'inquiry' and 'trial' would be that up to the stage when the proceeding results in discharge, it is only an inquiry and from the point at which it may result in conviction or acquittal, it becomes a trial.

(9) The trial starts in Summons case when the accusation is stated to the accused for recording his plea; in the Warrant case on private complaint, the trial starts when the charge is framed and read over to him for recording his plea after examination of witnesses; in the trial of warrant case on police report, the trial starts

when the charge is framed and explained to the accused for recording his plea, before recording evidence; and in Sessions Case the trial starts when the Sessions, after committal, framed the charge and read over to him for recording his plea."

63. The duty of the judicature is to act upon the true intention of the Legislature - *the mens or sententia legis*. Now that the other High Courts have interpreted Section 408 Cr.P.C., differently than the Madras High Court in Devarasu's case, this Court is called upon to choose that interpretation, which represents the true intention of the Legislature, in otherwords, the 'legal meaning' or 'true meaning' of the statutory provision. In *Dinesh Chandra Jamanadas Gandhi v. State of Gujarat* reported in 1989 (1) SCC 420 = AIR 1989 SC 1107, the Apex Court held as follows:

"The distinction between literal and legal meaning of statutory language lies at the heart of the problem of interpretation of statutes. The court is not entitled to decline to determine the legal meaning of a statute on the principle 'non-liquet'."

64. In the process of interpreting a statute or a provision, it should also be kept in mind that it is the duty of the Court to conceive and perceive the true intention of the Legislature and in the words of Hon'ble Justice G.P.Singh, in his Book, "Interpretation of Statutes", "how far and to what extent each component part of the statute influences the meaning of the other part, would be different in each given case. The abovesaid views requires consideration, for the reason that the component in Section 408 Cr.P.C., in juxtaposition with the proviso to Section 407 Cr.P.C., of the Code, is the crux of the subject matter, for consideration by this Court.

65. One of the submissions advanced by Mr.S.Prabhakaran, learned counsel for the petitioners is that the judgment of the Hon'ble Mr. Justice M.Karpagavinayagam, in Devarasu's case (cited supra), is per incuriam. Therefore, before addressing the other issues, let me first consider the said submission.

66. According Mr.S.Prabhakaran, learned counsel for the petitioner, the judgment in Devarasu's case (cited supra), has not considered the statutory provisions under Sections 407, 408, 409 and other Sections, which deal with transfers and recording of reasons by the Sessions Judge, in the matter of transfer of a case or appeal from one Criminal Court to another and therefore, the abovesaid

judgment is per incurim.

67. It is also his further contention that when Rattiram and others v. State of M.P., reported in 2012 (4) SCC 516, which explained the binding effect of the earlier judgments and the principle of per incurim, were pointed out, during the course of hearing and it was also argued that Devarasu's case (cited supra), is per incuriam, in view of the judgment of the Division Bench of Kerala High Court, which held that the Court of Sessions, has power to transfer a criminal case or appeal from one Criminal Court to another, in the same Sessions Division, which is also the view of the decision made in Radhey Shyam and another Vs. State of U.P., reported in (ALL.) 1984 (2) Crimes 50, the learned Principal and Sessions Judge, Chennai, by relying on Devarasu's case (cited supra) and R.Rama Subbarayalu Reddiar v. Rengammal reported in (1962) 2 MLJ 318 (FB), has erroneously rejected the request for transfer of the appeals.

68. Before answering this submission, as to whether, the judgment in Devarasu's case (cited supra), is per incuriam or not, this Court deems it fit to extract few decisions, considered by the Apex Court in Rattiram's case (cited supra) and relied on by the petitioner

"21. In Union of India and Another v. Raghubir Singh (dead) by L.Rs., and others [(1989) 2 SCC 754], the Constitution Bench, speaking through R. S. Pathak, CJ, has held thus:-

"We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court"

22. In Indian Oil Corporation Ltd., v. Municipal Corporation and Another [AIR 1995 SC 1480], the Division Bench of the High Court had come to the conclusion that the decision in Municipal Corporation, Indore v. Smt.Ratna Prabha & Ors., [AIR 1977 SC 308], was not a binding precedent in view of the later decisions of the co-equal Bench of this Court in Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee [AIR 1980 SC 541] and Dr.Balbir Singh v. Municipal Corporation Delhi [AIR 1985 SC 339]. It is worth noting that the Division Bench of the High Court proceeded that the decision in Ratna Prabha (supra) was no longer good law and binding on it. The matter was referred to the Full Bench

which overruled the decision passed by the Division Bench. When the matter travelled to this Court, it observed thus:-

"The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in Ratna Prabha (AIR 1977 SC 308) (supra) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co- equal Bench of this Court did not and could not do."

23. In Chandra Prakash and Others v. State of U.P. and Another¹⁴, a subsequent Constitution Bench reiterated the view that had already been stated in Raghubir Singh (supra).

27. Recently, in Siddharam Satlingappa Mhetre v. State of Maharashtra and Ors., reported in AIR 2011 SC 312, while addressing the issue of per incuriam, a two-Judge Bench, speaking through one of us (Bhandari, J.), after referring to the dictum in Bristol Aeroplane Co. Ltd. (supra) and certain passages from Halsbury's Laws of England and Raghubir Singh (supra), has stated thus:-

"149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of Code of Criminal Procedure. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength."

69. Before I delve into the question, as to whether, the judgment in Devarasu's case, can be declared as per incuriam, let me consider few decisions of the Courts, as to what per incuriam means,

(i) Per incuriam means of decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a

specific reference to an earlier binding precedent may or may not be correct, but cannot be said to be per incuriam.

(ii) The literal meaning of the expression "per in curiam" is "through want of care" {Vide: Mozley and Whitely's Law Dictionary. 7th Edition, page 255). In Black's Law Dictionary, 5th Edition, page 1025, it has been defined as "through inadvertence". In Halsbury's Laws of England. Fourth Edition, Volume 26, page 259 - Paragraph . 578, it is stated thus:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake"

(iii) In Ramachandra Naidu Vs. Pattabhi Reddy, reported in 1964 (1) ALT 90, it was held that a decision rendered per incuriam need not be followed, even by that Judge not to speak of other courts of co-ordinate jurisdiction and to a decision given per incuriam the principle of comity of judgments will not apply.

(iv) In Mamleshwar Prasad and Anr., v. Kanhaiya Lal reported in AIR 1975 SC 907, the Supreme Court referred to Morelle Ltd v. Wakeling (1955)2 Q.B. 379, and declared that the per incuriam principle is of limited application and it will not be extended to cases which were merely not fully argued or which appeared to take wrong view of the authorities or to misinterpret a statute. The Supreme Court quoted with approval a passage from The English Legal System by R J.Walker & M..G.Walker, III Edition, Butterworths, 1972, which reads as follows:

"The per incuriam principle is of limited application.
Very few decisions have subsequently been regarded as

having been reached per incuriam and in *Morelle Ltd v. Wakeling* (1955) 2 Q.B. 379, a Master of the Rolls stated that such instances should be of the rarest occurrence, and should be limited to decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned. Thus the doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute.

(v) In *A.R. Antulay v. R.S. Nayak* reported in AIR 1988 SC 1531, the principle of per incuriam has been explained and applied. The relevant passage is as follows:

"44. It appears that when this Court gave the aforesaid directions in 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in *Anwar Ali Sarkar's* case. See *Halsbury's Laws of England*, 4th Edn. Vol. 26 page 297, para 578 and page 300, the relevant notes 8, 11 and 15, *Dias on Jurisprudence*, 5th Edn. pages 128 and 130, *Young v. Bristol Aeroplane Company Ltd.* (1944) 2 All E.R. 293 at 300. Also see the observation of Lord Goddard in *Moore v. Hewitt* (1947) 2 All E.R. 270 at 272 and *Penny v. Nicholas* (1950) 2 All E.R. 89, 92A. Per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See *Morelle Ltd v. Wake-ling* (1955) 1 All E.R. 708. Also see *State of Orissa v. Tritaghur Paper Mills Co. Ltd.* We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Arts. 14 and 21 of the Constitution these directions were legally wrong."

(vi) In *Punjab Land Devt. & Reclamation Corporation Ltd. Chandigarh, etc., and several others v. Presiding Officer, Labour Court, Chandigarh etc., and several others* (1990) 2 L.L.J. 70, the Supreme Court considered the meaning of the expression 'per incuriam' and explained thus:

"43. We now deal with the question of per incuriam by reason of allegedly not following the Constitution Bench decisions. The Latin expression per incuriam means 'through

inadvertence'. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of this Court. It cannot be doubted that Article 141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In *Bengal Immunity Company Ltd., v. State of Bihar*, it was held that the words of Article 141, "binding on courts within the territory of India" though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgment but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice.

The doctrine of ratio decidendi has also to be interpreted in the same line. In England a decision is said to be given per incuriam, when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords. It has been said that the decision of the House of Lords mentioned above, refers to a decision subsequent to that of the Court of Appeal. However, a prior decision of the House of Lords inconsistent with the decision of the Court of Appeal will make the later decision of the Court of Appeal of no value as given per incuriam. But if the prior decision had been cited to the court of Appeal and that Court had misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House to rectify the mistake. In Halsbury's Laws of England 4th Ed. Vol. 10 para 745 it has been said:

While former decisions of the House are normally binding upon it, the House will depart from one of its own previous decisions when it appears right in the interests of justice and of the proper development of the law to do so. Cases where the House may reconsider its own previous decisions are those involving broad policy and questions of legal principle. Only in rare cases will the House reconsider questions of construction of statutes or other documents. The House is not bound to follow a previous case merely because it is indistinguishable on the facts.

The position and experience in this Court could not be much different keeping in view the need for proper development of law and justice."

(vii) In State of U.P and another vs. Synthetics and Chemicals Ltd., and another, reported in 1991 (4) SCC 139, the Supreme Court held as follows:-

"Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'inj ignoratium of a statute or other binding authority (Young vs. Bristol Aeroplane Co.Ltd., reported in 1944 (1) KB 718 = 1944 (2) All ER 293). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

(viii) In Gomthy Vs. State, reported in 1996 (2) KLT 91, it has been held that Judgment rendered ignoring the binding authority or basing on wrong understanding of law or a binding precedent, would be Judgment per incuriam.

(ix) In Government of Andhra Pradesh and another vs. B.Satyanarayana Rao (Dead), reported in 2000 (4) SCC 262 = AIR 2000 SC 1729 = 2000 AIR SCW 1561, the Supreme Court held as follows:-

"Rule of per incuriam can be applied where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue. We therefore find that the rule of per incuriam cannot be invoked in the present case. Moreover a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to laying down a correct law."

(x) In State of Bihar vs. Kalika Kuer, reported in AIR 2003 SC 2443 = 2003 (5) SCC 448, the Supreme Court held as follows:-

At this juncture, we may examine as to in what circumstances a decision can be considered to have been rendered per incuriam. In Halsbury's Laws of England (Fourth Edition) Vol.26: Judgment and Orders Judicial Decisions as Authorities (Pages 297-298, Para 578) we find it observed about per incuriam as follows:-

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of

a court of co-ordinate jurisdiction while covered the case before it, in which case it must decide which case to follow (Young vs. Bristol Aeroplane Co.Ltd., reported in 1944 (1) KB 718 = 1944 (2) All ER 293), or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force (Young vs. Bristol Aeroplane Co.Ltd., reported in 1944 (1) KB 718 = 1944 (2) All ER 293). A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties (Morville Ltd., vs. Wakeling, reported in 1955 (2) QB 379 = 1955 (1) All ER 708 C), or because the court had not the benefit of the best argument (Bryers vs. Canadian Pacific Streamships, Ltd., reported in 1957 (1) QB 134 = 1956 (3) All ER 560(CA) and as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority (A & J Mucklow Ltd., vs. IRC, reported in 1954 Ch 615 = 1954 (2) All ER 508 (CA)). Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake." (Williams vs. Glasbrooks Bros. Ltd., reported in 1947 (2) All ER 884 (CA)).

(xi) In M/s.Nicks (India) Tools vs. Ram Sarat, reported in AIR 2004 SC 4348 = 2004 (6) Supreme 417, the Supreme Court held that "In the instant case, we have already noticed the basic ground on which the Labour Court reduced the back wages was based on a judgment of the High Court of Punjab and Haryana which as further noticed by us, was overruled by a subsequent judgment of a Division Bench. Therefore, the very foundation of the conclusion of the Labour Court having been destroyed, the appellant could not derive any support from the above cited judgments of that Court."

(xii) In Nirmal Jeer Kaur vs. State of M.P and another, reported in 2004 (7) SCC 558, on the principles of per incuriam, at paragraph 21, the Apex Court observed as follows:-

"Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'inj ignoratium of a statute or other binding authority

(Young vs. Bristol Aeroplane Co.Ltd., reported in 1944 (1) KB 718 = 1944 (2) All ER 293). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

(xiii) In Central Board of Dawoodi Bohra Community v. State of Maharashtra, reported in (2005) 2 SCC 673, at paragraph 7, the Supreme Court reiterated per incuriam means a decision rendered by ignorance of a previous binding decision such as a decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law.

(xiv) In M.P. Rural Road Development Authority v. L.G. Chaudhary Engineers & Contractors, reported in (2012) 3 SCC 495, after considering a catena of decisions, reiterated what per incuriam means, the Supreme Court at paragraphs 28 to 33, considered the principles and judgments as follows:-

28. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in Young v. Bristol Aeroplane Co. Ltd reported in 1944 KB 718 (CA) Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered "per incuriam". The principles are: (KB p. 729)

"... Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam."

29. The decision in Young v. Bristol Aeroplane Co. Ltd. R reported in 1944 KB 718 (CA) was subsequently approved by the House of Lords in Young v. Bristol Aeroplane Co. Ltd. reported in 1946 AC 16 (HL), AC at p. 169 of the Report. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by Lord Greene, the Master of Rolls in the Court of Appeal on the

principle of per incuriam (see the speech of Lord Viscount Simon in Bristol Aeroplane Co. Ltd. case, reported in 1946 AC 16 (HL), AC at p. 169 of the Report).

30. Those principles have been followed by the Constitution Bench of this Court in Bengal Immunity Co. Ltd. v. State of Bihar reported in AIR 1955 SC 661 = 1955 (2) SCR 603 (see the discussion in SCR at pp. 622 and 623 of the Report).

31. The same principle has been reiterated by Lord Evershed, Master of Rolls, in Morelle Ltd. v. Wakeling, reported in 1955 (4) 2 QB 379(CA), QB at p. 406. The principle has been stated as follows:

"... As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

32. In State of U.P. v. Synthetics and Chemicals Ltd. reported in 1991 (4) SCC 139, this Court held (SCC p. 162, para 40) that the doctrine of "per incuriam" in practice means "per ignoratum" and noted that the English courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in Bristol Aeroplane Co. Ltd. reported in 1946 AC 163 (HL). The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see Synthetics and Chemicals Ltd. case, SCC para 41).

33. In MCD v. Gurnam Kaur reported in 1989 (1) SCC 101, a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in SCC para 11 at p. 110 of the Report and in explaining the principle of per incuriam the learned Judges held:

"11. ... A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute."

(xv) In Oriental Insurance Co. Ltd. v. Siby George, reported in (2012) 12 SCC 540, the Supreme Court reiterated that a decision rendered in ignorance of binding precedents, has no precedential value and thus it is per incuriam."

70. Reverting back to the case on hand, reading of the judgment in Devarasu's case (cited supra), makes it clear that The Hon'ble Mr. Justice Karpagavinayagam, has considered two important questions of law, viz.,

(1) Can a Sessions Judge, in a single sessions Division, exercise jurisdiction to transfer a Sessions case pending on the file of an Additional Sessions Judge with co-existing jurisdiction under section 408 Cr.P.C., irrespective of the stage, considering the said Additional sessions Judge to be a criminal Court as referred in the said section?

(2) Can the same Sessions Judge exercise jurisdiction alternatively under section 409(2) Cr.P.C. to withdraw a sessions case made over earlier under section 194 Cr.P.C., pending on the file of the Additional Sessions Judge with co-existing jurisdiction after framing of the charge and recording the plea of the accused and before the commencement of the examination of the witnesses?

71. While considering the above questions of law, the Hon'ble Judge has not only heard the learned Public Prosecutor for Pondicherry, the learned counsel for the accused, but also taken the assistance of an Amicus Curie. The learned Judge has considered several provisions in the Code of Criminal Procedure, dealing with appointment of Sessions, Additional and Assistant Sessions Judges, powers under Section 10(3) Cr.P.C., powers under Sections 193 and 194 Cr.P.C., to make over a session case, powers conferred under Sections 374 and 381(2) Cr.P.C., in making over an appeal to the Additional Sessions Judges, powers conferred on the Additional Sessions Judge, under Section 400 Cr.P.C., administrative and judicial powers under Sections 407 to 410 Cr.P.C., in the matter of transfer, withdrawal or recalling of a case or an appeal, as the case may be and a catena of decisions, before answering two questions of law, extracted supra.

72. In addition to the above, the learned Judge has extensively considered the dictionary meaning of the words, "subordinate" and "lower" from various reputed dictionaries. The learned Judge has also considered the dictionary meaning of the word, "transfer" in Thesaurus and Law Lexicon. Judgment of various Courts, including Radhey Shyam's case (cited supra), Reny George's case (cited supra) and other decisions, have been considered and the learned Judge has taken the view that a Court of Additional Sessions Judge, is not a subordinate Court or lower Court, to the Court of Sessions Judge and both the Judges, exercise same and equal jurisdiction, in the

disposal of the cases and appeals.

73. The learned Judge in Devarasu's case (cited supra), has held that Section 408 Cr.P.C., would relate only to cases, pending in criminal Courts of original jurisdiction. Additional Judges do not exercise original jurisdiction. So, the words "any particular case" contained in Section 408(1) Cr.P.C., would relate to cases pending in the Criminal Court, which a lower Court, could take cognizance and it would not refer to cases, already made over by the Sessions Judge to the Additional sessions Judge.

74. The learned Judge has further held that the Sessions Judge being the administrative head, presiding over the court of Session could distribute the cases or make over cases to various additional Sessions Judges. For the cases pending before the additional Sessions Judge, the High court can straightaway be moved, since the bar under Section 407(2), would not be applicable to those cases. The learned Judge has further held that since the word 'lower Court' has been used in sub-section (2) of Section 408, like the word 'subordinate', used in Section 407(2), it must mean that the words, "Criminal Court", as referred to in section 408(1) must be necessarily a lower Court.

75. Hon'ble Mr. Justice M.Karpagavinayagam in Devarasu's case (cited supra), has held that the administrative decision taken by the Sessions Judge, under Section 409 Cr.P.C., could be subjected to challenge. Section 409 confers administrative powers on the Sessions Judge to withdraw or recall the sessions case already made over by him to the Additional Sessions Judge before the commencement of trial and in such circumstances, the examination of the witnesses has not commenced and as such, the trial has not commenced.

76. It is also the conclusion of the learned Judge in Devarasu's case, that a Sessions Judge has jurisdiction to receive a case, take the same on file, hear, take cognizance and then make over the same to the Additional Sessions Judge. An Additional Sessions Judge gets jurisdiction to deal with such matter only, when it is placed before him under the orders of the Sessions Judge of the same division. The Court of the Additional Sessions judge is not a separate Court, but a part of the Court of Session or the Court of Session itself. Therefore, the Sessions judge cannot transfer a case from his own Court to his own Court.

77. The judgment of the Hon'ble Mr. Justice M.Karpagavinayagam, in Devarasu's case (cited supra), cannot at any stretch of

imagination, be construed and argued, as per incurim. In the light of the decisions considered, the contention of Mr.S.Prabhakaran, learned counsel for the petitioner that the decision in Devarasu's case (cited supra), is per incuriam, is rejected. I am constrained to refer the observations of the Hon'ble Justice M.Srinivasan, as to how, the expression, "per incurim" is loosely used.

"But during the last three decades, Courts have found it convenient very often to throw away earlier rulings with the label per incuriam. We notice with anguish that at times the meaning of the expression had not been understood properly, which has led to the misuse of the same, if not abuse. One such instance is found in Abdul Malick v. The Collector of Dharmapuri and Ors. (1968)1 M.L.J. 9, where a single Judge of this Court held that a judgment rendered at the admission stage without notice to the opposite party was per incuriam. That is obviously based on a wrong understanding of the term per incuriam."

78. Placing reliance on a judgment of this Court in Ganesan and another v. State, represented by the Inspector of Police, R-2, Kodambakkam Police Station, Chennai, reported in 2011 (5) CTC 747, Mr.S.Prabhakaran, learned counsel for the petitioner submitted that Section 408 Cr.P.C., empowers the learned Sessions Judge, to transfer any particular case from one Criminal Court to another Criminal Court, in his Sessions Division.

79. Reading of the above judgment shows that the subject matter considered is whether cases, which are not exclusively triable by Court of sessions can be committed to a Sessions Court, without any committal order, passed by the Metropolitan Magistrate. My esteemed Brother, Hon'ble Mr. Justice Nagamuthu, while holding that Court of Sessions shall take cognizance of any offence, only when it is committed to it by the jurisdictional Magistrate and that the Court of Sessions has no power to direct a Magistrate to commit any case to his file nor withdraw a case, through the Magistrate and further declaring the law that the Magistrate has a legal duty to commit a case, to the Court of Sessions, when the alleged offence, are exclusively triable by the Court of Sessions, at Paragraph No.39, has observed that:

"Section 408 Cr.P.C., empowers a Session Judge, only to transfer any particular case from one Criminal Court to another Criminal Court, in his Sessions Division."

80. First of all, as per the principles on the law of Precedents, decision in Ganesan's case, cannot at any stretch of

imagination, be said to be judicial precedent, on the exercise of the powers, by the Sessions Judge, in terms of the provisions to sub-Section (2) of Section 407 r/w. 408(1) and (2) Cr.P.C. Decision in Ganesan's case, can be construed as an authority, only with reference to the abovesaid issues, considered by the learned Judge.

81. On the aspect, as to when, a judgment could be treated as Judicial Precedent, binding on the Courts, this Court deems it fit to consider few decisions,

(i) In *State of Orissa vs. Sudhansu Sekar Misra*, reported in AIR 1968 SC 647, the Hon'ble Supreme Court explained as to when a decision can be taken as a precedent, which as follows:-

"A decision is only an authority for what it actually decides. What is of the essence of a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic, this is what Earl of Halsbury LC said in *Quinn v. Leatham*, reported in 901 AC 495.

'Now before discussing the case of *Allen vs. Flood*, reported in 1898 AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

It is not profitable task to extract a sentence here and there from a judgment and to build upon it."

(ii) In *Union of India Vs. Dhanwanti Devi*, reported in 1996 (6) SCC 44 = 1996 (7) Supreme 51, the Supreme Court has explained, what constitutes a precedent, which as follows:-

"Before adverting to and considering whether solatium and interest would be payable under the Act, at the outset, we will dispose of the objection raised by Shri Vaidyanathan that *Union of India v. Hari Krishan Khosla*

reported in 1993 Supplement (2) SCC 149, is not a binding precedent nor does it operate as ratio decidendi to be followed as a precedent and is per se per incuriam. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates- (i) findings of material facts, direct and inferential. A inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its

ratio decidendi.

Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents.

(iii) In *State of Punjab v. Devans Modern Breweries Ltd.*, reported in (2004) 11 SCC 26, the Hon'ble Supreme Court explained the doctrine of precedents and when a judgment becomes per incuriam. Paragraphs 334 to 336, 339 and 343, of the judgment are relevant and they are as follows:-

Precedent

334. The doctrine of precedent is a well-accepted principle. A ruling is generally considered to be binding on lower courts and courts having a smaller bench structure:

"A precedent influences future decisions. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee the precise situation that will arise, so the rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and 'malleable' ... No word has one proper meaning, nor can anyone seek to fix the meaning of words for others, so the interpretation of the rule remains flexible and open-ended. (See *Dias Jurisprudence*, 5th Edn., p. 136.)"

335. However, although a decision has neither been reversed nor overruled, it may cease to be "law" owing to changed conditions and changed law. This is reflected by the principle "*cessante ratione cessat ipsa lex*".

"... It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law; the other is where a case, which is acknowledged to have been the law at the time, has ceased to have that character owing to altered

circumstances. (See Dias Jurisprudence, 5th Edn., pp. 146-47.)”

336. It is the latter situation which is often of relevance. With changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalisation when the entire philosophy of society, on the economic front, is undergoing vast changes.

339. Judicial discipline envisages that a coordinate Bench follow the decision of an earlier coordinate Bench. If a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter may be referred only to a larger Bench. (See Pradip Chandra Parija v. Pramod Chandra Patnaik, reported in 2003 (7) SCC 01, SCC at paras 6 and 7; followed in Union of India v. Hansoli Devi, reported in 2002 (7) SCC 01, SCC at para 2.) But no decision can be arrived at contrary to or inconsistent with the law laid down by the coordinate Bench. Kalyani Stores, reported in AIR 1966 SC 1686 and K.K. Narula, reported in AIR 1967 SC 1368, both have been rendered by the Constitution Benches. The said decisions, therefore, cannot be thrown out for any purpose whatsoever; more so when both of them if applied collectively lead to a contrary decision proposed by the majority.

343. It is also trite that the binding precedents which are authoritative in nature and are meant to be applied should not be ignored on application of the doctrine of sub silentio or per incuriam without assigning specific reasons therefor. I, for one, do not see as to how Kalyani Stores and K.K. Narula read together can be said to have been passed sub silentio or rendered per incuriam.

82. As stated supra, while considering the power of the Court of Sessions, to take cognizance of an offence, exclusively triable by the Court of Sessions and other offences, not exclusively triable by Sessions Court, this Court has dealt with the procedure for committal of offences and the consequences thereof, and therefore, the sentence occurring in Section 39 of the judgment, stated supra, can only be obitor dicta, which in the respectful view of this Court, cannot have any binding effect, to the facts on hand.

83. Before addressing the some of the issues, raised in the present revision cases, let me consider some of the decisions of the

Courts, as to how to interpret, a statute and sections in a statute.

84. In LT.-Col. Prithi Pal Singh Bedi v. Union of India reported in 1983 (3) SCC 140, at Paragraph 8, held as follows:

"8. The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not lead to an absurdity.If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority by which the rule is framed. This necessitates examination of the broad features of the Act."

85. In Narendra H.Khzurana v. Commissioner of Police reported in 2004 (2) Mh.L.R. 72, it is held that it must be noted the proper course in interpreting a statute in the first instance is to examine its language and then ask what is the natural meaning uninfluenced by the considerations derived from previous state of law and then assume that it was properly intended to leave unaltered. It is settled legal position, therefore, that the Courts must try to discover the real intent by keeping the direction of the statute intact.

86. In Nathi Devi v. Radha Devi Gupta reported in AIR 2005 SC 648, the Apex Court held that, "The interpretation function of the Court is to discover the true legislative intent, it is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the Court must

look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional."

87. In Nathi Devi's case, it is further held that, "It is equally well-settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors."

88. Section 408 Cr.P.C., states that whenever it is made to appear to a sessions Judge that an order under this sub section is expedient for the ends of justice, he may order any particular case be transferred from one criminal Court to another criminal Court in his sessions division and the Sessions Judge may act either on the report of the lower Court or on the application of a party interested, or on its own initiate.

89. Proviso to Section 407(2) Cr.P.C., states that no application for transferring a case from one Criminal Court to another Criminal Court in the same Sessions Division, can be made, unless an application for such transfer has been made to the Sessions Judge and rejected by him. Sum and substance of the argument is that the revision petitioners can seek for a transfer of a case or an appeal, from the High Court, under Section 407(1) of the Code, but before doing so, as per the proviso to Section 407(2), the revision petitioners/the party interested, have to approach the Sessions Judge, under Section 408 Cr.P.C. In view of the bar, under Section 407(2) Cr.P.C., the transfer applications filed under Section 408 Cr.P.C., before the Sessions Judge, are maintainable in law.

90. It is the endeavor of this Court to find out that if the two provisions are placed in juxtaposition, with reference to transfer, what is the intention of the Legislature?

(i) Whether the words, "Criminal Court" referred in Section 408(1) Cr.P.C., means a lower or subordinate Court to a Sessions Judge;

(ii) Whether the words "Criminal Court" in Section 408 (1) Cr.P.C., includes the Court of Additional Sessions Judge, also.

91. In all the revision cases, the revision petitioners have

challenged the orders, dismissing the applications filed by them, to transfer the appeals, pending on the file of the learned IInd Additional Judge, City Civil Court, Chennai, to any Court of equal jurisdiction. The transfer applications have been filed after the appeals were posed for judgment. Therefore, on the facts and circumstances of the present revision cases, this Court is also called upon to decide, (1) as to whether, the Sessions Judge, in exercise of his power, under Section 408 Cr.P.C., has the power to transfer an appeal from one Criminal Court to another Criminal Court, in his Sessions Division. (2) If so, under Section 408 Cr.PC, whether he is empowered to transfer a case or an appeal, after the commencement of trial or the appeal, as the case may be. These are some of the issues, which are raised in the present revision cases.

92. What is the binding effect of the judgments of other High Courts, larger in composition, on the issue, on the Subordinate Courts, within the territorial jurisdiction of this Court, is also an issue, called upon to be addressed.

93. Let me consider some more judgments on the interpretation of the statutes,

(i) In Justice G.P. Singh's Principles of Statutory Interpretation (11th Edn., 2008), the learned author while referring to judgments of different Courts states (at page 134) that procedural laws regulating proceedings in court are to be construed as to render justice wherever reasonably possible and to avoid injustice from a mistake of court. He further states (at pages 135 and 136) that: "Consideration of hardship, injustice or absurdity as avoiding a particular construction is a rule which must be applied with great care. "The argument ab inconvenienti", said LORD MOULTON, "is one which requires to be used with great caution"."

(ii) In the words of Tindal, C.J., in Sussex Peerage case [(1844) 11 Cl & F 85], wherein, he said thus, "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves so alone in such cases best declare the intent of the lawgiver."

(iii) In Nairin v. University of St. Andrews reported in 1909 AC 147, the Apex Court held that, "Unless there is any ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and

constitutional principle and practice."

(iv) In *Ram Rattan v. Parma Nand* reported in AIR 1946 PC 51, the Hon'ble Mr.S.R.Das, held as follows:

"The cardinal rule of construction of statutes is to read the statutes literally, that is, by giving to the words their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case, the literal construction leads to no apparent absurdity and therefore, there can be no compelling reason for departing from that golden rule of construction."

(v) In *Poppatlal Shah v. State of Madras* reported in AIR 1953 SC 274, the Supreme Court held that, "It is settled rule of construction that to ascertain the legislative intent all the constituent parts of a statute are to be taken together and each word, phrase and sentence is to be considered in the light of the general purpose and object of the Act itself."

(vi) In *Rao Shive Bahadur Singh v. State*, reported in AIR 1953 SC 394, the Supreme Court held that, "While, no doubt, it is not permissible to supply a clear and obvious lacuna in a statute, and imply a right of appeal, it is incumbent on the Court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application."

(vii) What is the spirit of law, Hon'ble Mr. Justice S.R.Das in *Rananjaya Singh v. Baijnath Singh* reported in AIR 1954 SC 749, said that, "The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the Sections of the Act."

(viii) In *Hari Prasad Shivashanker Shukla v. A.D.Divelkar* reported in AIR 1957 SC 121, the Apex Court held that, "It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended, Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined."

(ix) In *Kanai Lal Sur v. Paramnidhi Sadhukhan* reported in AIR 1957 SC 907, the Supreme Court held that,

"it must always be borne in mind that the first and primary rule of construction is that the intention of the

Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.

The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise. When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the courts would prefer to adopt the latter construction.

It is only in such cases that it becomes relevant to consider the mischief and defect which the Act purports to remedy and correct."

(x) In *Attorney-General v. HRH Prince Ernest Augustus of Hanover* reported in (1957) 1 All.ER 49, Lord Somervell of Harrow has explained the unambiguous, as "unambiguous in context".

(xi) In *State of W.B., v. Union of India* reported in AIR 1963 SC 1241, the Apex Court held that in considering the expression used by the Legislature, the Court should have regard to the aim, object and scope of the statute to be read in its entirety.

(xii) In *State of Uttar Pradesh v. Dr. Vijay Anand Maharaj* reported in AIR 1963 SC 946, the Supreme Court held as follows:

"But it is said, relying upon certain passages in Maxwell on the Interpretation of Statutes, at p. 68, and in Crawford on 'Statutory Construction' at p. 492, that it is the duty of the Judge "to make such construction of a statute as shall suppress the mischief and advance the remedy," and for that purpose the more extended meaning could be attributed to the words so as to bring all matters fairly within the scope of such a statute even though outside the letter, if within its spirit or reason. But both Maxwell and Crawford administered a caution in resorting to such a construction. Maxwell says at p.68 of his book:

"The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words."

Crawford says that a liberal construction does not justify an extension of the statute's scope beyond the

contemplation of the Legislature.

The fundamental and elementary rule of construction is that the words and phrases used by the Legislature shall be given their ordinary meaning and shall be constructed according to the rules of grammar. When the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. It is a well recognized rule of construction that the meaning must be collected from the expressed intention of the Legislature."

(xiii) In *Namamal v. Radhey Shyam* reported in AIR 1970 Rajasthan 26, the Court held as follows:

"It was observed by Pollock C. B. in *Waugh v. Middleton*, 1853-8 Ex 352 (356):-- "It must, however, be conceded that where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be, if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it." And substantially the same opinion is expressed by Lord Selborne in *Caledonian Ry. v. North British Ry.* (1881) 6 AC 114 (222):-- "The mere literal construction of a statute ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which, that intention can be better effectuated." Again Lord Fitzgerald in *Bradlaugh v. Clarke*, (1883) 8 AC 354 at p. 384 observed as follows:-- "I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statutes, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such an inconvenience, but no further." 11. Maxwell in his book on Interpretation of Statutes (11th Edition) at page 226 observes thus:--

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules

no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Sir Edward Cole's words, to suppress the mischief and advance the remedy."

(xiv) In *Inland Revenue Commissioner v. Joiner* reported in (1975) 3 All. ER 1050, it has been held that normally a statutory provision consists of a general description of some factual situation and the legal consequences ensuing from it. Whether the general description is wide or narrow, it will have some limits. The question before a court of law in dealing with a statute is whether the factual situation proved before it falls within the general description given in the statute. A real difficulty in determining the right answer can be said to arise from an "ambiguity" in the statute. It is in this sense that the words, "ambiguity" and "ambiguous" are widely used in judgments.

(xv) In *Commissioner of Sales Tax v. M/s. Mangal Sen Shyamlal* reported in 1975 (4) SCC 35 = AIR 1975 SC 1106, the Apex Court held that, "A statute is supposed to be an authentic repository of the legislative will and the function of a court is to interpret it "according to the intent of them that made it". From that function the court is not to resile. It has to abide by the maxim, "ut res magis valiat quam pereat", lest the intention of the legislature may go in vain or be left to evaporate into thin air."

(xvi) In *C.I.T., Madras v. T. Sundram Iyengar (P) Ltd.*, reported in 1976 (1) SCC 77, the Supreme Court held that, if the language of the statute is clear and unambiguous and if two interpretations are not reasonably possible, it would be wrong to discard the plain meaning of the words used, in order to meet a possible injustice.

(xvii) If the words are precise and unambiguous, then it should be accepted, as declaring the express intention of the legislature. In *Ku. Sonia Bhatia v. State of U.P.*, and others reported in 1981 (2) SCC 585 = AIR 1981 SC 1274, the Supreme Court held that a legislature

does not waste words, without any intention and every word that is used by the legislature must be given its due import and significance.

(xviii) In *Philips India Ltd., v. Labour Court* reported in 1985 (3) SCC 103, the Apex Court, at Paragraph 15, held as follows:

"(15) No cannon of statutory construction is more firmly, established than that the statute must be read as a whole. This is a general rule of construction applicable to all statutes alike which is spoken of as construction *ex visceribus actus*. This rule of statutory construction is so firmly established that it is variously styled as 'elementary rule' (See *Attorney General v. Bastow* [(1957) 1 All.ER 497]) and as a 'settled rule' (See *Poppatlal Shall v. State of - Madras* [1953 SCR 667 : AIR 1953 SC 274]). The only recognised exception to this well-laid principle is that it cannot be called in aid to alter the meaning of what is of itself clear and explicit. Lord Coke laid down that: 'it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers' (Quoted with approval in *Punjab Breverages Pvt. Ltd. v. Suresh Chand* [(1978) 3 SCR 370 : (1978) 2 SCC 144 : 1978 SCC (L&S) 165])."

(xix) In *Nyadar Singh v. Union of India* reported in AIR 1988 SC 1979, observed that ambiguity need not necessarily be a grammatical ambiguity, but one of the appropriateness of the meaning in a particular context.

(xx) It is a well settled law of interpretation that "when the words of the statute are clear, plain or unambiguous, ie., they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences. Reference can be made to the decision of the Apex Court in *Nelson Motis v. Union of India* reported in AIR 1992 SC 1981.

(xxi) In *M/s.Oswal Agro Mills Ltd., v. Collector of Central Excise and others* reported in 1993 Supp (3) SCC 716 = AIR 1993 SC 2288, the Apex Court held that, where the words of the statute are plain and clear, there is no room for applying any of the principles of interpretation, which are merely presumption in cases of ambiguity in the statute. The Court would interpret them as they stand.

(xxii) In *Nasiruddin v. Sita Ram Agarwal* reported in (2003) 2 SCC 577, the Supreme Court held as follows:

"35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom....

37. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which is not there. It cannot rewrite or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used.But the intention of the legislature must be found out from the scheme of the Act."

(xxiii) In *Indian Dental Association, Kerala v. Union of India* reported in 2004 (1) Kant. LJ 282, the Court held that, "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. The object of all interpretation is to discover the intention of Parliament, "but the intention of Parliament must be deduced from the language used", for it is well-accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. Where the language of an Act is clear and explicit, the Court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature. Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. The decision in a case calls for a full and fair application of particular statutory language to particular facts as found. It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express. A construction which would leave without effect any part of the language of a statute will normally be rejected."

(xxiv) In *State of Jharkhand v. Govind Singh* reported in (2005) 10 SCC 437, the Supreme Court held that,

"12. It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature.

13. Interpretation postulates the search for the true

meaning of the words used in the statute as a medium of expression to communicate a particular thought. The task is not easy as the "language" is often misunderstood even in ordinary conversation or correspondence. The tragedy is that although in the matter of correspondence or conversation the person who has spoken the words or used the language can be approached for clarification, the legislature cannot be approached as the legislature, after enacting a law or Act, becomes *functus officio* so far as that particular Act is concerned and it cannot itself interpret it. No doubt, the legislature retains the power to amend or repeal the law so made and can also declare its meaning, but that can be done only by making another law or statute after undertaking the whole process of law-making.

14. Statute being an edict of the legislature, it is necessary that it is expressed in clear and unambiguous language.....

15. Where, however, the words were clear, there is no obscurity, there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to innovate or take upon itself the task of amending or altering the statutory provisions. In that situation the judges should not proclaim that they are playing the role of a lawmaker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased. This can be vouchsafed by "an alert recognition of the necessity not to cross it and instinctive, as well as trained reluctance to do so". (See Frankfurter: "Some Reflections on the Reading of Statutes" in *Essays on Jurisprudence*, *Columbia Law Review*, p. 51.)

16. It is true that this Court in interpreting the Constitution enjoys a freedom which is not available in interpreting a statute and, therefore, it will be useful at this stage to reproduce what Lord Diplock said in *Duport Steels Ltd. v. Sirs* [(1980 (1) All.ER 529] (All ER at p. 542c-d):

"It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the

court before whom the matter comes consider to be injurious to the public interest.

19. In *D.R. Venkatachalam v. Dy. Transport Commr.* [1977 (2) SCC 273] it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation."

(xxv) In *Vemareddy Kumaraswamy Reddy v. State of A.P.*, reported in (2006) 2 SCC 670, the Supreme Court held that,

"12. It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature. It is well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous."

(xxvi) In *A.N.Roy Commissioner of Police v. Suresh Sham Singh* reported in AIR 2006 SC 2677, the Apex Court held that,

"It is now well settled principle of law that, the Court cannot change the scope of legislation or intention, when the language of the statute is plain and unambiguous. Narrow and pedantic construction may not always be given effect to. Courts should avoid a construction, which would reduce the legislation to futility. It is also well settled that every statute is to be interpreted without any violence to its language. It is also trite that when an expression is capable of more than one meaning, the Court would attempt to resolve the ambiguity in a manner consistent with the purpose of the provision, having regard to the great consequences of the alternative constructions."

(xxvii) In *Adamji Lookmanji & Co. v. State of Maharashtra* reported in AIR 2007 Bom. 56, the Bombay High Court held that, when the words of status are clear, plain or unambiguous, and reasonably susceptible to only meaning, Courts are bound to give effect to that meaning irrespective of the consequences. The intention of the legislature is primarily to be gathered from the language used. Attention should be paid to what has been said in the statute, as also to what has not been said.

(xxviii) In *State of Haryana v. Suresh* reported in 2007 (3) KLT 213, the Supreme Court held that, "One of the basic principles of Interpretation of Statutes is to construe them according to plain,

literal and grammatical meaning of the words. If that is contrary, to or inconsistent with any express intention or declared purpose of the Statute, or if it would involve any absurdity, repugnancy or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no further. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it must advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity."

(xxix) In Visitor Amu v. K.S.Misra reported in 2007 (8) SCC 594, the Supreme Court held that, "It is well settled principle of interpretation of the statute that it is incumbent upon the Court to avoid a construction, if reasonably permissible on the language, which will render a part of the statute devoid of any meaning or application. The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intent is that every of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. It is not a sound principle of construction to brush aside words in a statute as being in apposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."

(xxx) In Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., reported in (2008) 4 SCC 755, the Supreme Court, at Paragraphs 52, 54, 55 and 56, held as follows:

"52. No doubt ordinarily the literal rule of interpretation should be followed, and hence the court should neither add nor delete words in a statute. However, in exceptional cases this can be done where not doing so would deprive certain existing words in a statute of all meaning, or some part of the statute may become absurd."

(xxxi) In Phool Patti v. Ram Singh reported in (2009) 13 SCC 22, the Supreme Court held that,

"9. It is a well-settled principle of interpretation that the court cannot add words to the statute or change its language, particularly when on a plain reading the meaning seems to be clear."

(xxxii) In Mohd. Shahabuddin v. State of Bihar, reported in (2010) 4 SCC 653, the Supreme Court held that,

"179. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is a determinative factor

of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to a recent decision of this Court in *Ansal Properties & Industries Ltd. v. State of Haryana* [2009 (3) SCC 553]

180. Further, it is a well-established principle of statutory interpretation that the legislature is specially precise and careful in its choice of language. Thus, if a statutory provision is enacted by the legislature, which prescribes a condition at one place but not at some other place in the same provision, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that the provision was consciously enacted in that manner. In such cases, it will be wrong to presume that such omission was inadvertent or that by incorporating the condition at one place in the provision the legislature also intended the condition to be applied at some other place in that provision."

(xxxiii) In *Satheedevi v. Prasanna* reported in (2010) 5 SCC 622, the Supreme Court held as follows:

"12. Before proceeding further, we may notice two well-recognised rules of interpretation of statutes. The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise—*Kanai Lal Sur v. Paramnidhi Sadhukhan* [AIR 1957 SC 907]

13. The other important rule of interpretation is that the court cannot rewrite, recast or reframe the legislation because it has no power to do so. The court cannot add words to a statute or read words which are not

there in it. Even if there is a defect or an omission in the statute, the court cannot correct the defect or supply the omission - Union of India v. Deoki Nandan Aggarwal [1992 Supp (1) SCC 323] and Shyam Kishori Devi v. Patna Municipal Corpn. [AIR 1966 SC 1678]"

(xxxiv) In Sri Jeyaram Educational Trust & Ors., v. A.G.Syed Mohideen & Ors. reported in 2010 CIJ 273 SC (1), it is held that,

"6. It is now well settled that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the Legislature or the Lawmaker, a court should open its interpretation tool kit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the Statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be."

(xxxv) In Delhi Airtech Services (P) Ltd. v. State of U.P., reported in (2011) 9 SCC 354, the Supreme Court, while dealing with a provision under Section 17(3-A) of the Act, held that,

"Therefore, the provision of Section 17(3-A) cannot be viewed in isolation as it is an intrinsic and mandatory step in exercising special powers in cases of emergency. Sections 17(1) and 17(2) and 17(3-A) must be read together. Sections 17(1) and 17(2) cannot be worked out in isolation.

55. It is well settled as a canon of construction that a statute has to be read as a whole and in its context. In Attorney General v. Prince Ernest Augustus of Hanover [1957 AC 436], Lord Viscount Simonds very elegantly stated the principle that it is the duty of court to examine every word of a statute in its context. The learned Law Lord

further said that in understanding the meaning of the provision, the Court must take into consideration "not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy." (All ER p. 53 I)

57. These principles have been followed by this Court in its Constitution Bench decision in *Union of India v. Sankalchand Himatlal Sheth* [1977 (4) SCC 193]. At SCC p. 240, Bhagwati, J. as His Lordship then was, in a concurring opinion held that words in a statute cannot be read in isolation, their colour and content are derived from their context and every word in a statute is to be examined in its context. His Lordship explained that the word context has to be taken in its widest sense and expressly quoted the formulations of Lord Viscount Simonds, set out above.

94. If the intention of the legislature is to confer powers on the Sessions Judge, to transfer a case or appeal from one Criminal Court to another Criminal Court, including the Court of Additional District Judge, exercising equal jurisdiction, then the Legislature could have simply omitted the word "lower" in the opening sentence of the words in sub-Section (2) of Section 408 of the Criminal Procedure Code. After deletion of the word, "lower" and if sub-Sections (1) and (2) are joined together, the Section would be read as follows:

"Whenever it is made to appear to a sessions Judge that an order under this sub section is expedient for the ends of justice, he may order that in particular case be transferred from one criminal Court to another criminal Court in his sessions division, either on the report of the Criminal Court, on the application of the party interested, or on his own initiative."

95. Power is conferred on the Sessions Judge in Sub-Section (1) of Section 408 Cr.P.C., to transfer a case from one Criminal Court to another Criminal Court, in the same Sessions Division and such power can be exercised, only for the reasons, stated in sub-Section (2) of Section 408. If the Sessions Judge, deems it expedient for the ends of Justice, to transfer any particular case, from one Criminal Court to another Criminal Court, in his Sessions Division, either on the report of the lower Court or on the application of the party interested or on his own initiative and if the words, "criminal Court" have to be meant to be inclusive of an Additional Sessions Court also, then the Section 408, has to be read, as conferring powers on the Sessions Judge, to withdraw any case, even after the

commencement of the trial of a case. Notwithstanding the decision in Devarasu's case (cited supra), I have made an attempt to find out the legislative intent, in Section 408 Cr.P.C. Let me consider few decisions, as to how, a Section has to be read and interpreted.

(i) In *Samrao v. District Magistrate, Thana* reported in AIR 1952 SC 324, the Apex Court held that, "It is the duty of the Courts to give effect to the meaning of an Act, when the meaning can be fairly gathered from the words used, that is to say, if one construction will lead to an absurdity while another will give effect to what common sense would show was obviously intended, the construction which would defeat the ends of the Act, must be rejected even if the same words used in the same section, and even the same sentence, have to be construed differently. Indeed the law goes so far as to require the Courts sometimes even to modify the grammatical and ordinary sense of the words if by doing so absurdity and inconsistency can be avoided."

(ii) It is well settled that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act, so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugancy either within the statute or between a Section or other parts of the statute. [Ref. *Raj Krishna v. Bonod Kanungo* reported in AIR 1954 SC 202].

(iii) In *Rananjaya Singh v. Baji Nath Singh* reported in AIR 1954 SC 749, the Apex Court held that, "The spirit of law may well be an illusive and unsafe guide in the interpretation of the statutes and the supposed spirit can certainly not be given effect to in opposition to the plain language of the sections of the Act, and the rules made thereunder. If all that can be said of these statutory provisions is that construed according to the ordinary, grammatical and natural meaning of their language they work injustice, the appeal must be made to the Parliament and not to the Supreme Court."

(iv) In *The State of Bihar v. Hira Lal Kejriwal* reported in AIR 1960 SC 47, the Supreme Court, at Paragraph 6, held that,

"To ascertain the meaning of a section it is not permissible to omit any part of it: the whole section should be read together and an attempt should be made to reconcile both the parts.The first part gives life to that Order, and, therefore, the acts authorised under that Order can be done subsequent to the coming into force of the Ordinance.The second part appears to have been enacted for the purpose of avoiding this difficulty or, at any rate, to dispel the ambiguity."

(v) In *S.Gurmej Singh v. S.Pratap Singh* reported in AIR 1960 SC 122, the Supreme Court, at Paragraph 9, held as follows:

"It is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself, and that phrases are to be construed according to the rules of grammar."

(vi) In *A.R.Antulay v. Ramdas Srinivas Nayak* reported in 1984 (2) SCC 500, the Supreme Court held that, "It is a well established cannon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience; nor does any cannon of construction permit the court to read the section in such manner as to render it to some extent otiose."

(vii) In *Balasinor Nagrik Co-operative Bank Ltd., v. Babubhai Shankerlal Pandya* reported in 1987 (1) SCC 606, the Supreme Court, at Paragraph 4, held as follows:

"It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section.It also provides for the manner of the exercise of such power. Sub-section (1) of Section 36 is made subject to the fulfilment of the conditions prerequisite,"

(viii) In *Balasinor Nagrik Co-operative Bank's case* (cited supra), the Apex Court held that precise functions of the two provisos to a Section has to be read together. The Supreme Court held that sub-Section (1) of Section 36 is made subject to defeasance clause engrafted in the first provision. If the guiding principle enunciated in *Balasinor Nagrik Co-operative Bank's case* (cited supra), is applied to Section 408 Cr.P.C., then it would certainly convey that the Sessions Judge can transfer only a case from a lower Court and not from a Court of equal jurisdiction.

(ix) In *T.N.State Electricity Board v. Central Electricity Regulatory Commission* reported in 2007 (7) SCC 636, the Supreme Court held that, "Resort can be had to the legislative intent for the purpose of interpreting a provision of law, when the language employed by the legislature is doubtful or susceptible of meanings more than one. However, when the language is plain and explicit and does not admit of any doubtful interpretation, the Supreme Court cannot, by reference to an assumed legislative intent expand the meaning of an expression employed by the legislature and therein include such category of persons as the legislature has not chosen to do."

(x) In *Ansal Properties & Industries Ltd. v. State of Haryana*,

reported in (2009) 3 SCC 553, the Supreme Court held that,

"It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is determinative factor of legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute.

40. In Ganga Prasad Verma (Dr.) v. State of Bihar [1995 Supp (1) SCC 192], it has been held that: (SCC p. 195, para 5)

"5. Where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

96. As per Section (2) of Section 409, a Sessions Judge may withdraw, trial of a case or hearing of an appeal, from the file of the Additional Sessions Judge, only before the commencement of the trial of a case or hearing of an appeal. Now it is the case of the petitioners that the Sessions Judge, in exercise of the his powers, under Section 408 Cr.P.C., can transfer a case or an appeal, even after the commencement of trial or hearing of an appeal, on the application of a party interested, if it is expedient for the ends of justice. If the principle, what cannot be done directly by the Sessions Judge, in exercise of his administrative powers, under Section 409(2) Cr.P.C., cannot also be done indirectly by the Sessions Judge, under Section 408 Cr.P.C., is applied, then the Sessions Judge, cannot transfer the trial of a case or hearing of an appeal, from one Additional Sessions Judge, to another, within his Sessions Division. At Paragraph 25 of the judgment in Noida Entrepreneurs Association v. Noida reported in 2011 (6) SCC 58, the Supreme Court held as follows:

"22. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud", which means "whenever a thing is prohibited, it is prohibited whether done directly or indirectly". (See: Swantraj & Ors. v. State of Maharashtra, AIR 1974 SC 517; Commissioner of Central Excise, Pondicherry v. ACER India Ltd., (2004) 8 SCC 173; and Sant Lal Gupta & Ors., v. Modern Co-operative Group Housing

Society Ltd., & Ors., JT (2010) 11 SC 273).
At Paragraph 26 in Noida Entrepreneurs Association's case (cited supra), the Apex Court, further held that,

"23. In Jagir Singh v. Ranbir Singh & Anr. AIR 1979 SC 381, this Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance." While deciding the said case, the Court placed reliance on the judgment in Fox v. Bishop of Chester, (1824) 2 B & C 635, wherein it has been observed as under:-

"To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing in an indirect or circuitous manner that which it has prohibited or enjoined."

97. In Cine Exhibition (P) Ltd., v. Collector reported in 2013 (2) SCC 698, at Paragraph 9 of the judgment, it was observed by the Apex Court that what cannot be done directly, cannot be permitted to be done indirectly. The same principle quoted in Priyanka Overseas (P) Ltd., v. Union of India, reported in 1991 Supp (1) SCC 102; K.K. John v. State of Goa reported in 2003 (8) SCC 198; State of Punjab v. Devans Modern Breweries reported in 2004 (11) SCC 40; Zahira Habibulla Sheik v. State of Gujarat reported in 2004 (5) SCC 353; Ram Chandra Singh v. Savitri Devi reported in 2004 (12) SCC 713; Sangramsinh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad (Dead) Through L.Rs. & Ors., reported in 2005 (11) SCC 314; Ramdev Food Products (P) Ltd., v. Arvindbhai Rambhai Patel reported in 2006 (8) SCC 726; State of Haryana v. M.P. Mohla reported in 2007 (1) SCC 457; Shivkumar Sharma v. Santosh Kumari reported in 2007 (8) SCC 600; Subhash Chandra & Anr. v. Delhi Subordinate Services Selection Board reported in 2009 (15) SCC 458 and Rashmi Rekha Thatoi v. State of Orissa reported in 2012 (5) SCC 690. But the question to be considered is, what is the effect of the expression, "expedient for the ends of justice", in sub-Section (1) of Section 408 Cr.P.C., and the words, "on the report of the lower Court" in sub-Section (2) of Section 408.

98. A combined reading of sub-Section (1) and the opening sentence of Sub-Section (2) of Section 408 Cr.P.C., states that "any particular case", can be transferred from one Criminal Court to another Criminal Court, in his Sessions Division, on the report of the lower Court, which means, a report is necessarily required from a lower Court. Present revision cases have been filed challenging the dismissal of the petitions filed to transfer the appeals, pending on the file of the 2nd Additional Sessions Judge, Chennai, to some other Court of competent jurisdiction and not any case.

99. In Section 408 Cr.P.C., the Legislature has used the words, "any particular case", from one Criminal Court to another Criminal

Court, in his Sessions Division and whereas, in Section 409 Cr.P.C., when the Sessions Judge, exercises the administrative power, the words, "any case or appeal", are employed. Thus, there is an inbuilt restraint in Section 409(2) Cr.P.C., in exercise of the power conferred on the Sessions Judge and he cannot recall or withdraw any case or appeal, after the commencement of the trial or hearing of an appeal, pending before the Additional Sessions Judge and that is why, the Legislature is cautious in stating that such power can be exercised, at any time, before the trial of the case or hearing of the appeal.

100. The expression "any particular case" used in Section 408(1) Cr.P.C., should be given its natural meaning and effect. Hon'ble Justice Lahoti, in Harbhan Singh v. Press Council of India reported in AIR 2002 SC 1351, observed as follows:

"Legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material - intrinsic or external - is available to permit a departure from the rule."

101. The words "criminal Court" in Sub-Section (1) of Section 408 Cr.P.C., must be read in the context in which it is explained in sub-Section (2) of the same Section, ie., lower Court and in such circumstances, it can comprehend that, that the words, Criminal Court, refers only to a lower Court and not to a Court of equal jurisdiction. Though the words "Criminal Court" at the first blush, may appear to mean all the criminal Courts, within the Sessions Division of a Sessions Judge, but a close scrutiny of sub-Section (2) of Section 408 Cr.P.C., would make it clear that there is no obscurity and vagueness.

Let me consider some of the decisions, as to how, a Section has to be read and interpreted in the context, in which, it is used.

(i) In D.N.Banerji v. P.R.Mukherjee reported in AIR 1953 SC 58, the Supreme Court held that the same word may mean one thing in one context and another in a different context.

(ii) In the case of Reserve Bank of India v. Peerless G.F., & Co., Ltd., AIR 1987 SC 1023, the apex Court held :

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and

then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

(iii) In *Balram Kumawat v. Union of India* reported in 2003 (7) SCC 628, the Supreme Court held that, "Contextual reading is a well-known proposition of interpretation of statute. The classes of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. The rule of "ex visceribus actus" should be resorted to in a situation of this nature." (iv) In *State of Gujarat v. Salimbhai Abdulgaffar Shaikh* reported in 2003 (8) SCC 50, the Supreme Court held that,

"Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court.....

.....It is well settled principle that the intention of the legislature must be found by reading the Statute as a whole. Every clause of Statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute. It is also the duty of the Court to find out the true intention of the legislature and to ascertain the purpose of Statute and give full meaning to the same. The different provisions in the Statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express."

102. Context in which the words, 'case' and 'appeal', are employed in Section 409 Cr.P.C., is for withdrawal or recall, which is the exercise of an administrative power of the Sessions Judge, and he is empowered to do so, "at any time before the commencement of trial or the hearing of the appeal". Section applies to all the criminal Courts, irrespective of the fact, whether it is of equal jurisdiction or lower. To be precise, as per Section 409(2) Cr.P.C., at any time before the trial of the case or the hearing of the appeal

has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge and whereas, if both sub-Sections (1) and (2) of Section 408, are conjointly read, it applies only to the lower Court. If the intention of the Legislature was to expand the power of the Sessions Judge to transfer a case from a Criminal Court to another, then the words, "lower Court" need not to have been specifically stated. The Legislature could have simply used the word, "Court", instead of the words "lower Court".

103. The first portion of the sentence, occurring in sub-Section (2) of Section 408 Cr.P.C., cannot be isolated, to mean that any party interested, can seek for transfer of a case from one Criminal Court to another, even if the Sessions case is dealt with by a Additional Sessions Judge of equal jurisdiction. In the context of purposive construction, Hon'ble Justice Sinha in *New India Assurance Co. Ltd., v. Nusli Nerille Wadia* reported in 2008 (3) SCC 279, states that,

"With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations.

104. Purpose of the legislation, as could be deduced from the reading of the provision, is that if a case is pending on the file of the lower Court, for the expedient of ends of justice, if a party interested files an application or on the report of the lower Court or on its own initiate, the Sessions Judge can transfer a case from one Court to another Criminal Court, in his Sessions Division. In *Shri Ram Saha v. State* reported in AIR 2004 SC 5080, that in applying a purposive construction a word of caution is necessary that the text of the statute is not to be sacrificed and the Court cannot rewrite the statute on the assumption that whatever furthers the purpose of the Act must have been sanctioned.

105. In *Re: District and Sessions Judge v. Unknown* reported in 2005 (3) MPHT 411, a Hon'ble Division Bench of the Madhya Pradesh High Court held that Section 408 is not controlled by Section 409(2) Cr.P.C., I am in respectful agreement with Their Lordships' view. But with an exception that the power of transfer from one Criminal

Court to another Criminal Court, can be exercised only with reference to, "any particular case", on the file of the lower Court and not any case or appeal from the Court of equal jurisdiction. Sections 408 and 409 of the Code of Criminal Procedure, can certainly be reconciled, only to the limited extent.

106. Keeping the broad principle in interpreting a statute and the Sections, in the backdrop and if the expressions in sub-Section (1) in Section 408 Cr.P.C., "expedient for the ends of justice" and the expression, "on the report of the lower Court", in sub-Section (2) of Section 408 Cr.P.C., are conjointly read, then, in the humble opinion of this Court, the legislative intent, is to apply section 408 Cr.P.C., only to a case, pending in the lower Court and not to the Court of equal jurisdiction.

107. While taking note of the expression, "expedient for the ends of justice", the Kerala High Court in Surendra Kumar's case, has reached a conclusion that a party who is aggrieved, and who has a case before a Criminal Court, be that a Additional Sessions Judge or a lower Court, should have his grievance redressed, by the learned Sessions Judge, when a transfer is sought for, under sub-Section (1) of Section 408 Cr.P.C..

108. Section 406 deals with the powers of the Supreme Court. Section 407 deals with the power of the High Court. Section 408 deals with the powers of the Sessions Judge to transfer a case from one Criminal Court to another Criminal Court. If Sections 406 and 407 are read, with the aid of the words "expedient for the ends of justice", then the qualifying expression, "any particular case" in sub-Section (1) of Section 408 Cr.P.C., and the words, "lower Court", in sub-Section (2) of Section 408 Cr.P.C., are to be meant and given effect, to confer powers on the Sessions Judge, to transfer any particular case, only from a Criminal Court to another Criminal Court, lower to a Sessions Judge and if the provision is read in that way, it would avoid any hardship, inconvenience and anomaly in the system, which in my humble opinion, is what the legislature has intended to regulate the proceedings, in the matter of transfer. In that context, proviso to Section 407(2) is engrafted and which states, that,

"Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him."

109. At any rate, the Code enables the party interested to move the High Court, under Section 407 Cr.P.C., and he is not remediless. But the question is whether, he has two remedies, ie., one by applying to the Sessions Judge, under Section 408 (1) Cr.P.C., and thereafter, to move the High Court, under Section 407 Cr.P.C. In the

hierarchical set up, as provided for, in Sections 406 to 408 of the Code, remedy is available to the party, who intends to move the Sessions Judge, if it is a case, in the lower Court and not of equal jurisdiction. Expedient for the ends of justice, is also one of the grounds, engrafted in Section 407 Cr.P.C., when an application is filed for transfer in the High Court. This provision applies to all the Courts, subordinate to High Court and is not restrictive, whereas, as per Section 408, power of the Sessions Judge to transfer a case from one Criminal Court to another, in the same Sessions Division, can be exercised only, if a case is pending in the lower Court.

110. On the aspect, as to whether, the Government or the High Court has the power to transfer a case, from the Court of a Special Judge to another Criminal Court, a Hon'ble Division Bench in Rattilal v. M.Nanavati v. State of Delhi reported in 1954 CrL.J., 1252, at Paragraphs 7 and 8, held as follows:

"7. Section 526, Criminal P. C., and Clause 22, Letters Patent, empower the High Court to transfer any criminal case from any Court subordinate to its authority to any other Court of equal or superior jurisdiction. The general scheme of the Criminal Law Amendment Act, 1952, makes it quite clear that the Court of a Special Judge is a Court subordinate to the High Court.....

Section 7 declares that certain offences shall be tried by the Special Judge for the area within which they were committed or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government. Section 8 enacts that a Special Judge shall follow the procedure prescribed by Criminal P. C., and that for the purpose of the said provisions the Court of the Special Judge shall be deemed to be a Court of session. It empowers the special judge to pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted. Section 9 empowers the High Court to entertain appeals and revisions from the orders of Special Judges.

These provisions make it quite clear that the Court of a Special Judge is subordinate to the High Court and consequently that it is within the power of the said Court to transfer a case from the Court of one Special Judge to the Court of another such Judge....."

111. One of the arguments of Mr.S.Govindarajan, learned Additional Public Prosecutor is that if Section 408 Cr.P.C., has to be meant to be conferring power on the Sessions Judge, then a

accused, who is facing a case, before the Special Judge, an Additional Sessions Judge, can also seek for a transfer from his Court to any other Criminal Court of equal jurisdiction, taking the plain meaning of the words, "Criminal Court", in Section 408(1) of the Code. In the light of the decision, stated supra, a Sessions Judge is not empowered to do so, though the Court of a Special Judge, is presided over by an Additional Sessions Judge of a Criminal Court.

112. Section 408(1) Cr.P.C., refers to only "any particular case" and not all cases, as mentioned in Section 409(2) Cr.P.C. The word "any" in Section 409(2) Cr.P.C., is used in the general sense, in contra distinction to the expression "any particular case", in Section 408(1) Cr.P.C. Expression "particular case" used in Section 408(1) Cr.P.C., has a special and distinct meaning, than the words "any case" in Section 409 Cr.P.C. Another important fact is that the word "appeal", mentioned in Section 409(2) Cr.P.C., is conspicuously absent in Section 408 Cr.P.C.

113. Let me consider, as to whether, the Courts can add or delete or substitute any word to a statute or section.

(i) In CIT v. Badhraj and Company reported in 1994 Supp (1) SCC 280, the Apex Court held that an object oriented approach, however, cannot be carried to the extent of doing violence to the plain meaning of the Section used by rewriting the Section or substituting the words in the place of actual words used by the legislature.

(ii) In Dadi Jagannadham v. Jammulu Ramulu reported in (2001) 7 SCC 71, the Supreme Court held that,

"13. We have considered the submissions made by the parties. The settled principles of interpretation are that the court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the court would not go to its aid to correct or make up the deficiency. The court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

(iii) In Institute of C.A. of India v. Ajit Kumar Iddya reported in AIR 2003 Kant. 187, the Karnataka High Court held that, "So far as the cardinal law of interpretation is concerned, it is settled that

if the language is simple and unambiguous, it is to be read with the clear intention of the legislation. Otherwise also, any addition/subtraction of a word is not permissible. In other words, it is not proper to use a sense, which is different from what the word used ordinarily conveys. The duty of the Court is not to fill up the gap by stretching a word used. It is also settled that a provision is to be read as a whole and while interpreting, the intention and object of the legislation have to be looked upon. However, each case depends upon the facts of its own."

(iv) In *Sanjay Singh v. U.P. Public Service Commission* reported in (2007) 3 SCC 720, the Supreme Court held that,

"It is well settled that courts will not add words to a statute or read into the statute words not in it. Even if the courts come to the conclusion that there is any omission in the words used, it cannot make up the deficiency, where the wording as it exists is clear and unambiguous. While the courts can adopt a construction which will carry out the obvious intention of the legislative or the rule-making authority, it cannot set at naught the legislative intent clearly expressed in a statute or the rules."

(v) In *Mohan v. State of Maharashtra* reported in (2007) 9 SCC 431, the Supreme Court held that,

"9. In our opinion under Section 11-A what has to be seen is the date of last publication of the declaration under Section 6, and not any subsequent corrigendum to the said declaration. The only circumstance under which the period between the declaration under Section 6 and the award can be extended is mentioned in the Explanation to Section 11-A which states:

"In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a court shall be excluded."

There is no mention in Section 11-A that the period after the publication of the declaration under Section 6 and the publication of any corrigendum to the said declaration has also to be excluded. We will be adding words to the statute if we put such interpretation to Section 11-A, and it is well settled that the court should not add or delete words in a statute.

114. When the word "appeal" is conspicuously absent in Section 408 Cr.P.C., then the circumstances stated in Section 408(2) can be

made applicable, only to any particular case and not to an appeal, pending in any Court. In Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, the Hon'ble Bench of the Kerala High Court, while interpreting Section 408 Cr.P.C., has observed as follows:

"The Presiding Officer of a District Court is the District Judge. The District Judge on the civil side is empowered to transfer any case at any stage from one Additional District Court. If so why should there be a restricted meaning for transfer on the criminal side for the only reason that a provision akin to Section 24(3) regarding subordination is not expressly provided under the Code of Criminal Procedure? Should not that enabling provision be read into under Section 408 since Section 408 appears under Chapter XXXI of the Code dealing with the transfer of criminal cases and since Section 408 itself is captioned as power of Sessions Judge to transfer cases and appeals from one criminal court to another criminal court and in view of the bar under the proviso to Section 407(2) of the Code? It has also to be noted that the power under Section 408 is to be exercised only if it is expedient for the ends of justice and not for any other reason."

115. Reading of the judgment in Surendra Kumar's case (cited supra), indicates that the Hon'ble Bench has drawn an analogy from the Code of Civil Procedure and applied the principle of *causis omisus*.

116. In Padmasundara Rao v. State of Tamil Nadu reported in 2002 (3) SCC 533, a Constitution Bench of the Supreme Court held that, "a *causis omisus* cannot be supplied by the Court, except in the case of clear necessity and when reason for it is found in the four corners of the statute itself."

117. In Unique Butyle Tube Industries Pvt. Ltd. v. U.P. Financial Corporation and Others reported in 2003 HKC 852: 2003 (2) SCC 455: 2003 (113) Comp Cas 374: 2003 All LJ 427: AIR 2003 SC 2103, it was argued that the Court cannot supply the omissions by the Legislature. While interpreting a provision, the Supreme Court held that the Court only interprets the law and cannot legislate it and it is for the legislature to amend, modify or repeal it if it is deemed necessary. It is further held that by the principle of *causis omisus*, Court cannot supply the law.

118. In Lallu Prasad v. State of Bihar reported in 2007 (1) SCC 49, the Supreme Court, while considering the principle of *causis omisus*, in the Statute, at Paragraphs 7 and 8, held as follows:

"7. So far as the plea relating to *causis omisus* is concerned the position in law is as follows:

"21. Two principles of construction - one relating to

causus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a causus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a causus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result", said Danackwerts, L.J. in *Artemiou v. Procopiou* (1966 1 QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislature and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (Per Lord Reid in *Luke v. IRC* (1963 AC 557) where at p. 577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges").

22. It is then true that, "when the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is causus omissus, and that the law intended quae frequentius accidunt."

"But," on the other hand, "it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom" (See *Fenton v. Hampton* (1858) XI Moore, P.C. 347). A causus omissus ought not to be created by interpretation, save in some case of strong necessity. Where, however, a causus omissus does really occur, either through the inadvertence of the legislature, or on the principle quod semel aut bis existit proetereunt legislators, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute - Causus omissus et oblivioni datus dispositioni communis

juris relinquitur; "a causus omissus," observed Buller, J. in Jones v. Smart (1 T.R. 52), "can in no case be supplied by a court of law, for that would be to make laws." The principles were examined in detail in Maulavi Hussein Haji Abraham Umarji v. State of Gujarat and Anr., (JT 2004 (6) SC 227).

8. "12. The golden rule for construing all written instruments has been thus stated:

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (See Grey v. Pearson (1857) (6) H.L. Cas. 61).

The latter part of this "golden rule" must, however, be applied with much caution. "if," remarked Jervis, C.J.,

"the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (See Abley v. Dale 11, C.B. 378).

119. The words, "subordinate" or "lower" is absent in sub-Section (1) of Section 408. The words, "lower Court" are mentioned in sub-Section (2) of Section 408. Is there any intentional or causus omissus by the Legislature in not including the word "subordinate" or "lower" in Section 408(1) Cr.P.C., or there is any defect in not mentioning the words as, "subordinate criminal Court" or the words "lower Court" mentioned in sub-Section (2) of Section 408 would step in aid of interpreting the words "Criminal Court" used in sub-Section (1) of Section 408 Cr.P.C. Even if it is a defective phrasing, as per the decision of the Privy Council in Crawford v. Spooner reported in (1846) 6 Moore PC 1, "We cannot aid the Legislature's defective phrasing or an Act, we cannot add or mend and, by construction made up deficiencies, which are left there."

120. In the light of the decisions of the Courts, as to how, the words used within different parts of the Section, have to be read and interpreted harmoniously, with the other provisions of the statute, if the latter part of a Section supplements the former, and is also explanatory, then there is no difficulty in coming to a conclusion,

that the omission of the word "subordinate" in sub-Section (1) of Section 408 Cr.P.C., is intentional. If both the Sub-Sections are conjointly read, then it would convey the meaning that the words, "Criminal Court" used in sub-Section (1) of Section 408 Cr.P.C., means only a lower Court not a Court of equal jurisdiction.

121. Thus, even if there was a causus omissus, in the Code of Criminal Procedure, Legislative causus omissus cannot be supplied by Judiciary.

122. Plain reading of Section 409(2) Cr.P.C., would indicate that the Sessions Judge can withdraw or recall a case made over to the Additional Sessions Judge, before the commencement of the trial in the Additional Sessions Judges' Court or any appeal before the hearing of an appeal.

123. In Section 409(2) Cr.P.C., the words, "commence", "trial" and "hearing", are used. Section empowers the Sessions Judge to recall or withdraw a case or an appeal before the commencement of the trial or hearing of an appeal. It is an inbuilt restraint in Section 409(2) Cr.P.C., on the Sessions Judge, while exercising his administrative powers. Difficulty may arise, in understanding, as to when a trial or hearing of the appeal has commenced. Therefore, this Court deems it fit to consider the meaning of the above words.

124. Civil action in most jurisdiction is commenced by filing a complaint with the court. Fed.R.Civil P.3 [see Black's Law Dictionary, 6th Ed. At 268].

125. "Proceedings commenced". Proceedings were held to have been "commenced", in the case of an arrest without warrant, when the detainee was charged at the police station, and not upon his first Court appearance (R.V.Brentwood Justices, ex.p.Jones, (1979) RTR 155). Where an information was laid but was not served on the alleged offender, and subsequently a fresh information was laid and served, the proceedings "commenced" for the purposes of this paragraph upon the laying of the second information (R.V.South Western Magistrates' Court, ex.p. Beaton (1980) RTR 35. (Criminal Law Act, 1977 (c45), sched.14, para 1).

126. Commencement of criminal proceedings or prosecution. A complaint or preliminary oath before a Magistrate on which a warrant is issued. (Wharton). A prosecution on a criminal charge is deemed commenced when a complaint has been filed and a warrant issued. (State v. Woolworth, 148 Kan 180, 81 P2d 43).

127. Criminal action is commenced within statute of limitations at time preliminary complaint or information is filed with Magistrate in good faith and a warrant issued thereon.... A criminal prosecution is "commenced" (1) when information is laid before Magistrate charging commission of crime, and a warrant of arrest is issued, or (2) when grand jury has returned an indictment." [Union of

India v. Madan Lal Yadav, AIR 1996 SC 1340 at 1346].

128. Commencement of trial, until and unless the competent authority convenes the GCM and the GCM assembles to consider the charge and examines whether they would proceed with the trial, the trial does not commence. The preliminary investigation conducted in such cases do not amount to commencement of trial, Shiv Prasad Panday v. Director CBI, AIR 2003 SC 1974 (1980): (2003) 11 SCC 508, [Border Security Force Act, 1968, ss.141, 84).

129. Trial, the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. 'Trial' is to find out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given' (Co.Litt.124 b).

130. Trial, is used in the sense of reference to a stage after the inquiry, State of Bihar v. Ram Naresh Pandey, AIR 1957 SC 589: 1957 SCC 282: 1957 SCR 279: 1957 SCJ 386: 1957 SCA 350 : 1957 ILR 36 Pat 513.

131. Trial, is the examination by a competent court of the facts or laws in dispute, or put in issue in a case. It is the judicial examination of issues between the parties, whether they are of law or of fact, Sajjan Singh V. Bhagilal Pandya, AIR 1958 Raj. 307.

132. The word 'trial' in s.98 of the Representation of People Act, 1951 means the entire proceeding before the tribunal from the reference to it by the Election Commission to the conclusion, Om Prabha Jain v. Gain Chand, AIR 1959 SC 837 ; 1959 Supp (2) SCR 516. (Representation of the People Act, 1951 s.98).

133. Trial, is understood as referring to the stage of the proceeding in a criminal case after the charge had been framed against the accused, Vijay Kumar v. State, 1977 CLR J&K 37 (41) : 1977 FAJ 526.

134. In Gandharv Lal v. State of Himachal Pradesh reported in 1980 CrL. L.J. 1189, the Hon'ble Himachal Pradesh High Court, at Paragraphs 8 to 10, held as follows:

"8. The term 'trial' has of course not been defined anywhere in the Code. Its import can, however, be ascertained by reference to various provisions of the Code. We find reference to four types of trials in the Code. They are-(1) trial before a Court of Session, (2) trial of warrant cases by Magistrate, (3) trial of summons cases by Magistrates and (4) summary trials.

135. In Union of India v. Major General Madan Lal Yadav reported in 1996 (4) SCC 127, the Supreme Court held that,

"The word 'trial' according to Collins English

Dictionary means:

"the act or an instance of trying or proving; test or experiment... Law. a. the judicial examination of the issues in a civil or criminal cause by a competent tribunal and the determination of these issues in accordance with the law of the land. b. the determination of an accused person's guilt or innocence after hearing evidence for the prosecution and nor the accused and the judicial examination of the issues involved".

According to Ballentine's Law Dictionary [2nd ed.] 'trial' means:

"an examination before a competent tribunal according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or law for the purpose of determining the right of the parties, it may be considered a trial"

In Black's Law Dictionary [Sixth Edition] Centennial Edition, the word 'trial' is defined thus:

"A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction... A judicial examination, in accordance with law of the land, of a cause, either civil or Criminal, of the issues between the parties, whether of law or facts, before a court that has proper jurisdiction".

In Webster's Comprehensive Dictionary International Edition, at page 1339, the word 'trial' is defined thus:

"....The examination, before a tribunal having assigned jurisdiction, of the facts or law involved in ail issue in order to determine that issue. A former method of determining guilt or innocence by subjecting the accused to physical tests of endurance, as by ordeal or by combat with his accuser... In the process of being tried or tested... Made or performed in the course of trying or testing...".

The word 'commence' is defined in Collins English Dictionary to mean "to start or begin; come or cause to come into being, operation etc." In Black's Law Dictionary it is defined to mean :

"to initiate by performing the first act or step. To begin, institute or start Civil action in most jurisdictions is commenced by filing a complaint with the court.... Criminal action is commenced within statute of limitations at time preliminary complaint or information is filed with magistrate in good faith and a warrant issued thereon... A

criminal prosecution is "commenced" [1] when information is laid before magistrate charging commission of crime, and a warrant of arrest is issued, or [2] when grand jury has returned an indictment".

In the "Words and Phrases" [Permanent Edition] Vol.42A, at page 171, under the head "Commencement", it is stated that "trial' commences at least from the time when work of empanelling of a jury begins".

Our conclusion further gets fortified by the scheme of the trial of a criminal case under the Code of Criminal Procedure, 1973, viz., Chapter XIV "Conditions requisite for initiation of proceedings" containing Sections 190 to 210, Chapter XVIII containing Sections 225 to 235 and dealing with "trial before a Court of Sessions" pursuant to committal order under Section 209 and in Chapter XIX "trial of warrant-cases by Magistrates" containing Sections 238 to 250 etc. It is settled law that under the said Code trial commences the moment cognizance of the offence is taken and process is issued to the accused for his appearance etc. Equally, at a Sessions trial, the court considers the committal order under Section 209 by the Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the cognizance of the offence and taking further steps to conduct the trial."

136. Trial, though the word 'trial' is not defined either in the Code or in the Act, it is clearly distinguishable from inquiry. The word 'inquiry' is defined in s.2(g) of the Code as 'every inquiry, other than a trial, conducted under this Code by a Magistrate or Court". So trial is distinct from inquiry and inquiry must always be a forerunner to the trial, *Vidyadharan v. State of Kerala*, (2004) 1 SCC 215 (222) [Criminal Procedure Code, 1973, s.2(g)].

137. Trial, inquiry, the word 'trial' is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. The word 'inquiry' is defined in s.2(g) of the Code as 'every inquiry, other than a trial, conducted under this Code by a Magistrate or Court." So the trial is distinct from inquiry and inquiry must always be a forerunner to the trial, *Moly v. State of Kerala* (2004) 4 SCC 584 (587) [Criminal PC, 1973, S.2(g)].

138. In *Jaspal Singh v. Municipal Corporation of Delhi* reported in AIR 1972 Delhi 230, the Court held that,

"The hearing of the suit would be on a date to which it may have been adjourned to be taken up by the Court for applying its mind to it. Where the suit stands adjourned for merely acquiring the knowledge as to what has happened in a pending transfer application moved before the District Judge, then it cannot be held that the adjourned date would be for hearing of the suit. No authority has been cited before me which may persuade me to any other view."

139. In *Sham Lal v. Rajinder Kumar Modi* reported in 1990 (2) SCC 187, the Supreme Court held as follows:

"7. Word "Hearing" can admit of a very wide and liberal interpretation. It may include recording of evidence, consideration of arguments on some aspects of suit, examination of various question relating to suit and so on. The essential prerequisite is whether the Judge is applying his mind to some aspect of the case. If he is conducting some routine work or passing interlocutory orders, he can't be said to be "hearing the suit".

8. In a suit, "hearing" can be conducted at various stages. It does not necessarily imply the last hearing at the time of final adjudication. Going by the scheme and purpose of Order 9, C.P.C, hearing contemplated therein is the first hearing required to be conducted in terms of summons which may have been issued to the defendant under Order 5, Rule 1. It does not envisage an adjourned hearing which is taken care of by Order 17, C.P.C."

140. The Supreme Court in *Siraj Ahmad Siddiqui v. Prem Nath Kapoor* [1993 (4) SCC 406], while dealing with the provisions of the U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972, referring to the concept of first hearing, held as under:

"13. The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit.We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."

141. The Supreme Court in Mahadev Govind Gharage v. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka reported in 2011 (6) SCC 321, at Paragraph 40, held as follows:

"40. The date of hearing must not be confused with the expression 'step in the proceedings'. These are two different concepts of procedural law and have different connotation and application. What may be a 'step in the proceeding', essentially, may not mean a 'hearing' by the Court. Necessary ingredients of 'hearing' thus are application of mind by the court and address by the party to the suits."

142. The above decisions, can be made applicable to the hearing of an appeal also. In the case on hand, arguments have been advanced by both sides and appeals were posted for judgment. In the light of the decisions, stated supra, without any doubt, it can be concluded that the hearing of the appeals is over and therefore, the power under Section 409(2) Cr.P.C., cannot be exercised by the Sessions Judge, to transfer the appeals to any other Court of competent jurisdiction.

143. At stated supra, the Sessions Judge is not empowered to withdraw or recall any case, after the commencement of the trial, exercising his administrative powers. High Courts of Gauhati, Kerala and Madhya Pradesh have taken a different view. In the latter paragraphs of this Judgment, I have also considered a case, where a learned single Judge of this Court, has rejected a prayer for transfer of a case, after the trial has commenced.

144. I am of the humble opinion that the higher Courts, have to consider, what is the logic and reason of the Legislature in engrafting the words, in Section 408(2) Cr.P.C., i.e., on the report of the lower Court", followed by the later portion of the sentence, " or on the application of a party interested, or on his own initiative."

145. In the light of the law declared by the Apex Court, on the interpretation of statutes or the Section, this Court is of the humble opinion that a Section or any part in the section, has to be read, as a whole and each word, as a whole, used in Section has to be given its meaning to the context, in which, it is used. Each word employed in the legislation has to be given the plain, literal and grammatical meaning and Courts are not empowered to delete or substitute the same, by way of interpretative process. Therefore, it is not open to the petitioners to contend that the opening sentence

of sub-Section (2) of Section 408 Cr.P.C., ie., on the report of the lower Court or in particular, the use of the words, "lower Court", is illogical to the context, in which, sub-Section (1) to Section 408 Cr.P.C., is enacted by the Legislature, in the matter of transfer of a case, ie., from a Criminal Court to another Criminal Court.

146. Section 407 Cr.P.C., states that the High Court may order, that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction. Reading of sub-Clause (c) of Section 407(1) Cr.P.C., states that an order of transfer can be passed by the High Court, provided that the High Court is satisfied that whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice.
it may order-

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

147. At this juncture, having regard to the language used in Section 407(1) Cr.P.C., this Court is also bound to consider, sub-Section (2) of Section 407 Cr.p.C., which states that the High Court may act on the report of a lower Court, within the territorial jurisdiction of the High Court or on the application of a party interested, can make an application, under Section 407 Cr.P.C., to transfer any particular case or appeal or class of appeals, from a Criminal Court, subordinate to High Court's authority, to any other such criminal Court of equal or superior jurisdiction.

148. Sub-Sections (1) and (2) of Section 407 Cr.P.C., state that on the application of a party interested, he can seek for an order to be passed by the High Court that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction; that any particular case be committed for trial to a Court of Session; or that any particular case or appeal be transferred to and tried before itself, for anyone of the reasons, in sub-Clauses (a), (b) or (c), which reads as follows:

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice.

149. Thus, the power of the High Court to order for transfer of a case or appeal, pending on the file of any subordinate Court thereto, for the reasons contained in sub-Section (1) of Section 407 Cr.P.C., is clear. When the main Section 407 deals with any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction, proviso to Section 407 Cr.P.C., states that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

150. The word "any" in Section 408(1) Cr.P.C., is controlled by the context, in which, it is used. It is not used in the general sense, but restricted to the circumstances, stated therein. The word "any" used in Section 409(2) Cr.P.C., is in general sense. Needless to state that the use of the word, "particular" in Section 408(1) Cr.P.C., is for the specific purpose, transfer. In Section 409(2) Cr.P.C., when the word, "any" is used, it is as wide as possible, because the Sessions Judge, in exercise of his administrative powers, distributes the cases and appeals to the other Additional and Assistant Judges, by making over the cases and appeals and at any time, before the commencement of the trial and hearing of the appeal, he can withdraw or recall, any case or appeal.

151. In Section 408(1) Cr.P.C., there is an omission of the

word, "appeal". In order to understand, as to how the words, "any", "case", "any particular case" or "appeal", have to be understood in the context, in which, they are used, let me incorporate the definitions and some of the cases decided.

(i) In *Ashiq Hasan Khan v. Sub-Divisional Officer, Sadar, Monghyr* reported in AIR 1965 Patna 446, a learned Single Judge of the Patna High Court, with reference to the word, "any", held as follows:

"...it is clear that the use of the expression "any" would be equal to the word "all" in certain contexts and as has been referred to in Stroud's Judicial Dictionary (3rd Edition, page 150), the word "any" excludes limitation or qualification. Referring to *Liddy v. Kennedy*, (1871) 5 HL 134, Stroud has quoted the following passage "So, a power in a lease, enabling the lessor to resume possession of any portion of the premises demised; enables him to resume aft." Even in the Oxford Dictionary "any has been taken to mean "all." "

(ii) The word 'any' may have one of the several meanings according to the circumstances, it may mean 'all', 'each', 'every', 'some', or 'one' or more out of several, whether the expression 'any' used in the statute is indicative of singular or the plural will depend upon the context of each case. [*Pashupati Nath Singh v. State* 1978 Pat. LJR 578 (581); 1978 BLJ 593].

(iii) In Wharton's Law Lexicon, the word 'any' means "some; one of many; and indefinite number. One indiscriminately or whatever kind or quantity. Word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute. It is often synonymous with 'either', 'every' or 'all'. Its generality may be restricted by the context;" [Black's Law Dictionary, 5th Edn.,]. [Ref. *Shri Balaganesna Metals v. M.N. Shanmugham Chetty*, (1987) 2 SCC 707 (718) ; AIR 1987 SC 1668].

(iv) In *Lucknow Development Authority v. M.K. Gupta* reported in AIR 1994 SC 787, the Supreme Court held as follows:

"The word 'any' dictionaryly means 'one or some or all'. In Black's Law Dictionary it is explained thus, "word ,any' has a diversity of meaning and may be employed to indicate 'all' or ,every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject- matter of the statute". The use of the word

'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all."

(v) In *Indian Medical Association v. V.P. Shantha* reported in AIR 1996 SC 550, the Supreme Court held that,

"The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionaryally means; one or some or all', In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all."

(vi) "APPEAL" is defined in the Oxford Dictionary, volume I page 398, as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former. In the Law Dictionary by Sweet, the term "appeal" is defined as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court or Court of appeal, and it is added that the term, therefore, includes, in addition to the proceedings specifically so called, the cases stated for the opinion of the Queen's Bench Division and the Court of Crown Cases reserved, and proceedings in error. In the Law Dictionary by Bouvier an appeal is defined as the removal of a case from a Court of inferior to one of superior jurisdiction for the purpose of obtaining a review and re-trial, and it is explained that in its technical sense it differs from a writ of error in this, that it subjects both the law and the facts to a review and re-trial, while the latter is a Common Law process which involves matter of law only for re-examination; it is added, however, that the term "appeal" is used in a comprehensive sense so as to include both what is described technically as an appeal and also the common law writ of error; as put by Lord Westbury in *Attorney-General v. Sillem*, 10 HLC 704, the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. As Mr. Justice Subramania Ayyar observed in *Chappan v. Moidin*, 22 Mad 68 at p.80 the two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power, on the part of the former, to review decisions of the latter.

(vii) In the Commentary on American jurisprudence by Andrews, Volume II, Page 1510, it is pointed out that appellate procedure embraces two distinct modes of its exercise, namely, first, the record of the inferior tribunal may be brought to the superior tribunal and the decision reviewed, affirmed, reversed or modified; or, secondly, the superior tribunal may check the exercise or usurpation of power in inferior tribunals exercising judicial or quasi-judicial power, or direct the mode in which they shall proceed without controlling the manner of doing that which is the result of judicial deliberation. Story in his work on the Constitution (Volume II, Sections 1760 to 1776), points out the distinction between the original and the appellate jurisdiction of a Court, and observes that the characteristics of an appeal is the revision of a judicial proceeding of an inferior Court, so that the mode in which that power is exercised is wholly immaterial. [Secretary of State v. British India Navigation Co., 9 Ind Cas 183 (185) (Per Mookerjee and COX. JJ.)]

(viii) An 'appeal' is the removal of a cause or a suit from an inferior to a superior judge or Court for re-examination or review. Chappan v. Maidin Kutti, ILR (1899) 22 Mad 68, 80.

(ix) An appeal, strictly so called, is one, "in which the question is, whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it" (per Lord Davey, Ponnammam v. Arumogam [1905] AC 383, at 390).

(x) In Section 115, Civil Procedure Code (5 of 1908), and in Sections 15 and 39 of the Letters Patent the word "appeal" was used in a comprehensive sense so as to include both what is described technically as an appeal as also the common law writs of error. But the word 'appeal' seems to be used in its narrower sense in the Limitation Act, [Subramanya Pillai v. Seethai Ammal, 12 Ind Cas 38, (per AYLING AND SPENCER, JJ.)]

(xi) The expression "appeal" in S.5, Limitation Act XV of 1877, does not include an application for leave to appeal in form pauperis [Ref. Surat Chandra Dey v. Broheshwari Dass - 30 C. 790]

(xii) An 'appeal' is an application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court. [Nagendra Nath Dey v. Suresh Chandra Dey, AIR 1932 PC 165 : 59 (IA) 283 as referred in Tirupati Balaji Developers (P) Ltd v. State of Bihar (2004) 5 SCC 1, 15 para 11]

(xiii) In Chautala Workers Co-operative Transport Society Ltd.,

v. State of Punjab reported in AIR 1962 Punjab 94, the Court held that,

"The word 'appeal' has not been defined anywhere and its scope has not been laid down in the statute in question.

An appeal in legal parlance is held to mean the removal of a cause from an inferior or subordinate to a superior tribunal or forum in order to test and scrutinise the correctness of the impugned decision. It amounts in essence and pith to a complaint to a higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set right."

(xiv) An appeal, in substance, is in the nature of a judicial examination of a decision by a higher Court of a decision of an inferior Court, to rectify any possible error in the order under appeal. V.C.Shukla, State Through C.B.I., AIR 1980 SC 962, 995

(xv) Contrasted with "review": "Appeal", in the context of an ouster clause means re-examination by a superior judicial authority of both findings of fact and conclusions of law as to the legal consequences of those facts made by an inferior tribunal in the exercise of a jurisdiction conferred upon it by statute to decide questions affecting the legal rights of others, and the substitution of the superior judicial authority's own findings of fact and conclusions of law for those of the inferior tribunal. In 'review' the function of the superior judicial authority is limited to re-examining the inferior tribunal's conclusions of law as to the legal consequences of the facts as they have been found by the inferior tribunal." (Att-Gen. v. Ryan [1980] AC 718 at 729, HL per Lord Diplock).

(xvi) Broadly speaking, an 'appeal' is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court. State of Gujarat v. Salimbhai Abdulgaffar Shaikh (2003) 8 SCC 50, Para 11 : AIR 2003 SC 3224.

(xvii) In Nammal v. Radey Shyam reported in AIR 1970 Rajasthan 26, the Court held that,

"Now according to Webster's Dictionary the first meaning, in law, of the noun 'appeal' is the "removal of the cause or a suit from "an inferior to a superior Judge or court for re-examination "or review . The explanation of the term in Wharton's Law Lexicon, which is only different

in words, is "the removal of a "cause from an inferior to a superior Court for the purpose of "testing the soundness of the decision of the inferior Court."

And in consonance with this broad meaning of the word appellate jurisdiction means, the power of a superior Court to review "the decision of an inferior Court". Here the two things, which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. This has been well put by Story: The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject matter has been already instituted and acted upon by some other Court, whose judgment or proceedings are to be revised, (Section 1761: Commentaries on the Constitution of the United States)" (P 80). Suffice it to say that even if we adopt the dictionary meaning of the word "appeal" as "the removal of a cause or the suit from an inferior to a superior Judge or court for re-examination or review," it cannot be said that merely by filing an application for leave to appeal, the cause or suit is removed from an inferior court to a superior court for re-examination or a review. An application for grant of leave to appeal is only an application for grant of necessary permission to file an appeal. If the permission is granted then only the applicant can file appeal. Thus, making of an application for leave to appeal cannot be regarded as "appeal" itself.....

.....Secretary of State v. British India Steam Navigation Co., (1911) 9 Ind Cas 183 (Cal).... In this connection, the learned Judges observed, "Now the term 'Appeal' is defined in the Oxford Dictionary, Volume 1, page 398, as the transference of a case from an inferior to a higher Court or tribunal in the hope of reversing or modifying the decision of the former." Reference was also made to the definition of the term "appeal" contained in the Law Dictionary by Sweet where it was defined "as a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court, or Court of appeal." This case also cannot be of any assistance to us in deciding the point argued before us."

(xviii) In Wharton's Law Lexicon, the word, "case" includes a

suit or any proceeding, before a court. [Legal Services Authorities Act, 1987 (39 of 1987) s.2(1)(a)] It also means - (1) A trial, (2) A trial involving some point of law so important as to be published in Law Reports for future use as a precedent, and (3) A statement of facts and documents, raising a point of law, submitted for the opinion of counsel. (4) includes a suit or any proceeding before a court. [Legal Services Authorities Act, 1987 (39 of 1987) s.2(1)(a)], (5) The expression "case" is not limited in its import to the entirety of the matter in dispute in an action.

(xix) The Word "Case" in Section 253, Cr.P.C., is not restricted to a complaint. This is not a civil proceeding. "Case" should also include case made out at the trial. Firm Govind Moti & Co., v. S.B. Corporation, AIR 1954 Kutch 33 at 37 : 1954 CrL.J. 1086.

(xx) The expression "case" is not defined in the Criminal Procedure Code. It is undoubtedly not restricted to a litigation in the nature of a suit in a civil court. It includes a proceeding in a civil court in which the jurisdiction of the court is invoked for the determination of some claim or right legally enforceable. The expression "case" is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceedings in a civil court. To interpret the expression "case", as an entire proceeding only not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice. The expression "case" includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for executing it with a suit alone." [S.S.Khanna v. F.J.Dillon (1964) 4 SCR 409 : AIR 1964 SC 497]

(xxi) The word 'case' may cover a petition filed under Section 528 of the old CrPC (5 of 1898) (now Ss.8-412 of 1974 code) before the Sessions Judge. Vajirwan P. Seth v. Ratanlal Jahotia, AIR 1964 AP 59, 63.

(xxii) In Bhimappa Bassappa Bhu Sannavar v. Laxman Shivarayappa Samagouda reported in AIR 1970 SC 1153, the Supreme Court held that,

"The word 'case' is not defined by the Code but its meaning is well understood in legal circles. In criminal jurisdiction means ordinarily a proceeding for the prosecution of a person alleged to 'have committed In offence. In other contexts the word may represent other

kinds of proceedings but in the context of the sub-section it must mean a proceeding which at the end results either in discharge, conviction, or acquittal of an accused person.

(xxiii) In *Baldevdas Shivilal v. Filmistan Distribors (India) Pvt. Ltd.*, reported in AIR 1970 SC 406, the Supreme Court held that,

"The expression "case" is not limited in its import to the entirety of the matter in dispute in an action. This Court observed in *Major S.S.Khanna v. Brig.F.J.Dillon* [(1964) 4 SCR 409 = AIR 1964 SC 497] that the expression "case" is a word of comprehensive import : it includes a civil proceeding and is not restricted by anything contained in s. 115 of the Code to the entirety of the proceeding in a civil court. To interpret the expression "case" as an entire proceeding only and not a part of the proceeding imposes an unwarranted restriction on the exercise of powers of superintendence and may result in certain cases in denying relief to the aggrieved litigant where it is most needed and may result in the perpetration of gross injustice. But it was not decided in *Major S. S. Khanna's case*(1) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of s. 115 of the Code of Civil Procedure."

(xxiv) A 'case' is a formal legal proceeding instituted in a Court of law for the enforcement or prosecution of a right of suitors, the enforcement of an obligation binding another in favour of the suitor, the redress or prevention of a wrong, or punishment of a public offence. *Nirmal Das Khaturia v. The State Transport (Appellate) Tribunal, U.P. Lucknow*, AIR 1972 All 200, 209 (FB), {U.P.High Courts (Amalgamation) Order, (1948), Article 14.}

(xxv) In *J.C.Yadav v. State of Haryana* reported in AIR 1990 SC 857, the Supreme Court held that,

"The expression "in any particular case" does not mean that the relaxation should be confined only to an individual case. One of the meanings of the expression "particular" means "peculiar or pertaining to a specified person--thing--time or place--not common or general". The meaning of the word particular in relation to law means separate or special, limited or specific. The word 'case'

in ordinary usage means 'event', 'happening', 'situation', 'circumstances'. The expression 'case' in legal sense means 'a case', 'suit' or 'proceeding in Court or Tribunal'. Having regard to these meanings the expression 'in any particular case' would mean; in a particular or pertaining to an event, situation or circumstance. Rule 22 postulates relaxation of Rules to meet a particular event or situation,"

(xxvi) In V.P.Padmanabhan Nair v. M/s.Grasim Industries, Mavoor reported in AIR 1997 Kerala 356, the Court, with reference to Civil Procedure Code, held that,

"The expression "case" which appears in the Section is not defined anywhere in the Code. But, going by the Explanation to Section 115, the expression "any case which has been decided" includes any order made or any order deciding an issue, in the course of a suit or other proceeding."

152. The definitions to the words, "any", "appeal", "particular" and "any particular case" and the decisions are considered in this judgment only to explain that in Section 408 Cr.P.C., the word "any" or the words "any particular case" are used in different context, than in Section 409(2) Cr.P.C. It is also to understand that the word "case" used in Section 408(1) Cr.P.C., should not be interpreted to mean, appeal, as included in Section 408(1) Cr.P.C.

153. There is a conspicuous omission of the word, "appeal" in the proviso to Section 407(2) Cr.P.C. If the legislature had intended to include that an appeal pending on the file of one Criminal Court, can be transferred to another Criminal Court, in the same Sessions Division, by the Sessions Judge, on the application made by an interested person, then the word, "appeal" would have been included in the proviso also. The power to transfer an appeal from one Criminal Court to another, has been given only to the High Court and not to the Sessions Judge. That is why, while engrafting Section 408 Cr.P.C., the Legislature has framed Section 408(1), in the following manner that, "whenever it is made to appear to a sessions Judge that an order under this sub section is expedient for the ends of justice, he may order that any particular case be transferred from one criminal Court to another criminal Court in his sessions division".

154. Proviso to Section 407 and Section 408(1) Cr.P.C., would convey the same meaning, that is, an application can be filed by the party interested to seek for transfer from one Criminal Court to

another Criminal Court, in the same Sessions Division, but the case should be from a lower Court. The case can be pending on the file of the Assistant Sessions Judge or the Magistrate, lower in jurisdiction. Needless to state that Law Commission, in its 41st Report, has deleted any appeal to be filed to an Assistant Sessions Judge and he can have only original jurisdiction, ie., cases made over to him, by the Sessions Judge, in exercise of his powers under Section 409(2) Cr.P.C.

155. If the case or appeal is pending on the Courts of equal jurisdiction, ie., an Additional Sessions Judge, then the party interested may file an application, directly to the High Court under Section 407(1)(ii) Cr.P.C. While conferring power on the High Court to transfer cases or appeals, the Legislature has specifically stated that the Criminal Court, should be subordinate to its authority and the High Court can transfer any case or appeal or class of cases or appeals, to the Court of equal or superior jurisdiction.

156. The words, equal or superior jurisdiction are also conspicuously absent both in the proviso to Section 407(2) Cr.P.C., and in Section 408(1) Cr.P.C. But in sub-Section (2) of Section 408 Cr.P.C., the words "lower Court" are only used and therefore, this Court is of the view that the words "Criminal Court" in Section 408 (1) Cr.P.C., cannot be read as Court of equal jurisdiction and consequently, the Sessions Judge cannot transfer any case, pending on the file of equal jurisdiction. He can only transfer a case pending on the file of a lower Court, subject to the conditions, stated therein.

157. The word "appeal" cannot be inserted to the proviso to Section 407 Cr.P.C. Procedure to be followed in filing an application, under Section 407 Cr.P.C., ie., to the High Court, is set out in sub-Sections 3 to 7 of said Section, which are extracted hereunder:

"(3) Every application for order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which

it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case."

158. Sub-Section (3) of Section 408 Cr.P.C., states that, "the provision of sub section (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the sessions Judge for an order under sub section (1) as they apply in relation to an application to the High Court for an order under sub section (1) of Section 407, except that sub section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted. Sub-Section (1) of Section 407 Cr.P.C., states that the High Court can transfer any particular case or appeal, from the Criminal Court, subordinate to its authority.

159. Then, in my humble opinion, Sub-Sections 3, 4 and 5 of Section 407 Cr.P.C., as applicable in relation to an application, to the Sessions Judge, for an order of transfer under sub-Section (1) of Section 408 Cr.P.C., means the procedure to be followed, is the same. Then the only portion is, Sub-Section (6) of Section 407 Cr.P.C., and the same is also applicable to Section 408 Cr.P.C. When sub-Section (6) of Section 407 Cr.P.C., is applied or read into Section 408(3) Cr.P.C., then Sub-Section (3) of Section 408 Cr.P.C., has to be read that if the Sessions Judge is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be

stayed, on such terms as the Sessions Court may think fit to impose. The word, "High Court" cannot be read as forming part of sub-Section (3) of Section 408 Cr.P.C., and therefore, it would be appropriate to read, "High Court", as Sessions Judge, in sub-Section (3) of Section 408(1) Cr.P.C.

160. By incorporating sub-Sections 3 to 7 of Section 407 Cr.P.C., to Section 408 Cr.P.C., the Legislature has only stated that the same procedure has to be followed. The Legislature has also conferred on the Sessions Judge, to stay the proceedings of the subordinate or lower Court. Again both the proviso to Section 407 Cr.P.C., and Section 408 (1) would refer only to a "case" and not an "appeal".

161. Even taking it for granted that sub-Section 407(c)(ii) is incorporated, to Section 408 Cr.P.C., in the light of the proviso to Section 407(2), where, reference has been made only to a case, and not an appeal, this Court is of the view that no appeal can be transferred by the Sessions Judge, from one Criminal Court to another Criminal Court of equal jurisdiction, under Section 408 Cr.P.C., and it can be recalled or withdrawn, before the commencement of hearing.

162. By legal fiction, the Sessions Court can, at best, (1) transfer any particular case from a Criminal Court, subordinate to its authority, to an equal, subordinate Court or (2) if such case, is pending on the lower Court, to any superior Court, and (3) not a case pending in the Court, exercising equal jurisdiction.

163. Powers conferred on the High Court, under Section 407 Cr.P.C., cannot be imported to Section 408 Cr.P.C., not conferred on the Sessions Judge, by High Court. By legislative process, the Sessions Court can only stay the proceedings in the subordinate Court.

164. Proviso to Section 407 Cr.P.C., which according to the petitioners, enables them to prefer an application for transfer of an appeal from criminal Court to another. Section 407(c)(ii), confers power on the High Court, to transfer particular a case or appeal, or class of cases or appeals, from a Criminal Court subordinate to the High Court's authority to any other such Criminal Court of equal or superior jurisdiction. Whereas, proviso to Section 407(2), speaks only about a case and not an appeal, and therefore, the proviso has to be interpreted, in such a way, to mean that there is an exception to what is stated in the main enactment, and it is well known that a proviso to a Section cannot be interpreted, as the main section itself.

165. The normal rule applied, while reading a Section, with a proviso is that the proviso is not normally construed, as taking away the right conferred in the main Section, but in the light of the specific omission in the proviso, regarding appeals, proviso to Section 407(2) has to be confined only to the matter dealt with, and not any other, specifically excluded or by implication stand excluded.

166. In my humble opinion, what the Legislature has intended, while enacting Section 408(1) Cr.P.C., with reference to the proviso to Section 407(2) Cr.P.C., is only a case and not an appeal. Proviso to Section 407(2) Cr.P.C., cannot be expanded to cover appeals also.

167. In *Ram Narain Sons Ltd., v. Assistant Commissioner of Sales Tax* reported in AIR 1955 SC 765, the Supreme Court has held that,

"that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

168. Thus, by omitting the word "appeal" in the proviso, Legislature has drafted the proviso to Section 407 Cr.P.C., carving out a clear exception to the main Section. Scope of the proviso to Section 407 Cr.P.C., is limited only to a case and not an appeal. Proviso to Section 407 Cr.P.C. is intelligible and throws light on the exception to the main Section. Lord Russell in *Jennings v. Kelly* reported in (1939) 4 All.ER 464, said thus,

"Although a proviso may well be incapable of putting upon preceding words a construction which they cannot possibly bear, it may without doubt operate to explain which of the two or more possible meanings is the right one to attribute to them. One must, however, read the whole clause before attempting to construe any portion of it, and a perusal of the proviso fixes the meaning of the words which precede it."

Lord Right in the same judgement, said that,

"It is said that, where there is a proviso, the former part which is described as the enacting part, must be construed without reference to the proviso. No doubt, there may be cases in which first part is so clear or unambiguous as not to admit in regard to the matters which are there clear any reference to any other part of the Section. The proviso may simply be an exception of what is clearly defined in the first part, or it may be some

qualification not inconsistent with what is expressed in the first part."

169. Reading of Section 407 Cr.P.C., in its entirety, indicates the intention of the Legislature is to exclude appeals, from the purview of the proviso to Section 407(2) Cr.P.C., a part from the main Section and but for such exclusion, it would continue to be a part of the proviso also. Reference can also made to, what Lord Thankerdon observed in Province Of Bombay vs Hormusji Manekji reported in AIR 1947 PC 200, as follows:

"It is a familiar principle of statutory construction that where you find in the same section express exceptions from the operative part of the section, it may be assumed, unless it otherwise appears from the language employed, that these exceptions were necessary, as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section. There are four exceptions in the proviso to Section 4, which are clearly general exceptions to the operative provisions of the section."

170. Section 408 Cr.P.C., states that "Power of Session Judge to transfer cases and appeals". Heading of Section 409 Cr.P.C., is "withdrawal of cases and appeals by Sessions Judge". Though the heading of Section 408 speaks about transfer of cases and appeals, a close scrutiny of sub-Section, makes it clear that the Legislature has not included the word, "appeal" in the body of Section 408 Cr.P.C., in contra distinction to Section 409 Cr.P.C., where the Legislature has employed both the words, "any case and appeal".

171. In Refugee Co-operative Housing Society Ltd., New Delhi v. Harbans Singh Bhasin reported in AIR 1982 Del. 335, the Court that, "Headings prefixed to a section may be read along with the enacting provisions of the section to resolve any doubt-heading cannot prevail when intention of the Legislature can be gathered by reference to other sections."

172. In Raichurmatham Prabhakar v. Rawatmal Dugar reported in AIR 2004 SC 3625, the Supreme Court held that, "The view is now settled that the Headings or Titles pre-fixed to sections or group of sections can be referred to in construing an Act of the Legislature. But conflicting opinions have been expressed on the question as to what weight should be attached to the Headings or Titles. According to one view, the Headings might be treated as preambles to the provisions following them so as to be regard as giving the key to

opening the mind of the draftsman of the clauses arranged thereunder. According to the other view, resort to Heading can only be taken when the enacting words are ambiguous. They cannot control the meaning of plain words but they may explain ambiguities. (Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, v. 2004, pp. 152, 155). It is permissible to assign the heading or Title of a section a limited role to play in the construction of statutes. They may be taken as very broad and general indicators of the nature of the subject-matter dealt with thereunder. The Heading or Title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject-matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the Heading or Title, the Heading or Title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder."

173. In Mahesh Housing Co-operative Society Ltd., v. State of West Bengal reported in 2004 (1) CHN 10, the Court held that, "That the headings constitute an important part of the Act and may be read not only as explaining the sections, which immediately follow them, but the headings may be read as preamble to a statute and may be looked for that purpose to explain the enactment. The same can be considered as key to the construction of section, which follow them."

174. In the light of the decisions, stated supra, when there is a clear omission of the word, "appeal" in Section 408(1) of the Code, an appeal cannot be transferred by the Sessions Judge, in exercise his powers under Section 408 Cr.P.C., from the Court of an Additional Sessions Judge, after the commencement of the hearing.

175. The next contention raised by the learned counsel for the petitioners is that when the Hon'ble Division Bench decisions of other High Courts, on the issue were brought to the attention of the learned Principal Sessions Judge, Chennai, he should have considered the same, ignoring the learned single Judge's decision of the Madras High Court in Devarasu's case. According to the learned counsel for the petitioners, the Hon'ble Division Bench judgments of other High Courts, on the issue, are binding on the subordinate Courts, within the territorial jurisdiction of this Court.

176. While rejecting the case of the petitioners for transfer of appeals, on the basis of the judgment in Devarasu's case (cited supra), rendered by this Court, which is stated to be contrary, to the views expressed by other High Courts, including Division Bench

judgments, the learned Principal and Sessions Judge, Chennai, has considered a Full Bench decision of this Court in R.Rama Subbarayalu Reddiar v. Rengammal reported in (1962) 2 MLJ 318 (FB), wherein, at Paragraph 4, the Hon'ble Full Bench of this Court, held as follows:

"4. Before we deal with the question, involved in the appeal, it is necessary to examine the propriety of the procedure adopted by the learned District Judge. The normal rule as to the precedents is, that subordinate Courts are bound in the absence of any decision of the Supreme Court, to follow the decisions of the High Court to which they are subordinate. Where, however, there is a conflict between two decisions of the High Court, the rule to be adopted is as follows :--Where the conflict is between the judgment of a single Judge and a Bench or between a Bench and a larger Bench, the decision of the Bench or the larger Bench as the case may be, will have to be followed. But where the conflict is between two decisions both pronounced by a Bench consisting of the same number of Judges, and the subordinate Court after a careful examination of the decision came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one. To enable the subordinate Court to do so, the two apparently conflicting decisions must directly relate to and expressly decide the question that arises before the Court; otherwise a subordinate Court should follow that ruling which specifically deals with the point. It will not be open to it for example to follow the other decision which only impliedly or indirectly or by way of a mere observation gave expression to a contrary view. It follows that the learned District Judge in the present case was not justified in refusing to follow the decision referred in Francis v. Varghese, for his preference a decision which impliedly decided the point as against the one that directly did so is neither consistent with established rules relating to precedents nor conducive to orderly administration of justice."

177. The Madras High Court in Devarasu's case, has held that under Section 408 Cr.P.C., a Sessions Judge cannot transfer a case from one Additional Sessions Judge Court to another, which is not subordinate or lower. Whereas, the High Court of Kerala in Surendra's case (cited supra) and Madhya Pradesh High Court in Re:

District and Sessions Judge's case (cited supra), held that a case can be transferred from the Court of equal jurisdiction.

178. In *Jamuna Devi v. District and Sessions Judge* reported in 2007 (1) GLR 560 = 2007 (1) GLT 148, a Hon'ble Division Bench of the Gauhati High Court, has held that,

"the learned Sessions Judge had no authority or jurisdiction to withdraw the case as the power under Section 409(2) can be exercised at any time, before the trial court of the case or hearing of appeal has commenced. We find that the learned Sessions Judge did not exercise any power under Section 409 Cr.P.C."

179. On the aspect of binding precedent, on the same High Court or other High Courts, let me consider some of the decisions,

(i) Halsbury's Laws of England sets out only three exceptions to the rule of precedents and the following passage is found in paragraph 578 of Vol. 26, Fourth Edition.

...There are, however, three and only three, exceptions to this rule; thus (1) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) it is bound to refuse to follow a decision of its own which although not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords and (3) the Court of Appeal is not bound to follow a decision of its own if given per incuriam.

(ii) In *M. Subbarayudu v. State* reported in AIR 1955 Andhra 87, a Full Bench of the Andhra Pradesh High Court held that the binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not and co-ordinate Jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction. The connotation of the word 'co-ordination' is not the same as that of the words 'concurrence or simultaneity'. Simultaneity or coexistence is not a necessary ingredient of coordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level.

(iii) In *Anand Municipality v. Union of India* reported in AIR 1960 Guj. 40, a Full Bench of the Gujarat High Court applied the principles of binding effect, declared in *M. Subbarayudu's* case (cited supra).

(iv) A Full Bench of the Gujarat High Court in State of Gujarat v. Gordhandas Keshavji Gandhi reported in AIR 1962 Guj 128, has considered the question as to binding nature of judicial precedents. K. T. Desai, CJ. in his judgment, observed:

"Judicial precedents are divisible into two classes, those which are authoritative and those which are persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them. A persuasive precedent is one which the Judges are under no obligation to follow, but which they will take into consideration and to which they will attach such weight as they consider proper. A persuasive precedent depends for its influence upon its own merits.... A decision of a High Court Judge of a State is regarded as binding on all the subordinate courts in that State. A decision of a Division Bench of a High Court is regarded as binding on Judges of the same High Court sitting singly in the High Court. A decision of a Full Bench, i. e. a Bench of at least 3 Judges of a High Court is considered binding on all Division Benches of the same High Court.... A decision of a High Court Judge sitting singly is not legally binding on another Judge of the same High Court sitting singly. So also a decision of a Division Bench of a High Court is not legally binding on another Division Bench of the same High Court. A decision of a Full Bench is not legally binding on another Full Bench of the same Court. One Judge of a High Court has however, no right to overrule the decision of another Judge of the same High Court nor has one Division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court.... The rule that a court should follow the decision of another Court of co-ordinate jurisdiction is subject however to several exceptions which have been dealt with in Salmond's jurisprudence, 11th Edn. at page 199 to 217.

(1) A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.

(2) A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute.

(3) A precedent loses its binding force if court that decided it overlooked an inconsistent decision of higher court.

(4) xx xx xx xx xx

(5) Precedents sub silentio are not regarded as authoritative. A decision passed sub silentio when the particular point of law involved in the decision is not perceived by the Court or present to its mind."

(v) In Eknath Shankarrao Mukhawar v. State of Maharashtra reported in AIR 1977 SC 1177, it was held that judicial discipline as well as decorum suggested only one course when a Bench wanted to differ from the decision of a co-ordinate court and that was to refer to a larger Bench.

(vi) In Ayyaswami Gounder v. Munuswamy Gounder reported in 1984 (4) SCC 376, it was held that a single Judge of a High Court not agreeing with earlier decision of single Judge of the same Court, should refer the matter to a larger Bench and propriety and decorum do not warrant his taking a contrary view.

(vii) In Sonal Sihimappa v. State of Karnataka and Ors., reported in A.I.R. 1987 S.C. 2359, it was observed, In a precedent-bound judicial system, binding authorities have got to be respected and the procedure for developing the law has to be one of evolution.

(viii) The Hon'ble Chief Justice Pathak, speaking for the Constitution Bench, in Union of India v. Raghubir Singh reported in AIR 1989 SC 1933, said:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

(ix) In Sundaradas Knyalal Bhathiya v. The Collector, Thane reported in AIR 1991 SC 1893, the law is stated thus:

"17. It would be difficult for us to appreciate the judgment of the High Court. One must remember the pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction,

the matter shall be referred to a larger Bench. It is subversion of judicial process not to follow this procedure."

(x) In Philip Jeyasingh v. The Jt. Regr. of Co-op. Societies reported in 1992 (2) MLJ 309, a Full Bench of this Court, held as follows:

"49. The ratio decidendi of a decision may be narrowed or widened by the judges before whom it is cited as a precedent. In the process the ratio decidendi which the judges who decided the case would themselves have chosen may be even different from the one which has been approved by subsequent judges. This is because Judges, while deciding a case will give their own reasons but may not distinguish their remarks in a right way between what they thought to be the ratio decidendi and what were their obiter dicta, things said in passing having no binding force, though of some persuasive power. It is said that "a judicial decision is the abstraction of the principle from the facts and arguments of the case". A subsequent judge may extend it to a broader principle of wider application or narrow it down for a narrower application."

(xi) A Hon'ble Division Bench of Bombay High Court in CIT v. Thana Electricity Supply Ltd., reported in (1994) 206 ITR 727 (Bombay), held as follows:

"(a) The law declared by the Supreme Court being binding on all courts in India, the decisions of the Supreme Court are binding on all courts, except, however, the Supreme Court itself which is free to review the same and depart from its earlier opinion if the situation so warrants. What is binding is, of course, the ratio of the decision and not every expression found therein.

(b) The decisions of the High Court are binding on the subordinate courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction. It does not extend beyond its territorial jurisdiction.

(c) The position in regard to the binding nature of the decisions of a High Court on different Benches of the same court may be summed up as follows:

(i) A single judge of a High Court is bound by the decision of another single judge or a Division Bench of the same High Court. It would be judicial impropriety to ignore that decision. Judicial comity demands that a binding

decision to which his attention had been drawn should neither be ignored nor overlooked. If he does not find himself in agreement with the same, the proper procedure is to refer the binding decision and direct the papers to be placed before the Chief Justice to enable him to constitute a larger Bench to examine the question (see Food Corporation of India v. Yadav Engineer and Contractor AIR 1982 SC 1302).

(ii) A Division Bench of a High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court. If one Division Bench differs from another Division Bench of the same High Court, it should refer the case to a larger Bench.

(iii) Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of the earlier decisions.

(d) The decision of one High Court is neither binding precedent for another High Court nor for courts or Tribunals outside its own territorial jurisdiction. It is well settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect."

(xii) In Government of W.B vs. Tarun Roy and others, reported in 2004 (1) SCC 347, as regards binding precedent of a judgment, the Supreme Court at paragraph 26, has observed as follows:-

"26..... If rule of law is to be followed, judicial discipline demands that the court follows its earlier binding precedent. The Calcutta High Court itself has rejected such a plea. The matter is pending in appeal. An order passed to the contrary by another learned Single Judge in ignorance of the earlier binding precedent by itself would not constitute a binding precedent and may be held to have been rendered per incuriam.

(xiii) In Raman Gopi v. Kunju Raman Uthaman reported in 2011 (4) KLT 458, a Full Bench of the Kerala High Court held that when a Bench of higher number of judges of the concerned court decided a question on the subject, then that is binding on the Bench of co-equal judges or lesser number of judges of that court. Further, it is settled law that, if a decision has been rendered by the same High Court, then any decision rendered by any other High Court is not binding on the

other High Court but it has got only persuasive value.

(xiv) The Hon'ble Division Benches of Bombay, Delhi and Himachal Pradesh have applied the said principles in the matters, arising out of disputes, relating to Income-Tax.

1. Consolidated Pneumatic Tool Co. (India) Ltd., v. Commissioner of Income-Tax [(1994) 120 CTR (Bom) 22 = (1994) 209 ITR 277 (Bom)];
2. Geoffrey Manners and Co. Ltd., v. Commissioner of Income Tax [(1996) 136 CTR (Bom) 169 = (1996) 221 ITR 695 (Bom)]
3. Taylor Instrument Co. (India) Ltd., v. Commissioner of Income Tax [(1998) 232 ITR 771 (Del.)]

180. In the light of the Full Bench judgment of the Kerala High Court in Raman Gopi's case (cited supra), the Full Bench decision of our High Court in R.Rama Subbarayalu Reddiar's case (cited supra), the decision made in Surendra Kumar's case (cited supra), cannot be made applicable to the subordinate Courts in Tamil Nadu and it is also not binding on the Madras High Court.

181. It is also worthwhile to consider Sections 397 and 401 of the Code, as to when the High Court and the Sessions Judge exercise the power of the superintendence over the Courts subordinate to it. The said Sections are extracted hereunder:

"397. Calling for records to exercise powers of revision.

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, - recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

401. High Court' s Powers of revisions.

(1) In the case of any proceeding the record of which has been called for by itself or Which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code, an appeal lies but an application for revision has been made to the High Court by any person and the High Court Is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

182. As per Section 406 of the Act, the High Court, in exercise of its power, may order, that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction and that any particular case be committed for trial to a Court of Session.

183. As per sub-Section (2), the High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative. The qualifying expressions for exercise of power under Section 407 Cr.P.C., are that it should be a

Criminal Court subordinate to its authority and it may act either on the report of the lower Court, or on the application of a party interested or on its own motion. The High Court of any State, cannot exercise its powers, under Sections 397, 401, 407 Cr.P.C., over any Court, outside its territorial jurisdiction and therefore, the Court, to which it issues any order, under Section 407 of the Code, should be subordinate thereto. Needless to state that Courts in Tamil Nadu are not subordinate to any other High Court, except Madras High Court and thus, they are bound to respect and follow the decisions of this Court.

184. Admittedly, there are contrary views expressed by other High Courts. As per the Law of Precedents, the decision of a High Court, shall be binding on the subordinate Courts, within its territorial jurisdiction and insofar as judgments of other High Courts are concerned, they would be only of persuasive value, on the Courts, functioning under different territorial jurisdiction.

185. In *State of West Bengal v. Gangadhar Dawn and others* reported in 1989 Cr.L.J. 563, a Hon'ble Division Bench of Calcutta High Court considered a revision application, against the order of the learned Sessions Judge, allowing an application, filed by an accused, under Section 408 Cr.P.C., filed for transferring a case from the file of an Additional Sessions Judge, after the trial of the case had begun. At Paragraphs 4, 5 and 6 of the judgment, the Division Bench held as follows:

"4. There appears to be some apparent contradiction between Sub-section (1) of Section 408 and Sub-section (2) of Section 409; but in fact, there is none. It is possible to make a harmonious construction of these two sections.

5. The criminal Court referred to in Section 408 covers only those Courts where cases can be filed. The criminal cases are usually filed in the Court of either the Chief Judicial Magistrate or the Sub-Divisional Judicial Magistrate, Section 408 refers to those cases and has nothing to do with the cases that might be transferred to the Chief Judicial magistrate or to the Assistant and Additional Sessions Judges and Section 409, to the cases which have been transferred to the Additional Sessions Judges or Assistant Sessions Judges or Chief Magistrate. Section 409 relates to those transferred cases and Section 408 relates to the cases originally filed in the criminal Courts. That is why, we noted that there is no apparent incongruity between the provisions of these two sections.

6. Now, the Sessions Judge has exercised his power under Section 408 in respect of the case transferred from the Court of Sessions Judge to the Court of the Additional

Sessions Judge who already began the trial thereof. In view of the provision of Sub-section (2) of Section 409 which has already been quoted by us, he has no such power when the trial already commenced."

186. While dealing with a similar issue on transfers, the Hon'ble Division Bench of Calcutta High Court in Re: Smt. Tarulata Kala, reported in 1997 CrL.J. 1401, at paragraph No.6, held as follows:

"6. I have considered the submission of Mr. Roy and the materials as produced before me in the revisional application. I find no conflict in the decision of Radhey Shyam (supra). The conflict regarding them is interpretation of the same. Section 408(1) reads as follows:-

"Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division." (sic). (Underscoring is by me).

Sub-section (2) of Section 409 reads as under:-

"At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge." (sic). (The underscoring is by me).

So, both the sections speak of two stages, one up to the stage of case and another where the case steps into the stage of trial, that is, with the framing of the charge. The case under reference of the Allahabad High Court only speaks of transfer of the sessions case and not regarding trial. No doubt, the two sections are separate and independent and one is not controlled or regulated by the other. But sub-section (2) of Section 409 specifically points out two stages in a case, that is, one from pretrial which is termed as 'case' and very often one comes across with the expression 'till the trial commences before the Sessions Judge' shows that sessions case and sessions trial is not the same. Once the trial commenced, the Sessions Judge has not the power to withdraw and transfer the trial to some other court of another Sessions Judge or Additional Sessions Judge. But before that stage of the trial, the Sessions Judge has every power to withdraw the Sessions Case either upon an application or suo motu and

can transfer it to another court of session. In that there is no military between Section 408(1) and Section 409(2) of the Cr.P.c. The Legislature in its wisdom has used two terminology in Section 408(1) and 409(2) namely, the pre-trial stage of Sessions Case and trial stage. There is no doubt that the learned Sessions Judge has power to withdraw the the Sessions case to another Court in pretrial stage, but once the trial commences he has no power to transfer the case to another court of Sessions Judge."

187. In the light of the decision of the Calcutta High Court in Gangadhar Dawn's case (cited supra) and Re: Smt.Tarulata Kala's case (cited supra), can it be said that the decision of the Hon'ble Bench of Calcutta High Court is binding all the subordinate Courts, within the territorial jurisdiction of Kerala, Madhya Pradesh and Gauhati High Courts, or for that matter, can it be said that the decisions of the Kerala, Madhya Pradesh and Gauhati High Courts, are binding on the subordinate Courts? The answer is a clear 'No', in view of Article 227 of the Constitution of India, which states that,

"(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

188. In East India Commercial v. Collector of Customs reported in AIR 1962 SC 1893, decided on 04.05.1962, the majority view of the Apex Court is that,

"Under Art. 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the sub-ordinate courts can equally do so, for there is no specific, provision, just like in the case of Supreme Court, making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working: otherwise there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefor, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it."

189. In the light of the law laid down by the Apex Court in East India Commercial case (cited supra), which is binding on all Courts in the Country, by virtue of Article 141 of the Constitution of India, can it be argued that the learned Principal Sessions Judge, has committed a manifest illegality in dismissing the transfer applications, as not maintainable, by referring to the Full Bench decision of this Court in R.Rama Subbarayalu Reddiar v. Rangammal reported in 1962 (II) MLJ 318, the law laid down by this Court on precedents, to be followed, by the subordinate Courts to the Madras High Court, established under Article 215 of the Constitution of India, considering the exercise the power of superintendence over, all Courts and Tribunals, within the territorial jurisdiction of the Madras High Court, under Article 227 of the Constitution of India, the answer is a clear "No". A High Court may consider the decisions of other High Courts, decided on a point of law, but under the Constitutional scheme, each High Court has an independent power and jurisdiction to decide such question of law.

190. As regards the submission of Mr.S.Prabhakaran, learned counsel for the petitioner that the decision of the Madras High Court in Devarasu's case, decided by a learned single Judge of this Court, is not binding on the subordinate Courts, within the territorial jurisdiction of this Court, but the subordinate Courts should follow only the judgments of other High Courts, decided by a larger Bench of any other High Court, the answer lies in the decision of the Apex Court in East India Commercial v. Collector of Customs reported in AIR 1962 SC 1893 and other decisions, stated supra.

191. Under the Constitutional Scheme, each High Court established under Article 215 of the Constitution of India, and exercising powers under Articles 226 and 227 of the Constitution of India, and with reference to the Code of Criminal Procedure, Sections 397, 398 and 408, is empowered to decide a question of law, raised before each High Court. If the arguments of Mr.S.Prabhakaran, learned counsel for the petitioner, has to be accepted, then the law declared by the Madras High Court, can be ignored by the Subordinate Courts, within the jurisdiction of this Court. In the present revision cases, it is also the argument of Mr.S.Prabhakaran, learned counsel for the petitioners that this Court is also bound by the judgments of other High Courts, because the composition of the Bench is larger. Proposition advanced by the learned counsel for the petitioners, on the law of precedents, is against the Constitution of India. The Apex Court has only recognised the binding effect of its decision on all Courts, under Article 141 of the Constitution of India, which states

that the law declared by the Apex Court, shall be binding on all Courts and Tribunals, within the territory of India, including all the High Courts.

192. Framers of the Constitution of India, in their wisdom, are clear, in engrafting Articles 227 of the Constitution of India, which starts with an opening sentence, "Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction".

193. Of course, in the matters of administration of justice and public policy, "like cases should be decided alike", to avoid any kind of divergent views expressed by High Courts, but, can it be said and argued that a decision rendered by one High Court is binding on other High Court, or the Courts subordinate to its authority, in my humble opinion, it is clear "No".

194. Under the Constitutional Scheme, I am empowered to decide, a question of law, independently of what the other High Courts, have decided and for that matter, the decisions of the other High Courts, may have a persuasive value and they do not a binding precedent. It is true that there must be certain degree of certainty in the law, to be interpreted and applied to all the persons, to which, the Constitution of India, extends, but that principle, does not mean that a High Court is bound by the decision of another High Court, whether it is of the same strength or of a higher composition.

195. No doubt, Judicial Precedents, across the country should maintain uniformity, and that there should be harmony in deciding a point of law, to be followed, but that does not mean that a High Court cannot decide a question of law, on its own, but have to simply follow the decision, decided by another High Court. In a given case, when a Central law is interpreted, every High Court is empowered to independently consider, the question of law, de hors the decisions of other High Court.

196. If the argument of Mr.S.Prabhakaran, learned counsel for the petitioners is accepted, then, if even a law, is decided erroneously by another High Court, all the High Courts, including the Subordinate Courts, throughout the Country, have to follow the same, and that argument is not only against the Constitutional Scheme, but would be against the principles of binding precedent, followed by the Courts, across the Country, in the light of the Article 227 of the Constitution of India and with reference to Sections 397, 398 and 401 and in particular, to the case on hand, Sections 406 to 412 of the Code of Criminal Procedure.

197. Considering the Hierarchy of Courts and the decisions, which the subordinate Courts are bound to follow, as per the decision in East India Commercial v. Collector of Customs reported in AIR 1962 SC 1893 and the subordinate Courts take a different view, then the working of the hierarchical system, as per the scheme of Constitution of India, would be in chaos.

198. Text and the context of the words, "lower Court", in Section 408(2) Cr.P.C., cannot be deleted or sacrificed. When the language of Section 408 is capable of bearing more than one construction, in selecting the true meaning and regard must be had to the consequences resulting from adopting the alternative construction. A construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction, which avoids such results.

199. Law codified should be interpreted and applied in the manner, without being inconsistent with the smooth working of the system, which the Code intends to regulate the statutory scheme and to avoid any friction or confusion in the working of the system. It should be the endeavour of the Court that there is harmonious construction of the provisions of the Code.

200. Having regard to the remedy under Section 407 Cr.P.C., if the party interested, for the reasons stated in the said provision makes an application to High Court to transfer any case or an appeal from one Criminal Court to another, of the same jurisdiction or superior Court, the High Court, in exercise of the powers under Section 407 of the Code, would consider, as to whether, the party interested has made out a case, that any particular case or appeal or class of cases or appeals, pending on the file of any Courts subordinate to its authority, require to be transferred to any other Criminal Court of equal jurisdiction or superior Court. But if the Sessions Judge has to exercise the said power of transfer, the party interested, may after the commencement of the trial or hearing of the appeal, may make allegations against an Additional Sessions Judge, who is trying a case or on an appeal, made over to him, in the middle of the trial or hearing of an appeal or for any other cause, may attempt to protract the trial.

201. Provisions of the Code of Criminal Procedure, indicate that an Additional Sessions Judge, exercises equal judicial jurisdiction,

on any matter, made over to him, whether it is a case or an appeal, as the case may be. If the party interested, makes an allegation against the Additional Sessions Judge, in the conduct of the proceedings, whether it be a case or an appeal, whether the Sessions Judge, is administratively superior to look into the allegations? In my humble view, he cannot do so. While that be so, can it be said that an Additional Sessions Judge is subordinate to the Sessions Judge, or the Additional Sessions Court is a lower Court? My answer would be "No".

202. Looking at any angle, I am unable to persuade myself that the Court of an Additional Sessions Judge is a Court, subordinate or lower, to the Sessions Judge. Now look at from the view of the High Court. As per Article 227 of the Constitution of India, all the Courts, within its territorial jurisdiction, are subordinate to its authority. The High Court can exercise its administrative powers, in case of any exigency or the judicial power, under Section 407 of the Code, in the matter of transfer.

203. Considering the scheme of the Code, an Additional Sessions Judge, exercises the same jurisdiction, while trying a case or an appeal, as the case may be. When the Sessions Judge retains or makes any case or appeal, to be tried before himself or makes over a case or any appeal, under Section 409(2) Cr.P.C., to the Additional Sessions Judges, both the Sessions Judge and the Additional Sessions Judge, exercise the same powers and follow the same procedure, while trying a case or an appeal, as the case may be.

204. Assuming that in a given case, the Additional Sessions Judge, has not followed the procedure, prescribed in the Code of Criminal Procedure, and if any averments are made, to that effect in an application filed under Section 408(1) of the Code, by construing that an Additional Sessions Judge as inferior or subordinate or lower, in the matter of exercising judicial functions, is it open to the Sessions Judge to exercise his supervisory powers, on the judicial side? In my humble opinion, under the Constitutional Scheme of Article 227 or under Section 408 Cr.P.C., he cannot.

205. No doubt, on the administrative side, as a Sessions Judge of a Sessions Division, he can issue directions, subject to the restraint and limitations, as provided for, in Section 409(2) Cr.P.C. Viewing from any angle, as to the administrative or judicial supremacy of the Sessions Judge, over an Additional Sessions Judge and as to when, he can exercise his judicial powers, vis-a-vis, the High Court, in the matter of transfer of a case, from one Criminal

Court to another Criminal Court, in my view, the powers conferred should be circumscribed only, to the Constitutional scheme, the system, hierarchy and the provisions of the Code and therefore, the provisions have to be interpreted, accordingly.

206. In *Collector of Customs, Baroda v. Digvijaysinghji Spinning & Weaving Mills Ltd.*, Jamnagar, reported in AIR 1961 SC 1549, the Supreme Court, held that "It is one of the well-established rules of construction is that if the words of a statute are in themselves precise and unambiguous, no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declare the intention of the Legislature. It is equally well settled principle of construction that where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

207. In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth* reported in 1984 (4) SCC 27, the Supreme Court held that, "It is equally important that the Court should also, as far as possible, avoid any decision or interpretation of a statutory provision, rule or bye-law which would bring about the result of rendering the system unworkable in practice."

208. In *Suresh Khullar v. Vijay Khullar* reported in AIR 2008 Del. 1, the Court held that, "Where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than the one which would put hindrances in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation the Court should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

209. At this juncture, this Court deems it fit to consider an Australian judgement in *Project Blue Sky Inc v. Australian Broadcasting Authority* reported in (1998) 72 ALJR 841, at Page 855, wherein, Lord Herschell, observed that, "only by determining the hierarchy of the provisions, will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language maintaining the unity of the statutory scheme."

210. With the above guiding principles, in my humble opinion, if the words "Criminal Court", used in sub-Section (1) and the words "lower Court, used in sub-Section (2) of Section 408 Cr.P.C., are given the same meaning, ie., lower to the Sessions Judge, then, certainly, there would be a smooth functioning of the system, which the Code of Criminal Procedure, is purported to regulate, without there being any friction or confusion in the working of the system, which dispenses administration of justice.

211. At this juncture, this Court deems it fit to consider the words of Hon'ble Justice S.R.Dass in Chief Justice of Andhra Pradesh v. L.V.A. Dikshitula reported in 1979 (2) SCC 34, wherein, the Hon'ble Judge said that if two constructions are possible, then the Court must adopt that which will ensure smooth and harmonious working of the provisions of the Code of the Criminal Procedure and eschew the other, which would rise to practical inconvenience.

212. Reading of the order made in Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, shows that the Kerala High Court, has drawn an analogy of conferment of powers to the learned Sessions Judge under Section 24 CPC, wherein, as per sub Section (3) to Section 24 CPC, the Additional Sessions Judges and Assistant Sessions Judges have been shown as subordinates to the Sessions Judge. Code of Criminal Procedure has underwent so many changes and in 1973, it was revised. Both Cr.P.C., and CPC have underwent changes.

213. The legislature in its wisdom in Section 24 CPC., has stated that both the Additional Sessions Judge and Assistant Sessions Judge are subordinate to the Sessions Judge. Section 24 CPC., states that if the Sessions Judge had been conferred with a power to transfer a case or an appeal from one Court to another of equal jurisdiction i.e., from one Additional Sessions Judge to another Additional Sessions Judge and from one Assistant Sessions Judge to another Assistant Sessions Judge, and if the legislature wanted to confer a similar power on the criminal side also, i.e., in Section 408 of the Code of Criminal Procedure, the Legislature could have been amended Section 408 Cr.P.C., on the same lines as contained in Section 24 CPC also.

214. But a close reading of sub section (1) of 408, shows that there is a clear omission of the word 'appeal' in Section 408. Therefore, the Sessions Judge cannot transfer an appeal from one criminal court to another criminal court in his Sessions division.

215. This Court in the foregoing paragraphs has already considered the meaning of the two words i.e., (1) any; and (2) particular, in the context in which, the two words occur in sub-section (1) of Section 408 CPC. As already discussed, in the light of the decisions of the Apex Court as to how a Section or a statute has to be read, a conjoined reading of Sub Sections (1) & (2) with a specific inclusion of the word 'lower Court' in Sub Section (2) of Section 408 Cr.P.C., in the humble opinion of this Court, it cannot be contended that there is a *causus omissus* in the Code of Criminal Procedure, while conferring power on the Sessions Judge in *pari materia*, to Section 24 C.P.C. Therefore, with due respect to the Hon'ble Division Bench, I am not in agreement with the analogy drawn by the High Court of Kerala, in referring to Section 24 of the Code of Civil Procedure, in the Scheme of Code of Criminal Procedure Code, where the hierarchical system provides for transfer, wherein, there are provisions, for transfer, under Section 406 by the Supreme Court, Section 407 by the High Court and Section 408 by the Sessions Court, which makes it clear that the abovesaid Sections empower, each of the superior Courts to transfer cases from the Courts, lower or subordinate to its authority, in exercise of judicial functions.

216. In *Appukuttan v. Z.Thomas Zakaria* [Crl.O.P.(MD)No.18201 of 2012, dated 09.12.2014], relied on by the learned counsel for the respondent, the order of the learned Principal and District and Sessions Judge, Kanyakumari, rejecting the request of the petitioner therein to transfer C.C.No.397 of 2010, from the file of the learned Judicial Magistrate No.II and transfer the same, to the file of the Chief Judicial Magistrate, Nagercoil, to be tried, along with S.C.No.62 of 2011, has been challenged. While rejecting the request for transfer and joint trial, the learned Principal Sessions Judge, on the facts and circumstances of the case, has found that the trial in C.C.No.397 of 2010, had already begun. In S.C.No.62 of 2011, except the petitioner therein, all other witnesses have been examined by the learned Chief Judicial Magistrate, Nagercoil. Placing reliance on the decision in *Ashok Kumar Prabhudashbai Modi v. State of Gujarat* reported in 2004 Crl.L.J. 1624, the learned Principal Sessions Judge, Kanyakumari, rejected the request for transfer. Being aggrieved by the same, Crl.O.P., has been filed in the Madurai Bench of this Court, to set aside the said order and the petitioner has sought for the reliefs, as stated *supra*. This Court has considered the decision made in *Re: Smt.Tarulata Kala*, reported in 1997 Crl.L.J. 1401, wherein, the Calcutta High Court, at paragraph No.5, held as follows:

"6. I have considered the submission of Mr.Roy and the materials as produced before me in the revisional

application. I find no conflict in the decision of Radhey Shyam (supra). The conflict regarding them is interpretation of the same. Section 408(1) reads as follows:-

"Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division."

Sub-section (2) of Section 409 reads as under:-

"At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge." (sic). (The underscoring is by me).

So, both the sections speak of two stages, one up to the stage of case and another where the case steps into the stage of trial, that is, with the framing of the charge. The case under reference of the Allahabad High Court only speaks of transfer of the sessions case and not regarding trial. No doubt, the two sections are separate and independent and one is not controlled or regulated by the other. But sub-section (2) of Section 409 specifically points out two stages in a case, that is, one from pretrial which is termed as 'case' and very often one comes across with the expression 'till the trial commences before the Sessions Judge' shows that sessions case and sessions trial is not the same. Once the trial commenced, the Sessions Judge has not the power to withdraw and transfer the trial to some other court of another Sessions Judge or Additional Sessions Judge. But before that stage of the trial, the Sessions Judge has every power to withdraw the Sessions Case either upon an application or suo motu and can transfer it to another court of session. In that there is no military between Section 408(1) and Section 409(2) of the Cr.P.c. The Legislature in its wisdom has used two terminology in Section 408(1) and 409(2) namely, the pre-trial stage of Sessions Case and trial stage. There is no doubt that the learned Sessions Judge has power to withdraw the the Sessions case to another Court in pretrial stage, but once the trial commences he has no power to transfer the case to another court of Sessions Judge."

Considering both the decisions in Ashok Kumar Prabhudasbhai Modi's case (cited supra) and Re: Smt.Tarulata Kala's case (cited supra),

this Court in Appukuttan's case, held as follows:

"8. Even though the trial Court has powers to withdraw the Sessions case and transfer the same to another Court, it can be only done in the pre-trial stage. Once the trial has started, the Sessions Court has no power to transfer the case to another Court of Sessions.

9. In the light of the decision rendered by the Calcutta High Court and the decision of the Apex Court referred to by the Principal District and Sessions Court, Kanyakumari District at Nagercoil and taking note of Section 409(2) of Cr.P.C., as the trial has commenced and it is at the verge of conclusion, there is no need to club both the cases namely S.C.No.62 of 2011 and C.C.No.397 of 2010 to be tried in the same Court, more particularly when S.C.No.62 of 2011 pertains to different event and the trial has already been commenced, except the examination of witness Appukuttan, who is required for adducing evidence and in this regard, a warrant has already been issued. It is very unfortunate that the warrant issued on 14.07.2012 is yet to be executed."

So saying, dismissed the Crl.O.P.

217. Mr.S.Prabhakaran, learned counsel for the petitioner made an attempt to distinguish the above unreported judgment, as it is applicable only to a case and not an appeal. Whether Section 408(1) Cr.P.C., itself, can be made applicable, to an appeal, has already been discussed at length in the foregoing paragraphs. Though the learned counsel has argued that Appukuttan's case (cited supra), cannot be made applicable to the facts of the present revision petitions and contended that what is sought for by the revision petitioners is only transfer of appeals, pending on the file of the learned IInd Additional City Civil Court, Chennai, to any other Court of Session of equal jurisdiction and that the judgment in Appukuttan's case, pertains only to a case, quite contrary to the above submissions made, in the attempt to distinguish Appukuttan's case (cited supra), has relied on a Hon'ble Division Bench judgment of the Madhya Pradesh High Court in Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, wherein, the question posed before Their Lordships, was with reference to the powers of the Sessions Judge, to transfer part-heard cases, as the Presiding Officer, had resigned from the post and no other Judicial Officer was appointed in his place. If the judgment in Appukuttan's case (cited supra), is not applicable to the facts of the present revisions, then the same argument can be made applicable to the facts of this case also. In Re: District and Sessions Judge v. Unknown reported in

2005 (3) MPHT 411, the Hon'ble of Madhya Pradesh High Court, in its summary of the above reported judgment, has considered the judicial powers of the Sessions Judge, under Section 408 Cr.P.C., in the matter of transfer of any case from one Criminal Court to another Criminal Court, in the same Sessions Division and while summarizing their views at paragraph 19(a), held as follows:

"(a) A Sessions Judge in exercise of judicial power under Section 408 of the Code may transfer any case pending before any Criminal Court in his Sessions Division to any other Criminal Court in his Sessions Division. That would mean that he can transfer even those cases where the trial has commenced from one Additional Sessions Judge in his Sessions Division to another Additional Sessions Judge in his Sessions Division. The transfer of a case under Section 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further, the reason or reasons why it is expedient for the ends of justice to transfer the case, has to be recorded."

218. As regards the exercise of administrative powers of the Sessions Judge, under Section 409 Cr.P.C., the Hon'ble Division Bench of Madhya Pradesh in Re: District and Sessions Judge's case (cited supra), at Paragraphs 19(b)(iii), held that "powers can be exercised to recall any case or appeal which he has made over to any Additional Sessions Judge, before trial of such case or hearing of such appeal has commenced before such Judge and try the case or hear the appeal himself or make it over to another Court for trial or hearing in accordance with the provisions of the Code." Considering the circumstances, stated in Section 409(2) Cr.P.C., where the trial of the case, has commenced, before the Additional Sessions Judge, and when there was an eventuality of the Additional Sessions Judge, retiring or resigning, death or transferred outside the Sessions Division, the Hon'ble Division Bench said that the Sessions Judge in exercise of his administrative power, can recall the case.

219. The Hon'ble Division Bench of Madhya Pradesh High Court in Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, has not considered the question, as to whether, an appeal can be transferred from one Criminal Court to another Criminal Court, in the same Sessions Division under Section 408 Cr.P.C., when the Judge, hearing a case or the appeal, has not retired or resigned. To make it clear, it was not a case for transfer of an appeal.

220. The question considered in Surendra Kumar v. Vijayan reported in 2005 (4) KLT 475, by a Hon'ble Division Bench, is whether a Sessions Judge has power under Section 408 of the Code of Criminal

Procedure, 1973, to transfer a case, after commencement of trial or a part heard appeal from the court of Additional Sessions Judge to another competent court within the sessions division. In the foregoing paragraphs, this Court has already extracted the reasons, assigned by the Hon'ble bench. That apart, a Full Bench decision of the Allahabad High Court in Radhey Shyam and another Vs. State of U.P. (ALL.) 1984 (2) Crimes 50, has been considered. To sum, the Hon'ble Division Bench of Kerala High Court at Paragraph 12, held that,

"(1) An interested litigant is entitled to invoke Section 409 of the Code before the Sessions Judge for the purpose of withdrawing or recalling cases including revisions and appeals already made over to an Additional Sessions Judge, provided the trial or hearing of the cases or revisions or appeals as the case may be, has not commenced. It is an administrative exercise of power by the Sessions Judge.

(2) An interested litigant is entitled to move the Sessions Judge for transferring cases including revisions and appeals at any stage from the court of an Additional Sessions Judge, if such transfer is expedient for the ends of justice.

(3) Unless the litigant thus first moves the Sessions Judge, an application for transfer under Section 407 before the High Court is not maintainable.

(4) The Additional Sessions Judge concerned is entitled to make a report to the Sessions Judge for transferring any cases including revisions and appeals pending before him irrespective of the stage of such matters."

221. In *Jamuna Devi v. District and Sessions Judge* reported in 2007 (1) GLR 560 = 2007 (1) GLT 148, holding that the power under Section 407 Cr.P.C., is identical to that of the High Court, under Section 407 Cr.P.C., with certain modifications and following the earlier decision in *Subrata Paul v. Smti Ratna Gope* reported in 2002 (1) GLJ 421, the Gauhati High Court, held that the Sessions Judge has jurisdiction to consider an application for transfer, on his judicial side, under Section 408 Cr.P.C.

222. Here again, it should be noticed that the issue in *Jamuna Devi's* case (cited supra), was whether a case can be transferred. But the Division Bench has considered the power of the Sessions Judge, to transfer a part heard appeal also. Therefore, among the judgments cited by Mr.S.Prabhakaran, learned counsel for the petitioner, only

in two judgments in Jamuna Devi's case (cited supra) and Surendra Kumar's case (cited supra), the Gauhati High Court and the Kerala High Court, respectively, have considered the power of the Sessions Judge, under Section 408 Cr.P.C., to transfer an appeal, from one Criminal Court to another, within the same division. Judgement in Re: District and Sessions Judge v. Unknown reported in 2005 (3) MPHT 411, may not in strict senso applicable to the facts of this case. The other judgment of this Court rendered by My Esteemed Brother, Justice S.Nagamuthu in Ganesan's case (cited supra), deals with the committal of cases and the passing remark, that Section 408 Cr.P.C., empowers a Sessions Judge only to transfer any particular case from one Criminal Court to another Criminal Court in his Sessions Division, in my humble opinion, cannot be said to be precedent, as the issue of transfer was not subject matter considered. On this aspect, this Court takes support from the decisions stated supra, as to when a judgment can be treated as precedent.

223. As rightly contended by Mr.P.Govindarajan, learned Additional Public Prosecutor, the Sessions Judge, in exercise of the powers, under Section 408 of the Code of Criminal Procedure, cannot be said to have been conferred with a power to transfer "any particular case" from one Additional Sessions Judge to another, in the Sessions Division.

224. In Kumar v. State, represented by Superintendent of Police [Crl.R.C.No.740 of 2005, dated 12.02.2007], relied on by the learned counsel for the respondents, an order has been passed in C.M.P.No.7 of 2005 in S.C.No.56 of 2004, on the file of the learned First Additional Sessions Judge, Salem, filed under Section 409(2) Cr.P.C., was challenged by way of revision. In the said Miscellaneous Petition, the petitioner therein has sought for a prayer to stop the proceedings, which was dismissed. Reading of the order made in the Miscellaneous Petition, as extracted in the order made in the revision discloses that after the framing of the charges by the Fast Track Court No.I, Salem, in exercise of the powers, under Section 409 (2) Cr.P.C., the learned Principal Sessions Judge, Salem, has recalled the case and made over to the First Additional Sessions Judge, Salem. Fact discloses that subsequently about 30 prosecution witnesses have been examined by the learned First Additional Sessions Judge, Salem and after the closure of the prosecution evidence and at the time, when the case was posted for questioning the accused, under Section 313 Cr.P.C., a Miscellaneous Petition under Section 409(2) Cr.P.C., has been filed, by the accused to stop all the proceedings. On the above facts, a learned Judge of this Court, framed the

followings:

"1. Whether the petition filed under Section 409 (2) Cr.P.C, before the I Additional Sessions Court is legally maintainable?

2. Whether the prayer seeking to stop further proceedings, by way of filing the criminal miscellaneous petition is legally sustainable and supported by valid grounds?

3. Whether the revision petitioner can challenge the criminal proceedings in view of Section 462 of the Code of Criminal Procedure, after the prosecution evidence is closed and when the case is posted for questioning the accused under Section 313 Cr.P.C ?

225. Though the decision in Devarasu's case, decided by the Hon'ble Mr. Justice M.Karpagavinayagam, was pressed into service by the petitioner therein, by observing that the abovesaid decision, is not applicable to the facts of Kumar's case (cited supra), as the order of making over, has not been challenged by the petitioner therein, and holding Section 409(2) is not applicable to a part heard case and further taking note of the fact that the prosecution had already examined many witnesses, a learned Single Judge of this Court has dismissed Kumar's case. The decision relied on by Mr.Sundarsana Sampath, learned counsel for the respondents, may be applicable to the facts of this case only, to the extent that transfer cannot be ordered, after the examination of witnesses. The said principles can be applied to the present revision cases, where, after the appeals were posted for judgment, transfer petitions have been filed.

226. Insofar as the Additional Sessions Court is concerned, there cannot be any difference of opinion expressed in Surendra Kumar's case that Court of Additional Sessions Judge is also a Criminal Court, as per Chapter XXXI of the Code. With due respect to the Hon'ble Bench of the Kerala High Court, there cannot also be a dispute that the words, "if it is in the expedient for the ends of justice", used in Section 408 Cr.P.C., should be given its importance, which the legislature, has intended to confer power on the Sessions Judge, to transfer a case from one Criminal Court to another Criminal Court in his Sessions Division. But as regards the words, "Criminal Court", used in Section 408(1) Cr.P.C., this Court is of the view that the words, "Criminal Court" should be a Court, lower than the Sessions Judge.

227. The Hon'ble Division Bench of the Kerala High Court in

Surendra Kumar's case (cited supra), has interpreted the words, "lower Court" used in Section 408 Cr.P.C., does not mean a subordinate Court or inferior, to ensure that the power under Section 408 Cr.P.C., can be extended to issue directions for transfer of a case, pending before the Additional Sessions Judge.

228. While considering the powers of the Sessions Judge, in Section 408 Cr.P.C., with reference to the proviso to Section 407 Cr.P.C., and in particular to the expression, "in the expedient for the ends of Justice", the Hon'ble Division Bench of the Kerala High Court has held that the power to transfer a case from one Criminal Court to another, within the same Sessions Division, is conferred on the Sessions Judge, in the interest of the litigant public, and for the reason that it reduces the burden of the High Court. The Division Bench of the Kerala High Court also observed that as per Section 412 Cr.P.C., reasons have to be recorded, and any party aggrieved, can always take recourse to the revisional remedy, under Section 397 Cr.P.C. At this juncture, this Court deems it fit to extract Section 397 Cr.P.C., which deals with calling for records to exercise powers of revision,

"(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, - recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record. Explanation.- All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398."

229. Section 397 Cr.P.C., is very clear that the High Court or the Sessions Court, can exercise their revisional jurisdiction only in respect of any inferior Criminal Court situate within its local jurisdiction. Therefore, from the plain reading of Section 397 Cr.P.C., it is clear that the Sessions Court cannot exercise its revisional jurisdiction over an order or proceedings of the Additional Sessions Judge. If that be the statutory provision, no supervisory power can be conferred on the Sessions Judge, under Section 408

Cr.P.C., to transfer any case or appeal, after the commencement of trial or appeal, as the case may be. In such a view of the matter, the expression "expedient for the ends of justice." occurring in sub-Section (1) of Section 408, if conjointly read with the words, "lower Court", occurring in sub-Section (2) of the said Section, should be read to mean that power is conferred on the Sessions Judge only, to transfer a case in the lower Court only.

230. The other reason assigned by the Hon'ble Division Bench of Kerala High Court is that if the Sessions judge is empowered to transfer a case from one Criminal Court to another of equal jurisdiction, then it would reduce the burden of the High Court. With due respect, this Court is unable to accept the said reason, having regard to various decisions, extracted supra, as to how, a statute and Sections have to be interpreted, to maintain harmony in the construction of the structure of the whole statute.

231. As per Section 28 of the Protection of Women from Domestic Violence Act, save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973. Nothing in sub-section (1) shall prevent the court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23.

232. Whether the proceedings under Section 12 of the Act, is a case, within the meaning of Sections 406 to 409 of the Criminal Procedure Code, 1973? In the light of the definitions and decisions, stated supra, a proceeding under Section 12 of the abovesaid Act, before the learned Judicial Magistrate to adjudicate the issues, with reference to the provisions under Sections 18, 19, 20, 21, 22 and 23, may not fall under the caption, an offence, under the Penal provisions of any statute. But in the light of the definitions to the word, "trial", this Court is of the view, a proceeding instituted under the provisions of the Protection of Women from Domestic Violence Act, 2006, should be construed as a 'case' and a decisions made in a case can be appealed. At this juncture, Section 29 of the said Act, is extracted,

"There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."

223. Courts subordinate to the High Court are bound to follow the decision of that High Court, within whose territorial jurisdiction, they are located. That is the only interpretation that can be given in view of Articles 227 of the Constitution of India and Sections 397, 398 and 401 of the Code of Criminal Procedure. Decisions of the other High Courts are not binding on the Courts, within the territorial jurisdiction of this Court, when there is a decision of this Court, on the point of law. If the contention of Mr.S.Prabhakaran, learned counsel for the petitioners that the decisions of other High Courts have a binding precedent on the subordinate Courts of this High Court, cannot be accepted. To test the principle, the question is, judgment of which High Court, the subordinate Courts of this Court, would follow? Kerala or Calcutta, as both have divergent views. Constitution of India does not recognise any such proposition. The interpretation made would create chaos in the judicial system, administering justice. The very fact that the above High Courts have interpreted Section 408 Cr.P.C., in a different way, leads to the conclusion that the independence of each High Court, is respected.

224. At this juncture, reverting to the case on hand, first of all, the matter sought to be transferred from the file of the learned Additional Sessions Judge, is not a case, but an appeal, arising out of the Protection of Women from Domestic Violence Act, 2005, filed under Section 29 of the Act. There cannot be any ambiguity in Section 408 Cr.P.C., it has only mentioned about a case and not an appeal. The word "case" cannot be stretched to mean an appeal also, when there is no ambiguity or uncertainty in the provision.

225. Hon'ble Mr. Justice Subbarao in M.V.Joshi v. M.U.Shimpi reported in AIR 1961 SC 1494, said that, "when the words are clear and plain, the Court is bound to accept the expressed intention of the Legislature." I am extracting the words of the Hon'ble Judge, to the context of Section 408 Cr.P.C., in which, it is enacted for the reason that Section 408 Cr.P.C., speaks only about a 'case' and not an 'appeal'. In the present criminal revision cases, Appeal Nos.142 and 144 of 2014, pending on the file of the learned IInd Additional City Civil Court, Chennai, are sought to be transferred, by referring to Section 24 of the Code of Civil Procedure and Section 408 of the Code of Criminal Procedure.

226. It could be seen from Section 408 Cr.P.C., the word considered by the Legislature, is only to a "case", and not an "appeal", as contended by the revision petitioners. The reason, as to why, the petitioner has invoked Section 24 of the Civil Procedure Code, is obvious that as per Section 24 of the Code of Civil

Procedure Code, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court. However, in transfer applications in C.A.Nos.142 and 176 of 2014, filed in the typed of papers, under Section 408 Cr.P.C., has been referred.

227. Lord Reid in *Kirkness v. John Hudson & Co.*, reported in (1955) 2 All.E.R. 345, said that, "It would be hard to find anywhere a sentence of any length which does not contain such a word." He added further, thus, a provision is, in his judgment, is ambiguous only if it contains a word or phrase which in that particular context, which is capable of having more than one meaning.

228. In the light of the decisions and discussion, transfer applications filed by the revision petitioners, to transfer Appeal Nos.142, 144, 176 and 177 of 2014, on the file of the learned IInd Additional City Civil Court, Chennai, are not maintainable in law. There is no manifest illegality in the impugned orders, warranting intervention.

229. In the result, all the Criminal Revision Cases are dismissed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

skm

To

The Principal Sessions Judge,
Chennai

1 CC to Mrs.Sudharshana Sundar, Advocate SR.No. 17858

4 CCs to M/s.M.A.Gouthaman, Advocate SR.No. 17980

CrI.R.C.Nos.183 to 186 of 2015

VSN (CO)

PSI (06.04.2015)