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Articles:

1. Service Tax on Residential Complexes *by Chowdhury Amarnath.*
2. Complete disclosure in the description of a land benefits the purchasers and the vendors *by Roy Santanu.*

Newsletters:

1. Is our Law of the Land in Contempt with our own Democracy? *by Dutta Rajarshi.*
2. Spam – *A new bug in town by Banerjee Soumya.*
3. Adverse Possession *by David Douglas Robert.*

Service Tax on Residential Complexes

by Chowdhury Amarnath¹.

A question that is begging an answer:
Is service tax on housing complex justified?

Every middle class and upper middle class nourishes a dream to have a house of its own. He saves for a long period and then buys a house with help of a housing finance institution. Eventually, he pays stamp duty, registration charges, real estate charges, consultant fees etc., besides the price paid to the developer.

Back Ground:

Finance Act² had included services provided by commercial concern in relation to construction, repairs alteration or restoration of buildings, civil structure or part thereof which are used, occupied or engaged for the purposes of

commerce or industry. There was hardly any opposition to this proposal, as it covered only commercial and industrial structure. However the proposal contained in the Budget 2005-06 intends to cover even residential complexes. In line with the expectations, the Finance Minister has brought 9 (nine) additional Services into the service tax net. These changes will however come into effect from a date to be notified by the Government after the enactment of the Finance Bill 2005.

Finance Bill 2005:

The Finance Bill 2005, narrowed down the scope of construction services in two categories, firstly, commercial or industrial construction service³ and secondly, construction of complex⁴ by clause 88 of the Finance Bill 2005. The Budget seeks to cover construction of residential complexes having more than 12 (twelve) residential units or apartments together with common areas within the service tax net. Most of the residential complexes in the Metropolitan cities comprise more than 12 (twelve) units and also have some common area like passage, stairs, lift, etc., all such units will be covered. Also, the repair, alteration, renovation or restoration or similar services in relation to residential complexes are also sought to be covered.

Therefore for the levy, these are the conditions:

- (i) In a building or buildings, there shall be more than twelve residential units,
- (ii) The area for all such common units shall be common one,
- (iii) There shall be at least one of various facilities i.e. common park, common lift, common parking space, community hall, common water supply or common water effluent treatment system located within such premises and
- (iv) The layout shall be approved by appropriate local authority.

If all the above conditions are fulfilled, then such construction shall be taxable. However, while determining the above conditions, the residential unit for personal use shall be excluded.

Interpretations:

However, the main issue is whether a builder is liable to pay tax or not, (1) after construction of residential complex or industrial/commercial complex, and (2) after selling such complex or units. The answer would be in the negative because tax is not on sale or purchase, but on construction services given to any other person. However, the contractor who is engaged in the construction shall be liable to pay tax in both the cases, if such contractor is a commercial person. Nevertheless, if the contractor is an individual or has a proprietorship business then he shall not be liable to pay tax at all on commercial or industrial construction, but the rule is not applicable in case of residential complex.

The service tax will not be charged on the entire amount of the construction contract awarded to the contractor. Instead it will be levied as value addition on material like cement, steel, fittings and fixtures, tiles, etc., used to construct the building.

Under the Cenvat Credit Rules 2004, the service provider can take credit of excise duty paid on such inputs. But in most cases, contractors procure the materials from the market, which are not covered under duty paid on such inputs. Most of the builders do not keep the detailed accounts for the taxes they have paid on the purchase of materials or other inputs. Therefore, the service tax liability could go up manifold. To address this the government may/shall notify a system of calculating service tax on such services. Probably the same will be in the line with the system available in case of commercial and industrial constructions, which enjoy an abatement of 67% (sixty seven percent) in case of composite contract and where the gross amount charged includes the value of material cost. This abatement is subject to further condition that, no credit of input goods, capital goods and no benefit of exemption towards cost of goods have been availed.

Applicability:

This scheme of service tax is mainly applicable to group housing societies or other bodies, which use the service of outsider contractor to construct the complex and will not be applicable to small builders or construction for self use. The scheme is not applicable, if the house/complex is constructed by the owner himself with the help of outside service provider. For example, if Mr. A constructs a complex with help of labourers, services of engineers, architect, interior decorator, etc. The engineer or the architect may pay the service tax but Mr. A is not required to pay the same, even though the complex is constructed by him. This is because he is the owner of that complex himself. But, instead of constructing the complex solely by himself, if Mr. A appoints Mr. X to construct the building on his behalf, then Mr. X has to pay the service tax, provided the complex fulfils the conditions specified above. Also, Mr. X may require the services of engineer, architect, interior decorator, etc. and if service tax is paid on these services, then he can avail the same as credit on payment of services on construction as per the Cenvat Credit Rules.

On the other hand, it is to be noted that, those service providers whose aggregate value of taxable services provided during the preceding financial year is upto Rs 4,00,000 (Rupees four lac), has been exempted from service tax, or upto an aggregate of value of taxable services of Rs 4,00,000 (Rupees four lac) in a financial year is exempted.

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² Finance Act [No. 2] 2004.

³ Section 65(25b) of the Finance Act 1994.

⁴ Section 65(30a) of the Finance Act 1994 i.e., residential complex [Section 65(91a) of the Finance Act, 1994].

Conclusions:

Now coming to the question, as to whether service tax on residential complex is justified or not, in my considered view tax should be minimum on Bread, Clothing and Shelter (in our words **Roti, Kapra aur Makaam**).

End.

Complete disclosure in the description of a land benefits the purchasers and the vendors

by Roy Santanu⁵.

One of the basic elements in any real estate contract either residential or commercial is, properly and fully describing the land that is to be sold or leased. Normally the parties have a basic understanding of the land in the contract (for example, the land at 123, A.B.C. Street). However, considerable misunderstandings can crop up as regards the description of the land in the contract, typically a parcel of land, as well as confusion about whether other items of real and personal land are included or excluded from the contract. Consequently, it is important to focus early in the contract by accurately identifying and describing all of the items of land to be sold or leased, to avoid problems as the contract reaches its completion.

Firstly, any purchase agreement or lease should include a general description of the size and location of the land (for example, 2 Acre, 5 Cottah and 12 Square Feet land along with a 20,000 Square Feet office building, located at 123, A.B.C. Street) as well as a more specific legal description of the land. Since, many individuals are not proficient at reading legal descriptions of the land in the agreement, protection should be taken to make legal description accurate so that the agreement includes more or less the land that the parties intended to purchase or lease. In the same way, if the purchase price or rent, is to be determined based on the size of the land, the agreement should state the purchase price or rent in its clauses and sub-clauses and specify the rate per Bigha / Square Feet of land. By identifying the rate, the price or rent can be adjusted aptly once the actual size of the land is confirmed.

It is also vital to identify real land⁶ and personal

land⁷ included in the contract. In general, the sale or lease of land will be deemed to include any fixtures located on the land. The term fixture refers to items of personal land, often attached in some manner to the land. Fixtures also related to a specific piece of real land. Unfortunately, the line between fixtures and personal land is blurry and the definition of fixtures includes significant exceptions. Thus, listing items in the contract helps avoiding subsequent confusion and disputes.

In addition, there may be other items that are not fixtures that the parties want to include in the contract. For example, in a commercial purchase agreement the buyer often wants to get hold of the seller's interest in maintenance contracts, warranties, permits and project records related to the land, such as the name or logo for a project. In the residential framework, the focus is usually on what items of personal land are included in the contract. It is important for the buyer to specify in the purchase offer any items of personal land that he wants (for example lifts, doba, pond, maintenance equipment and chemicals, pumps or furniture). On the whole, residential purchase agreements include blanks in which, the personal land included in the contract is scheduled. Even though buyers often ignore the importance of specifying those bits and pieces.

On the contrary, a seller may want to specifically exclude certain items from the contract that it intends to hold, in order to avoid future claims from the buyer (The seller will exclude items which are fixtures included with the real land. Sellers may also want to specifically include certain personal land in a contract to avoid the costs of removal or continued ownership. At the end of the day, all parties to a real estate contract benefit when the land is fully and properly described in the agreement and its schedules. Thus, focusing on this issue from the start, can save wealth and future disappointments.

End.

Is our Law of the Land in Contempt with our own Democracy?

by Dutta Rajarshi.⁸

Note: This document is a collection of different views taken from various sources and the sources have been described in the footnotes attached to this document. I have made an effort to comment on these different views taken from the *Times of India* newspaper and from *Iyer's Contempt of Courts Act*.

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⁶ Real property is generally a term used in Anglo-American common law jurisdictions as opposed to immovable property in civil law jurisdictions. Generally speaking most real property consists, at least partially, of real estate. According to *Merriam-Webster's Dictionary of Law*, 1996, it is *Property consisting of land, buildings, crops, or other resources still attached to or within the land or improvements or fixtures permanently attached to the land or a structure on it; also an interest, benefit, right, or privilege in such property called also immovable property.*

⁷ According to *Merriam-Webster's Dictionary of Law*, 1996, *Personal property is property (as a vehicle) that is movable but not including crops or other resources still attached to land Property other than real property (a tax on the personal property of the corporation) Property belonging to a particular person.* In the common law systems personal property may also be called chattels, it is distinguished from real property, or real estate or realty.

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The contempt of court of law strikes at the root of equality, which is the bed-rock on which democracy rests. A mature democracy is one that is open – open to ideas, change and, most importantly, criticism. Take these away and what you have is not a democracy founded on equality and participation, but a closed society that consciously discriminates between people.⁹

*When the judiciary administers justice, it's one gilding cannon is; be you ever so high, you are not above the law.¹⁰ Can the judiciary then claim for itself a place that is so privileged that no criticism can touch it? Can the judges be held to be above all judgment? **No.**¹¹*

It is to be mentioned that courts are necessarily presided over by judges who, like all other men, are liable to err. It is, therefore, no offence to submit their decisions to fair, honest and reasonable criticism. An erring Judge and erring contemnors are both danger to the pristine purity of the Seating of Justice!¹² Democracy functions on the premise of checks and balance between the executives, legislator and judiciary, in excess in one domain are checked by the other. It is a judicial excess when the judiciary unilaterally decides that it will haul up in one who dares, differs with its views. Just as the judiciary intervenes to check excess by the executive and Parliament, this excess too must be checked – and if necessary by legislation.¹³

Of course, the best thing would have been for the Judges themselves to have taken a more lenient view of contempt, as is, in fact, the case in the more evolved democracies. In Norway, there is no contempt law, nor for the matter in Sweden and Denmark. Citizens in these countries can freely assail court judgments. Why, they can even speak about the judiciaries or a judge's class, gender, race and other biases, without any guild attaching to them for saying so, much less any chance that they will go to jail for the "Crime". In India, in contrast, you can be hauled up for as small an indiscretion as accusing a judge of being a bad driver. So often has contempt been evoked that we have the sorry spectacle of the "guilty" wearing their prison sentence like a trophy, as did Arundhati Roy. Truth is a complete defense against contempt and parliamentarians must enact this into law. And while they are at it, hopefully, they will also look within and curtail their own privileges – some so absurd as they shield the M.P.'s even from legitimate reportage.¹⁴

But it is erroneous to state that comment on pending proceedings lands one always in contempt proceedings, again where public interest over ways other considerations, comment in courtacious manner even in matters are indeed permissible.¹⁵

⁹ The Times of India, Kolkata, May, 2003.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *Iyer's Contempt of Courts Act*, 1995 Edition (Reprint with Supplement), Published by Law Publishers (India) Private Limited.

¹³ *ibid.*

¹⁴ *Supra* note 1.

¹⁵ *Supra* note 4.

Order! Order! Silence, the Court is in Session.

There can be a Kingdom without an Army but after confidence is in the authority of the State cannot remain if there are no court of justice. In the free world of bed, wherever responsible Governments exist, (the USA, UK, Common Wealth countries etc), this concept of special respect to sits of Justice attended with punishment in case contumacious behaviour prevails.¹⁶ An act constitutes contempt if it is calculated to interfere or has the tendency of interfering with due course of justice. The object of The Contempt of Courts Act, 1971 is to protect the public who should be vouchsafed without upholding and maintaining the glory and reputation of court on as regarding its authority fairness and impartiality. Lowering the dignity of the court or shaking the confidence of the public in it is undoubtedly reprehensible and the person doing so deserves condemnation.¹⁷

The proposed law is nothing but an attempt by the political class to take revenge on the only institution – apart from the Election Commission – which has time and again curbed our netas (Ministers) from their more egregious excesses. Whether it has been Allahabad High Court decision on Indira Gandhi or the judgment in the fodder scam case, which indicted Laloo Prasad Yadav, the judiciary has been widely seen as the country's last remaining bulwark against the many sins of omission and commission of our political leadership. Similarly, our netas (Ministers) have stoutly resisted all attempts to make them divulge their assets, and criminal connections, if any.¹⁸

In short, our law makers fancy themselves to be above the laws they make for the others. And so far, they have been held at least partially in check only by a vigilant judiciary whose autonomy is now sought to be undermined through the backdoor of amending the contempt law. The argument used is that the law as it stands infringes the rights of freedom of expression and information. Once elected into office by us, our so called representatives show nothing but contempt by their behaviour, both in and out of the House. However, through the deletion of the current contempt law, if such flagrant breach of public norms is allowed into our court rooms, it will spell the end of any hope of redress for the common citizen.¹⁹

Now, that the law to the Contempt of Court in India stands fairly crystallized by the 1971 Act, it is to be hoped that respect for courts of law, their decisions and orders will get due emphasis at the hands of the Bar and the litigant public, at large.²⁰ Judges as well as Lawyer should qualify the art of presenting firmly and politely their views without losing their stands in exhibiting contumacious behaviour. The legislator and the executive should recognize their duty to uphold the dignity and majesty of Courts of Justice. For in the ultimate analysis, the federal democracy can progress only when its streams

of justice are kept pure, unsullied and undefiled by contempt and respected by one and all.²¹

Conclusion

To conclude, I am of the opinion that a reasonable, fair criticism which has a good impact on the society is always welcome, but it should never cross the limit. The role of press and that of both print and electronic media as critics is very important. Let us walk hand-in-hand and work sincerely, dutifully and honestly for the progress and betterment of our society, fruits of which will be enjoyed by us, and only us.

End.

Spam – A new bug in town by Banerjee Soumya.²²

The Internet's explosive growth has opened new avenues for communication, learning, commerce and entertainment. Like any new medium, however, it comes with its share of problems. Since, one of the most widely used functions of the Internet is e-mail, it is estimated by one survey that by the end of 2005 the number of e-mails sent in any average day is expected to exceed 36 billion.²³

However, in recent times it has been observed that, although the purpose of the e-mail is to make communication more convenient, e-mail does not always provide the desired efficiency.²⁴

Much of the inefficiency problem with e-mail can be attributed to the increase in the number of advertisers using the Internet. The attempt of the advertiser's to capitalize on the seemingly endless pool of potential customers on the internet has created nightmares for individual consumers, business organizations and internet service providers. The nightmare comes in the form of spam.²⁵

Spam, which in a more refined way is called as Unsolicited Electronic Mail, has traditionally been viewed mainly as a nuisance, but it also constitutes a security threat. Three general categories of approaches have been used to address the spam problem: (1) informal measures, such as social norms and self regulatory efforts, (2) technical measures undertaken by individuals and organizations and (3) legal responses.

²¹ *ibid.*

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²³ Cindy.M.Rice, 'Comment: TCPA- A Justification for Prohibition of Spam?', *North Carolina Journal of Law & Technology*, Volume 2, Issue 3, Spring 2002, at <http://www.spamlaws.com/articles/>

²⁴ *ibid.*

²⁵ *Also see: CompuServe Inc. v. Cyber Promotions Inc.* (S.D. Ohio 1997) 962 F. Supp. 1015, 1018 n.1 - [The term Spam] is derived from a skit performed on the British television show *Monty Python's Flying Circus*, in which the word 'spam' is repeated to the point of absurdity in a restaurant menu.

Why Spam is a Problem

Objectionable Content: Spam is problematic for a number of reasons. Many of the objections to spam relate to its content. For example, some object to receiving commercial messages, particularly those that promote questionable ventures, illegal business schemes and marketing scams. Others are offended by messages that contain or advertise sexually explicit material. Such messages are particularly troubling when they are sent to minors. Senders of unsolicited messages rarely know the age of persons to whom the messages are sent.²⁶

Consumption of Internet Resources: Spam represents a significant proportion of all e-mail traffic, consuming massive amounts of network bandwidth, memory, storage space, and other resources. Internet users and service providers spend a great deal of time reading, deleting, filtering, and blocking spam, so Internet users pay more for Internet access as a result of spam.²⁷ Large Internet Service Providers (ISPs) such as American Online (AOL) report that anywhere from one-third to two-thirds of their email server capacity is consumed by spam.²⁸

Threat to Internet Security: Spam is both a wasteful activity and one that poses a threat to the security and reliability of Internet communications. Many spams come with hostile file attachment or embedded code which may pose security threat. An example of this would be the large scale disruptions of computer networks all over the world caused by a spammer virus called "Melissa" which attacked Microsoft's operating systems.²⁹

Legal Action Against Spamming

In the United States, there are specific anti-spamming legislations, at both Federal level and State level which can be used by ISPs to obtain relief. But, in India the recently enacted Information Technology Act does not specifically deal with spamming (Section 66& 43(e)). Therefore, the only forms of relief that subscribers and ISPs in India can find currently, are in tort theories, trademark law and criminal law.

²⁶ *Also see:* David E. Sorokin, "Technical and Legal Approaches to Unsolicited Electronic Mail" (2001) 35 U.S.F. L. REV. 325, at <http://www.sorkin.org/articles/usf.pdf>

²⁷ *ibid.*

²⁸ *Also see:* http://news.yahoo.com/news?tmpl=story&u=/cmp/20040526/tc_cmp/21100194

²⁹ *Also see:* Andrew Brown, "Micro Organism (Spamming)" (9th April, 1999) *NEW STATESMAN*, <http://www.internetwk.com/story/INW19990402S0003>

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *Supra* note 1.

¹⁹ *ibid.*

²⁰ *Supra* note 4.

Application of Tort principles to counter spam

A tort is a breach of some duty independent of a contract-giving rise to a civil cause of action and for which compensation is recoverable.³⁰ The principal aim of tort law is compensation of victims or their dependants.³¹ One of the tort principles namely "Trespass to personal property" can be and has been used to counter spam.

Trespass to chattels is committed when a person uses or intermeddles with another's personal property without authorization. The trespasser is liable to the rightful possessor of the property if the property's value or condition is impaired, or if the possessor is deprived of its use for a substantial time.³² Under this theory, the defendant becomes liable for trespass when the defendant's use or contact materially harms the quality, physical condition, or value of the possessor's chattel.

Internet Service Providers have a possessory interest in their chattel or personal property i.e. their computer equipment and software. This possessory interest is affected when a spammer, without authorization, transmits spam mails through the ISP's server. Because those spam mail clogs the server of the ISP, the server gets slowed down, and as a result the quality or value of the possessory interest gets diminished.

Case Study: The famous case of *Compuserve v. Cyber Promotions*³³ serves as an ideal example to demonstrate how ISPs can use the trespass to chattel theory to sue spammers. In *Compuserve*, an ISP brought a trespass to chattels action against *Cyber Promotions*, a company notorious for its spamming activities. It was determined that *Cyber Promotions* had intermeddled with *Compuserve's* possessory interest in its computer equipment by its unauthorized and intentional use of the ISP's equipment to send unsolicited commercial e-mail.³⁴ The court found that the harm resulting from *Cyber Promotions'* intermeddling was a decrease in the value the ISP placed on its equipment to serve its subscribers. Specifically, the court explained that '*although spamming did not physically damage the ISP's equipment, the value of the equipment was still diminished because the ISP was unable to access the resources necessary for efficient provision of services to its subscribers*'³⁵.

Furthermore, the court noted that the strain placed on plaintiff's resources resulted in a loss

³⁰ Also see: Ratanlal & Dhirajlal, *Law of Torts* (1999) page 4.

³¹ *ibid.* page 5.

³² Also see: *Am. Online Inc. v. LCGM Inc.*, 46 F. Supp. 2d at 451-52.

³³ Also see: 962 F. Supp. 1015, 1022 (S.D. Ohio 1997).

³⁴ *ibid.*

³⁵ *ibid.*

of revenue due to unsatisfied customer subscription cancellation, causing harm to *Compuserve's* business reputation and "goodwill," which is also actionable under the trespass to chattels doctrine.³⁶

The relief that subscribers and ISPs in India can find under trademark law and criminal law will be explained by the author in the next publication dated 15th June, 2005, Issue No. 3.

To be continued in next issue.

Adverse Possession

by David Douglas Robert³⁷.

Note: This document is a collection of different views taken from various sources and the sources have been described in the footnotes attached to this document. I have made an effort to comment on these different views taken from *M Krishnaswami's Law of Adverse Possession* (13th Edition, 2002) [Edited by Abha Kulshreshtha] LexisNexis Butterworths, Chapter 1.

Adverse possession relates to property as the subject, and to the character and manner of possession of the property by the person who claims right by adverse possession. These go together to constitute the concept of adverse possession. In order to be adverse, the possession must be by a person who does not acknowledge the other's rights, but denies them.³⁸ A person who bases his title on an adverse possession, must show, by clear and unequivocal evidence, that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.³⁹

Adverse possession is a relative term, though it is true that possession is prima facie adverse, mere use does not amount to adverse possession and mere possession is not adverse. There must be co-existence of the two distinct ingredients. Adverse possession means possession by a person holding the land on his own behalf or on behalf of some person other than the true owner having a right to immediate possession, provided the true owner is not under a disability or incapable of suing. An adverse possession is possession that is hostile under a claim or colour of title, actual, open, notorious, exclusive, and continuous for the required period of time, thereby giving an indefeasible right of possession or ownership to the possessor by the operation of the limitation of actions. Article 65 of the Limitation Act, 1963, provides a period of limitation of 12 years for filing a suit for possession of immovable property or interest thereon from the date on which the possession of the defendants became adverse, to the plaintiff. In the event of failure to file the suit within a period of limitation as prescribed under the Act, the right to such property is extinguished. Section 27 of the Limitation Act, 1963 provides that at the

³⁶ *ibid.*

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³⁸ *Muthiah Pillai v Vedambal* AIR (1986) Mad. 106 (DB), (1985) 98 Mad. LW 606.

³⁹ *State of Orissa v Tarinisen Mahanto* (1985) 60 Cut. LT 274 (DB).

determination of the period prescribed under the Act for filing a suit for possession of any property, the right of such person to such property shall be extinguished.⁴⁰

A person who has been in possession of an immovable property for more than 12 years continuously and openly, without any interruption and interference from the owner, though the factum of adverse possession is in his knowledge, and who denies the title of owner, would be deemed to have become owner by adverse possession under the law. Thus, the law confers ownership on such a person.⁴¹ Adverse possession ripens into a title only if the said possession is hostile, uninterrupted and without any protest by the true owners. If a person is able to hold on to his unauthorized possession during the lis and such possession is over a period of 12 years, the same cannot confer any title whatsoever.

If the adverse possession can be perfected into a title during the pendency of proceedings for restoration of possession, then in all cases where the litigation has lasted for more than 12 years, ownership shall be claimed resulting into absurd results.⁴² But the position is that a decree merely declaring the plaintiff's title to the property involved in the suit, will not interrupt the defendant's adverse possession of that property and if such possession is allowed to continue undisturbed for a period of 12 years or more from the commencement of such adverse possession, irrespective of the declaratory decree, the defendant will acquire title by prescription. The cause of action for recovery of possession is not from the date of the decree but from the date of defendant's adverse possession.⁴³

To possess adversely to the competitor animus is an essential element, and such animus and actual possession should be adequate in continuity, in publicity and to an extent to show that the instant possession is adverse to the competitor.⁴⁴ The findings on the question of adverse possession are mixed questions of law and fact. Adverse possession is a question of fact⁴⁵ and in a claim of adverse possession, the title is not disputed. What is alleged is only its extinction.⁴⁶ A plea of adverse possession, being based on facts, which have to be raised to that effect, is not necessarily a legal plea.⁴⁷

⁴⁰ *Aruba Gokalv Prabhat Bhuta* (1992) 1 Guj. LR 399, 404-5.

⁴¹ *Mannohan Service Station v Mohd Haroon Jaganwala & Ors* AIR 1994 Del. 337.

⁴² *Jagir Singh v Ram Kaur* (1992) Punj. LJ 17, 18.

⁴³ *George Mitran v Gertrude* (1990) [1] KLT 204.

⁴⁴ *Hasnuki D Desai & Co. v Bhimbhai Ranchhodji Vashi* (1985) 2 Guj. LR 644 [DB].

⁴⁵ *Goraki v Board of Revenue* (1985) All. LJ 82 [SJ].

⁴⁶ *Moin Uddin v Dy Director of Consolidation* AIR (1978) All. 241.

⁴⁷ *Yesu Sadhu Nimagre v Kundalik Babaji Nimagre* (1977) Mah. LJ 130.