No. 1593.

From

District and Sessions Judge,
Kurukshetra.

To

The Director (Academics),
Chandigarh Judicial Academy,
Sector-43-D, Chandigarh.

Dated, Kurukshetra, the 28th day of February, 2018.

Subject: **Setting up of Study Circles.**

Sir,

Kindly refer to your office letter No.Dir/CJA/2016/1247 dated 07.06.2016 on the subject cited above.

2. It is submitted that in compliance with the directions issued vide letter referred above, meeting of Study Circle comprising the Judicial Officers posted at Kurukshetra Sessions Division was held on 14.02.2018 at 4.00 p.m. in the Committee Room, District Courts, Kurukshetra on the identified topic "Procedure related to persons of unsound mind in Civil and Criminal matters ".

3. Copies of the relevant study material and the presentation prepared by Ms. Madhu Khanna Lalli, learned Additional District and Sessions Judge, Kurukshetra and Ms. Neetu Nagar, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Kurukshetra were supplied to all the Judicial Officers posted at Kurukshetra Sessions Division and discussions on the identified topic "Procedure related to persons of unsound mind in Civil and Criminal matters" were also made in the meeting.

4. Copies of the presentation made by Ms. Madhu Khanna Lalli, learned Additional District and Sessions Judge, Kurukshetra and Ms. Neetu Nagar, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Kurukshetra in the above said meeting is enclosed herewith.

5. It may be mentioned here that as per directions issued by the Chandigarh Judicial Academy, vide letter No. Dir/Acad/2017/03 dated

16.02.2017, Ms. Neetu Nagar, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Kurukshetra read briefly the contents of e-Newsletter of Chandigarh Judicial Academy, for the month of December, 2017 with focus on the salient aspects covered in aforesaid e-Newsletter.

6. It is further submitted that in the above said meeting, it was decided that next meeting of the Study Circle shall be held on 14.03.2018 at 4.00 p.m. in the Committee Room, District Courts, Kurukshetra. Ms. Gurvinder Kaur, learned Additional District and Sessions Judge, Kurukshetra and Shri Saurabh Sharma, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Kurukshetra, have been identified to prepare the presentation on the identified topic: "Sarfaesi Act". Shri Saurabh Sharma, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Kurukshetra, shall also read the contents of e-Newsletter of Chandigarh Judicial Academy, for the month of January, 2018.

This is for your kind information and necessary action, please.

(Shalini Singh Nagpal),
District and Sessions Judge,
Kurukshetra. 28/02/2018

Endorsement No. 1594-95 / Dated 28.2.2018.

Copy forwarded to the following for information and necessary action:

1. All the District and Sessions Judges, posted in the State of Haryana.
2. System Officer, District Courts, Kurukshetra with the direction to e-mail the same on the e-mail Ids of the Judicial Officers posted in Kurukshetra Sessions Division.

(Shalini Singh Nagpal),
District and Sessions Judge,
Kurukshetra. 28/02/2018

STUDY CIRCLE PRESENTATION
DISTRICT KURUKSHETRA.

TOPIC

PROCEDURE RELATED TO PERSONS OF

UNSOUND MIND IN CIVIL AND CRIMINAL

MATTERS

SUBMITTED BY:-

MS. MADHU KHANNA LALLI,
ADDITIONAL DISTRICT AND SESSIONS JUDGE,
KURUKSHETRA

MS. NEETU NAGAR
CIVIL JUDGE (JUNIOR DIVISION),
KURUKSHETRA

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Thank You

PERSONS OF UNSOUND MIND IN CIVIL MATTERS UNDER VARIOUS ACTS.

UNDER INDIAN CONTRACT ACT

According to Indian Contract Act, 1872, any person of sound mind can make a contract. Section 12 of the Act stipulates that a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

UNDER PERSONAL LAWS

Under Hindu Marriage Act, 1955, conditions in respect of mental disorders, which must be fulfilled before the marriage is solemnized under the Act, are as follows.

(i). Neither party is incapable of giving a valid consent as a consequence of unsoundness of mind.

(ii). Even if capable of giving consent, must not suffer from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children.

(iii). Must not suffer from recurrent attacks of insanity.

The expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia. The expression “psychopathic disorder” means a persistent disorder or disability of the mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment.

Marriages in contravention to the provision in respect of

mental disorders come under voidable category. Voidable marriages are those which may be annulled by a decree of nullity on the given grounds but may continue to be legal till the time it is annulled by a competent court.

According to section 13 of the said Act, divorce or judicial separation can be obtained if the person has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

The expression "incurably" of unsound mind cannot be so widely interpreted as to cover feeble minded persons or persons of dull intellect who understand the nature and consequences of the act and are therefore able to control them and their affairs, and their reaction in the normal way ***(A.I.R. 1969 Guj-48 and 78 CLT 1994 561)***. When there was sufficient evidence for the court to conclude that the slight mental disorder of the wife was not of such a kind and to such an extent that the husband could not reasonably be expected to live with her, divorce could not be granted ***(A.I.R. 1982 CAL 138)***. Each case of schizophrenia has to be considered on its own merits.

Under Special Marriage Act, 1954, the grounds for marriage, divorce and judicial separation are practically the same as those in the Hindu Marriage Act, 1955. The Special Marriage Act, 1954 is meant for any person in India and Indian nationals abroad, irrespective of the faith that the individual may profess. A marriage solemnized in any other form can be registered under this Act.

Under the prevalent Muslim Law, marriage is a type of contract. Therefore, a Muslim who is of sound mind and has attained puberty is qualified to marry. However, if the guardian of a person of unsound mind considers such a marriage to be in his interest and in the interest of society and is willing to take up all the monetary obligations of the marriage, then such a marriage can be performed. Talaq (divorce) under Muslim Law has to be for a reasonable cause and must be preceded by attempts for reconciliation by two arbiters. According to Muslim

Marriage Act, 1939, a woman married under Muslim Law is entitled to obtain a decree of divorce if her husband has been insane for a period of 2 years.

Under Christian Law, marriage is voidable, if either party was a lunatic or idiot. Christians can obtain divorce under Indian Divorce Act. 1869 (as amended in 2001) on grounds of unsoundness of mind provided: (i) it must be incurable (ii) it must be present for at least 2 years immediately preceding the petition. Divorce is not admissible on ground of mental illness under the Parsi Marriage and Divorce Act, 1936. However, divorce can be obtained if the defendant at the time of marriage was of unsound mind, provided the plaintiff was ignorant of the fact and the defendant has been of unsound mind for a period of 2 years upwards and immediately preceding the application.

TESTAMENTARY CAPACITY

Testamentary capacity is the legal status of being capable of executing a Will, a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. Section 59 of Indian Succession Act, 1925, stipulates among other things:

(i). Any person of sound mind can make a Will.

(ii). Persons, who are ordinarily insane, may make a Will during an interval while they are of sound mind.

(iii). No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, so that he does not know what he is doing. Testamentary capacity requires a person's full sense and mental sanity to have confirmed and signed the Will after understanding what his assets comprised and what he is doing by making a Will. He understands in full mental capacity to whom he is naming the assets to and how are they related to him and what repercussions it may have later.

UNDER CIVIL PROCEDURE CODE

Order 32 Rule 15 of Code of Civil Procedure, 1908 applies to persons of unsound mind and is being reproduced as follows:-

15."Rules 1 to 14 (except Rule 2A) shall so far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who though not so adjudged, are found by the Court on enquiry to be incapable by reason of any mental infirmity, of protecting their interest when suing or being sued."

A plain reading of this rule leaves no doubt that the Court has to conduct an enquiry before permitting the next friend to institute the suit. Rule 15 applies to persons of unsound mind**.** Persons of weak mind, who are incapable of protecting their interest, are also within this rule.

The procedure involves a judicial enquiry which consists, normally of two parts :

(i) questioning a lunatic by the Judge himself in open court or in chambers, in order to see whether he is really a lunatic and of unsound mind and

(ii) as the Court is generally proceeded over only by a layman to send the alleged lunatic to a Doctor for report about his mental condition, after keeping him under observation for some days." The enquiry contemplated under Order 32 Rule 15 is mandatory, to ascertain the mental state of mind of a person, before he is adjudged as unsound or mentally infirm, The word “enquiry” used in the provision means, to make an examination, to adjudge a person judicially as a lunatic or mentally infirm. “Adjudge" means, to decide or to determine judicially, which means that there must be adequate materials to come to such conclusion, that a person has to be represented by a guardian. Where a manager has been appointed of the property of a lunatic under the Lunacy Act, 1912, no person other than such manager should act as the next friend of the lunatic in a suit in respect of the lunatic's property. ***Bai Divali Versus Hira Lal (1899) ILR 23 BOM 403***. The Supreme Court has

held in case titled as ***Sharta Versus Dharampal, AIR 2003 SC 3450*** that the Court has powers to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32, Rule 15 of the Code of Civil Procedure, or Section 41 of the Lunacy Act as also for the determination of his competence as a witness. Thus, in a divorce proceedings, the Court can order medical examination either suo moto or at the instance of a party.

The inquiry as to whether a defendant by reason of his mental infirmity or incapable of protecting his own interest, can be held by the court even during pendency of suit. Where a suit was filed by a person of unsound mind and after his death his wife made a prayer before the Court that she may be permitted to sign the plaint filed by her husband, it was held by the Allahabad High Court in case titled as ***Kaneeza Khatoon Versus Shobarati, AIR 2007 ALL 28*** that when the suit itself was not maintainable, having been filed by a person of unsound mind, there cannot be any question of allowing his wife to continue that suit. It was observed that if she had any cause of action, she may file a fresh suit.

PERSONS TO BE UNSOUND MIND:-

A person may be adjudged to be unsound mind under the Lunacy Act 4 of 1912. Rule 15 is applicable to persons who are adjudged to be of unsound mind and others who are found by the court on enquiry to be incapable of protecting their interests. It does not apply to persons who are merely alleged to be insane. The Court must hold an inquiry. The provisions of Order 32 Rule 15 extends to all cases of mental infirmity, even when there is mere “weakness” of mind. The court can take appropriate steps to safeguard the interests of such a party.

IMPORTANT CASE LAWS:-

In case titled as ***Clara versus Sylvia,AIR 1985 Bom 372***, a next friend sued on behalf of person of unsound mind. Inquiry by the court as to the plaintiff status under Order 32 Rule 15 was not held at the time of filing suit, but was held subsequently. It was held that the omission to hold inquiry at the initial stage was a curable irregularity and

did not vitiate the trial. Where a person has not been so far adjudged to be a person of unsound mind and the same is in dispute for adjudication, it was held by the Madras High Court in case titled as ***G.V.Lakshminarayana versus G.V.Nagammal,2007(3)Mad LJ 473***, that by virtue of Order 32, Rule 15 of CPC, the power is vested on the court to order medical examination of a person even during the pendency of the suit.

To find out whether a person is of unsound mind or not, the court has always the right and duty to exercise the power. Mental infirmity in the context of Order 32, Rule 15 is not mental disorder, insanity or mental illness . Weakness of mind due to any reason, making a person incapable of protecting his interests, is sufficient to unfold the protective umbrella under Order 32, Rule 15. Such infirmity can also be caused by physical defects like deafness or dumbness. If such a person is before court as plaintiff or defendant the court is under an obligation to conduct an inquiry and should appoint next friend if found incapable of protecting his interests as held in case titled as ***Raveendran versus Sobhana, AIR 2008 Ker 145***. Where a suit was filed by a person of unsound mind through next friend but the plaintiff was not adjudged to be of unsound mind either under the Mental Health Act, 1987 or in any proceeding, it was held by the Punjab and Haryana High Court in case titled as ***Dilbagh Singh versus Savinder Kaur,AIR 2011 P&H 38*** that it would be obligatory on the part of the trial court to conduct an inquiry to find out as to whether the plaintiff by reason of mental infirmity, is incapable of protecting his interest as plaintiff in the suit. Failure on the part of trial court to hold necessary inquiry was held to be jurisdictional error.

The rule applies to a person who is deaf and dumb. In case titled as ***SHB Thangal versus K.T.Chirutha,AIR 1988 Ker 160***, plaint was filed by next friend in the name of a person of unsound mind. The defendant pleaded that the plaintiff was only a dumb person and not an idiot. It was held that Court cannot accept the plaint, without conducting an inquiry and raising an issue specifically and having it tried.

A decree passed against a lunatic not properly represented is not binding on him and may be set aside by suit, but cannot be challenged in execution proceedings, the reason being that a lunatic not properly represented is not a "party" to the suit within the meaning of Section 47 as held in case titled as ***Kalipada versus Hari.,(1917)ILR44 Cal 627***.

But it has been held that when a defendant is adjudged to be a person of unsound mind, without proper inquiry, and a guardian is appointed, and a decree is passed, it is open to him to apply to set that decree set aside as an exparte one under Order 9 Rule 13 as held in case titled as ***Balakrishnan versus Balachandran ,(1956) 1 Mad LJ 459***. A decree passed against a person of unsound mind, who is not represented at all in the suit, is a nullity. A decree in favour of lunatic will not be aside aside on the ground that he was not properly represented if the irregularity has caused no prejudice as held in case titled as ***Chatarbhuj versus Harnanand,AIR 1928 All 108/***

A Division Bench in ***(Rangaswami Reddi vs. Gopalaswami Reddiar) 1978 2 MLJ 564*** has held as follows:

"It is settled by a series of decisions of this Court as well as other Courts that the responsibility cast upon the Court under the provisions of the Code referred to above is very serious because a person concerned is denied his liberty to take action in his own way and some other person is imposed or foisted on him to take action purporting to be on his behalf. From one point of view if the person is not of unsound mind allowing another person to sue as a next friend on his behalf will be a total deprivation of the liberty of the person concerned to take care of his own interest and foisting on him another person to pursue a litigation which he himself might not have liked. On the other hand, if the person happens to be of unsound mind to deprive him of the opportunity of enforcing his remedies available under law by the interposition of next friend will cause serious prejudice to his interest and may even deny him and deprive of him of the means of livelihood or his source of income. Having regard to all these serious consequences which may flow in this

behalf the Court owes a duty to the person concerned to conduct an enquiry for the purpose of satisfying itself whether the person is incapable of protecting his interest when suing or being sued by reason of unsoundness of mind or mental infirmity or not."

In case titled as ***A.S.Mohammad Ibrahim Ummal vs. Shaik Mohammad Marakayar and another AIR 1949 Madras 292***, it was held that, "even when the memory has been recovered or sanity restored, the events of dark period remain dark and are never cleared up. So, the only safe course for the courts in the country is to follow rigorously the procedure prescribed in order 32 Rule 15."

In ***Balakrishnan vs Kalyani AIR 1957 Kerala 51***, at para 3, the court has held as follows:-

"To treat a person as one incapable of protecting his own interests by reason of unsoundness of mind or mental infirmity, is a very serious matter and it is in recognition of the seriousness of the matter that the legislature has insisted on a proper inquiry being made into that matter to enable the Court to come to a conclusion about the mental condition of the person concerned. The inquiry contemplated by R.15 is undoubtedly a judicial inquiry with notice to the party concerned or to any other person competent to speak on behalf of such party. It is for the Court to decide upon the manner in which and to the extent to which such inquiry has to be conducted to enable it to come to a satisfactory conclusion as to the mental condition of the party concerned.

If notice of such inquiry is given to the party, he may himself appear in Court and participate in the inquiry. If he appears or is brought before Court, his presence might enable the Court to form an impression about his mental condition. If it is deemed necessary he may be got examined by a medical expert and a certificate obtained from him as to whether he is mentally fit to protect his own interests."

In ***AIR 1968 Madras (S.Chattanatha Karayalar vs. Vaikuntarama Karayalar and another) 346***, this Court in paragraph 2 has held as follows:-

"Appointment of a guardian or next friend to a person who is

incapable of managing his affairs is a serious inroad upon the litigant's right to carry on his suit. Such wedging of a personal right in a party cannot be deduced, inferred or even taken for granted because the other parties to the list have no objection to such an appointment. The Court has a primary duty to perform in such circumstances. It has to judicially enquire whether it is necessary in the interests of justice. Mere and sole reliance upon the wishes and sentiments expressed by the other parties to the suit would neither be a guide or a safe guide. Even so, the fact that the first plaintiff is deaf and dumb cannot make a significant difference. In fact, the first plaintiff himself does not subscribe to the position that he is so incapable of managing his affairs. Notwithstanding the consensus of opinion amongst the other parties to the suit, the court cannot dispense with the judicial enquiry contemplated under Order 32, Rule 15 and render a clear finding that the person concerned, by reason of his infirmity, either physical or mental, is incapable of protecting his interests in the suit. The holding of such an enquiry is thus inescapable and consent cannot vest jurisdiction in Court to dislodge or divest the right of a litigant to conduct his suit, by superimposing a guardian or a next friend."

In case titled as ***Ramanathan Chettiar v. Somasundararn AIR 1941 Mad 505*** an application under Order XXXII, Rule 15 C. P. C. for the appointment of a guardian ad litem was filed on the ground that the defendant became mentally infirm subsequent to the institution of the suit. The trial Court, instead of holding a regular judicial enquiry contemplated under Rule 15, thought that it was sufficient to rely on the previous history of the litigation, and on the opinion it formed after looking at the defendant, and eliciting answers to some questions. The opportunity to adduce medical evidence was not given on the ground that the production of medical certificate would not advance the case any further. Pandrang Rao, J., held that there was no enquiry of the kind contemplated by law, and that the order must be deemed to be one in the irregular exercise of his jurisdiction. It was pointed out that, if the weakness of intellect is very great, and such as to make the party incapable of protecting his interests, he would come within the protection given by Order XXXII, Rule 15. The

learned Judge held that in the absence of a record of the questions and answers, it was impossible for the Court of revision to decide whether the conclusion arrived at on that particular aspect was justifiable and that the enquiry was unjudicial and unsatisfactory. I respectfully agree with this decision of the learned Judge.

In ***Mohammed Ibrahim Ummal v. Shaik Mohammed Marakayar AIR 1949 Mad 292 Satyanarayana Rao J***., held that, when the question of unsoundness of mind of the plaintiff arises not only under Order XXXII, Rule 15 but also as a substantial issue in the suit, the Court has ample jurisdiction to enquire into the question whether the plaintiff is really, by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests or not, and that it was open to the Court to seek medical assistance, and relied on Lee v. Ryder (1822) 6 Mad 294 : 56 E. R. 1103. The observations of Neville. J., in Richmond v. Richmond (1915) 111 LT 273 were quoted with approval by the learned Judge :

"With regard to the question of whether in any, or what degree, she is capable of managing her own affairs, and being bound by her own contract and by her own acts, that, in my opinion, is always a question for the Court to decide before which matter comes..... although the Court must have evidence of experts in the medical profession who can indicate the meaning of symptoms and give some general ideas of the mental deterioration which takes place in cases of this kind. I think that is a matter of importance to bear in mind because although the witnesses in the present case are the most competent men to be found to give an opinion upon questions of insanity from a medical aspect of the case, I think their evidence here has shown pretty well that they are not the best persons in the world to decide a question which depends upon the weighing of evidence and the materiality of the facts that come before them."

The learned Judge concluded that the Court was perfectly justified in seeking the assistance of experts. It was also ruled that the Court had power to compel the attendance of the plaintiff, and to examine not only

the parties and the witnesses summoned by them, but also other persons whom the Court thinks necessary, and that the Court is entitled to direct that the plaintiff should be subjected to the examination by an expert whom the Court appoints-

In case law titled as ***Dilbag Singh Vs Sawinder Kaur, 2011 (2) PLR 324*** it has been held *where a person has been adjudged to be of an unsound mind, in that event, no further enquiry is required to be held by the Civil Court. However, where a person has not been adjudged to be of unsound mind, in that event, the trial Court has to hold enquiry to find out as to whether such person by reason of any mental infirmity is incapable to protect his interest or right.*

Further, in judgment titled as *S***om Nath Vs. Tipanna Ramchandra Jannu AIR 1973 Bombay 276**, following principles and parameters of the inquiry have been set down:-

> "The above discussion clearly leads to the logical conclusion that when the plaint is being examined for the purpose of admission, if it contains a statement as required by clause (d) of Rule 1 of Order 7 that the plaintiff is a person of unsound mind and that a next friend is suing on his behalf, the court must at once hold an inquiry. It is the duty of the court to do so and it is not necessary for the next friend to make a separate application for that purpose. This inquiry should ordinarily include the calling of the plaintiff himself and questioning him in Court. If the Court entertains doubt about the mental capacity or the soundness of his mind, it is open to the Court to take further assistance in the form of medical examination and the evidence of the doctor under whose observations the plaintiff may be kept. The quantum and extent of inquiries must be left in each case to the circumstances prevailing. There may be a plaintiff who on immediate view may appear to be a person of unsound mind, and the Court may not need much evidence beyond recording of the questions put to and the answers given by the person concerned. There can be other cases which are not so clear and more evidence may be necessary. However, apart from the total extent of the evidence that might be

led, we would suggest that as a matter of strong commonsense approach, the plaintiff who is alleged to be of unsound mind should be invariably called for being questioned when the case falls under the second part of Rule 15 of Order 32. This inquiry is made "for the purpose of recording a finding by the court that the plaintiff is a person of unsound mind, or a person mentally so infirm as to be incapable of protecting his own interests. The provisions of Rule 15 of Order 32 makes it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction, or if not so adjudged, is found by the court on inquiry to be so. That is the foundation, prima facie, for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the court to give a finding and to admit the plaint and issue the process to the other side."

After considering various decisions relating to the scope and nature of enquiry to be conducted to determine unsoundness of mind or mental infirmity, the Andhra Pradesh High Court, in ***Duvvuri Rami Reddi vs. Duvvudu Papi Reddi AIR 1963 AP 160*** evolved certain principles, which are as follows :

"(1) Order XXXII, R.15 C.P.C. places persons of unsound mind or persons so adjudged in the same position as minors for the purposes of Rules 1 to 14.

(2) Order XXXII R.15 C.P.C. applies not only to a person adjudged to be of unsound mind, as under the old Code, but also to a person of weak mind.

(3) Where it is alleged that a party to a suit is of unsound mind, and the other party denies it, the Court must hold a Judicial inquiry, and come to a definite conclusion, as to whether by reason of the unsoundness of mind or mental infirmity, he is incapable of protecting his interests in the Suit.

(4) Mental infirmity may even be due to physical defects, if it

renders him incapable of receiving any communication, or of communicating his wishes or thoughts to others.

(5) Whether a person is of unsound mind or mentally infirm for the purpose of the rule and the extent of the infirmity has to be found by the Court on inquiry.

(6) Where the question of unsoundness of mind arises not only under O.XXXII, R.15 C.P.C. but is also one of the issues in the suit, the Court has ample jurisdiction to enquire into that question, and for that purpose seek medical opinion.

(7) The enquiry should consist not only of the examination of the alleged lunatic by the Judge, either in open court or chambers, and as Courts are generally presided over by lay-men, as a matter of precaution, the evidence of medical expert should be taken.

(8) Of course, the opinion, of a doctor, as is the opinion of any other expert, under Sec. 45 of the Evidence Act, is only a relevant piece of evidence.

(9) The Court may also compel the attendance of the alleged lunatic before it, and to submit himself for medical examination. If the alleged lunatic is in custody, the Court may direct the next friend or any other person having custody to produce him before the medical expert for examination.

(10) Where the precaution of judicial enquiry is not observed, the person cannot be declared lunatic, and a guardian cannot be appointed for him.

(11) When a person is` adjudged a lunatic irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an exparte decree, and have it set aside under O.IX R.13 C.P.C."

PROVISIONS IN CRIMINAL LAW AS TO PERSONS OF UNSOUND MIND.

(i). Insanity Under Indian Penal Code:

The defence of insanity is discussed in section 84 of the Indian penal code which reads as follows:-

"Act of a person of unsound mind- Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of doing the act, or that he is doing what is either wrong or contrary in law." The prosecution in discharging its burden of the plea of legal insanity has merely to prove the basic fact and rely upon the normal presumption of the law that everyone knows the law and the natural consequences of his act. Every type of insanity is not legal insanity; the cognitive faculty must be destroyed as to render one incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law; the court shall presume the absence of such insanity;the burden of proof of legal insanity is on the accused, though it is not as heavy as the prosecution; the court must consider whether the accused suffered from legal insanity at the time when the offence was committed; in reaching such a conclusion, the circumstances which preceded, attended or followed the crime are relevant consideration.

Unsoundness Of Mind:

The term unsoundness of mind has not been defined in the code. But it has been equated by the courts to mean insanity. This section only deals with incapacity of mind which is a result of 'unsoundness of mind' or 'insanity'. It is not every type of insanity which is recognized medically that is given the protection of this section. Medical insanity is different from legal insanity. The insanity should be of such a nature that it destroys the cognitive faculty of the mind, to such an extent that he is incapable of knowing the nature of his act or what he is doing is wrong or contrary to law.This section will apply even in cases of fits of insanity and lucid intervals. But it must be proved in such cases that at the time of commission of the offence, the accused was suffering from a fit of

insanity which rendered him incapable of knowing the nature of his act.

Kinds Of Insanity:

There are no hard and fast rules in respect of what are the kinds of insanity which are recognized by courts as ‘legal insanity'. The courts are influenced more by the facts of the case and the nature of crime, rather than any formal evidence as to the kind of insanity that the accused is suffering from.

Law groups insanity into two broad heads, namely,

(i). dementia naturalis i.e. individuals who are insane from birth; and

(ii). dementia adventitia or accidentialis i.e. an individual who becomes insane after birth.

(ii). INSANITY UNDER CRIMINAL PROCEDURE CODE:-

Chapter XXV of the Code of Criminal Procedure deals with the accused persons who are lunatics. Section 84 of the Indian Penal Code deals with an accused who is a lunatic at the time of the commission of the offence (Ss. 333-335 and 336). If an accused is a lunatic at the time of inquiry or trial and therefore incapable or making his defence, the Magistrate (S. 328) in the former case, and the Magistrate or the Court of Session (S. 329) in the latter, shall ascertain from evidence if the accused is a lunatic. If he is so found, then the Magistrate or the Court, even if the case is not bailable, may release him on an assurance being given that he will be cared for. If such assurance is not forthcoming, or if he cannot be enlarged on bail, he is detained in safe custody (S. 330). The Magistrate or Court may resume inquiry or trial against the accused at any time (S.331). If the accused is still insane, he can again be dealt with under S. 330 (S. 332). If, however, the accused appears to be of sound mind at the inquiry or trial but was a lunatic when he committed the offence, the inquiry or trial must be completed (S. 333). If he is found to have committed the offence, a finding is recorded accordingly, but the accused is acquitted (S. 334). In that event he is detained in safe custody and his case reported to the State Government (S. 335). Wherever a person detained under S. 330 is found to be capable of making his defence, he is tried as provided is S.

332 (S. 337). A person detained under S. 330 is found to be capable of making his defence, he is tried as provided in S. 332 (S. 337). A person detained under S. 330 or S. 335 may, when there is no danger of his doing injury to himself or to others, be either discharged (S. 338) or he may be made over to the care of a relation or friend (S. 339).

SECTION 329 CRPC

Section 329 states as follows: (1) "If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case. (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court.

Scope Of The Section:

This section deals with the application in the Magistrate Court or the Court of Session at District level. The Court is under a liability to at first place take into consideration whether the person against whom the enquiry has been held is of unsound mind or not. As per the principles of natural justice the accused who is believed to be of unsound mind has every right to be heard before the Court. The object of the enquiry under this section of Cr.P.C. is to check whether the person is capable of making his defence or not. Section 329 Criminal Procedure Code lays down the procedure in case of person of unsound mind tried before court. It provides for three stages. First, it must appear to the court that the accused was of unsound mind and incapable of making his defence. Second, the court is required to make the enquiry about unsoundness of mind of the accused and Third, the court has to record finding to the effect that the accused was of unsound mind and incapable of defending himself and stop further proceedings of the case. Section 331

provides for the trial of a person who was incapable of taking his defence but has been subsequently found capable of defending himself. Where a trial is postponed under Section 329, its resumption without recording medical evidence will be vitiated . Chapter XXV begins with Section 328 Criminal Procedure Code, which provides procedure for enquiry by a Magistrate in regard to the fact of unsoundness of mind. A Magistrate holding an enquiry, if has reason to believe that the person before him is of unsound mind and consequently incapable of making his defence, then he is enjoined upon to enquire into such unsoundness of mind and shall cause such person to be examined by Civil Surgeon of the District or such other medical officer as the State Government may direct. Such Civil Surgeon or Medical Officer is thereafter to be examined as a witness. Pending this enquiry, the Magistrate may deal with such a person in accordance with provisions of Section 330 Criminal Procedure Code, which talks of release of lunatic pending investigation or trial. If Magistrate is of the opinion that person is of unsound mind, he is to record his finding to that effect and then postpone the proceedings in the case.

Section 329 Criminal Procedure Code, on the other hand, provides for procedure in case of person of unsound mind tried before Court. This Section makes it clear that in a trial before Magistrate or Court of Sessions, if the accused appears to be of unsound mind and consequently incapable of making his defence, then the Court shall, in the first instance, try the fact of such unsoundness of mind and incapacity and if satisfied in this regard, shall record a finding to that effect and shall postpone further proceedings. This Section is similar to Section 328 Criminal Procedure Code, with this difference that latter relates to an enquiry before a Magistrate, while this Section relates to trial before Magistrate or Court of Sessions. However, both the Sections relate to unsoundness of mind at the time of inquiry or trial and not at the time of commission of offence. The distinction between incapacity at the time of doing the act charged and incapacity at the time of trial is, therefore, appreciable. Incapacity at the time of commission of offence is dealt

under Section 84 Indian Penal Code. Section 84 Indian Penal Code is a substantive provision which excuses the offence whereas Sections 328 and 329 Criminal Procedure Code affects the procedure and postpone the trial. Condition essential for applicability of the Sections is that it must appear to the Court that accused brought before it is of unsound mind. If it does so appear, then the fact has to be tried and decided first before calling upon the accused to stand trial for the offence charged. Word 'appears' imports lessor degree of probability than proof. These provisions are mandatory and ought to be strictly complied with. The issue of insanity is to be tried only where the accused appears to be incapable of making his defence due to mental infirmity. Magistrate is not to order inquiry on mere defence of insanity, he must have 'reasons to believe' that the accused is of unsound mind. A Magistrate can not act on his own opinion. He must have before him a statement of medical officer, who must be examined. Where the Court decides that the accused is of unsound mind and consequently incapable of making his defence, the trial is to be postponed. As provided in Section 330 Criminal Procedure Code, such a person may be released on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person or for his appearance when required before the Magistrate or the Court. The Court or the Magistrate is also entitled to direct the accused to be detained in safe custody in such a place and manner as it may think fit if it is of the view that the bail should not be taken or sufficient security is not given. Section 331 Criminal Procedure Code thereafter talks of resumption of enquiry or trial, when the concerned persons ceases to be of unsound mind. Section 332 Criminal Procedure Code prescribes a procedure to proceed with the trial or enquiry as the case may be. Unlike Sections 328 and 329 Criminal Procedure Code, Section 333 Criminal Procedure Code, prescribe procedure, when the accused person appears to be of sound mind at the time of enquiry and trial but the Court finds that he was incapable of knowing the nature of the act or that it was wrong or contrary to law at the time when he committed the act by reasons of unsoundness of mind.

Thus, Sections 333 Criminal Procedure Code and 334 Criminal Procedure Code regulates the procedure, when the accused person is found capable of making a defence but pleads that the act was committed at the time when he, on account of reasons of unsoundness of mind, was incapable of knowing the nature thereof. In such a case, he is required to be acquitted on the ground of unsoundness of mind. This is so provided by Section 334 Criminal Procedure Code .At the time of recording this finding, the Court is also to record a finding and state specifically whether the accused person had committed the act or not. Section 333, when read with Section 334 Criminal Procedure Code, would provide for acquittal of an accused where the Court is satisfied from the evidence given before it that the accused was, at the time of commission of crime by reasons of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law. While acquitting the accused on the ground of he being insane, the Court is to give a specific finding whether the accused had committed the act charged. A provision has also been made for detaining a person acquitted on such grounds in safe custody in the form of Section 335 Criminal Procedure Code.

The Law Commission in its 41 st report had inter-alia observed that when there is a special verdict (guilty but insane) and when there is a finding of unfitness to plead, the Court should have a discretion not to make an order for detention if it considers on medical evidence that it is safe for the public to order the immediate release of the accused. It is in this background that mandatory provisions of Section 471 Criminal Procedure Code (Old Code) were recommended to be replaced to leave some discretion to the Court. It was also observed that the primary objection of detention order under Section 471 (old Code) is rehabilitation of the accused and to prevent any trouble if he should relapse into insanity. It was felt that the accused would receive more personal attention and care from his own relatives or friends than in a lunatic asylum and where his relatives or friends were ready to look after him and to undertake that he causes no injury to himself or others, then there seems to be no reason why the accused should not be released to their custody.

This then coupled with Section 336 to 339 is the total scheme in this regard. These provisions are there to regulate the procedure in the present case. Reliance can be placed upon case law titled as ***Dimple @ Dimpu @ Gurcharan v. State of Punjab, (P&H) : Law Finder Doc Id # 178254 2009 (1) R.C.R. (Criminal) 602.***

IMPORTANT CASE LAWS:-

The Code does not contain any specific provision relating to cases where one or some only among several accused are, by reason of unsound mind, incapacitated from facing trial. Obviously, no such specific provision had been made because the relevant sections in Chapter XXV of the Code are capable of providing guidelines in such cases also. Section 329 of the Code contemplates postponement of further proceedings in the case. Section 332 contemplates a situation where the trial shall proceed. Obviously these sections can relate only to the case in so far as it relates to the accused who, by reason of unsoundness of mind, is incapable of making his defence. It cannot affect or relate to the case so far as it concerns the other accused . Any other construction would lead to very serious consequences for the accused who are not so incapacitated. The necessary implication of these provisions is that the case can proceed against the remaining accused . Any other interpretation would create untold hardship and prejudice to such accused and complications in relation to Court process. There can be no doubt that the learned Sessions Judge was correct in his decision to proceed with the trial of the case in relation to accused other than the 5th accused . Necessarily, the case against 5th accused must be given a separate number. I am supported in this view by the decision of the Bombay High Court in ***Narayaanrao Madhavrao Datarao v. The State of Maharashtra."***

In the case of ***Dr. Jaishankar v State of Himachal Pradesh, AIR 1972 SC 2267,*** the phrase “reason to believe” was interpreted and it was held that it means that belief which a reasonable person would entertain on the facts placed before him. It was also held further that the Magistrate was “duty bound” to try into the unsoundness of mind before having the case commenced. Therefore, it was held that this enquiry must

be a threshold one.

In another case of ***State of Mysore v Seetharam, AIR 1964 Mys 50***, it was held that if on an enquiry held for the unsoundness leads the Court to the belief that the person is of sound mind and in his reasonableness, was capable of making his defence at the time of his trial, he will be prosecuted under subsequent sections for the offences committed by him.

Therefore, if he is found to have a sound mind, an enquiry must be held under 332 and he should be dealt under 333 and 334. If not, the proceedings must be stayed and action must be taken under Section 330 until he reverts to sanity.

Mere certificate in regards to the insanity of the person is not enough. This means to say that the medical certificate that is prescribed for the accused by the Medical officer is not enough and the Magistrate must examine him. In the plea of insanity raised by the accused, it is the duty of the prosecution to subject the accused in the trial to medical examination immediately. This carries importance because if it is found out during the course of the investigation that the accused has been suffering from a mental disease, the prosecution is further duty bound to place before the Court all the evidence that could be available to show that the accused had committed the offence with a proper state of mind. ***[State of Maharashtra v Gobind Mahatarba Shinde, 2010 Cr LJ 3586 (3590) (Bom)***

If it appears to the Judge that the accused is incapable of making his defence, his duty is to follow the procedure in Section 329. There lies a distinction between incapacity at the time of commission of offence and at the time of trial. Where it appears to the Court that the accused is perfectly normal and that no mental disorder is apparent, there is no obligation to make any enquiry. But, if doubt arises in relation to the soundness of mind at any stage when the trial is commenced, the obvious course would be to postpone the hearing and inquire in to the matter first. Since the requirement under these Sections is mandatory and the Court is to try the fact of unsoundness of mind and capacity of the accused at the

first instance, the commencement of trial without recording medical evidence or satisfying himself or recording a finding on the material placed before him, will vitiate the trial. ***(Gurjit Singh v. State of Punjab, 1986(2) RCR(Criminal) 458 : 1986 Cri.L.J. 1505).***

The Court must have statement of medical officer and such officer must be examined as a mere written certificate of the medical officer that an accused is of unsound mind is not sufficient evidence of insanity. Such officer must be called and examined as a witness. Rather, the Court chose to prefer its personal observations recorded while it was busy attending to other cases as well. It would really sound strange. It is palpably illegal. Such a decision can not be based merely on information received out of Court from Civil Surgeon or on answer to question put to the accused. It is so held in ***Mehan Singh v. State, AIR 1954 Patna 129***. It has to be based on evidence. Thus, the Court was bound to examine the doctor as witness who had examined the petitioner and if it was still to view that the petitioner was not of unsound mind on the basis of some question and answer put to the petitioner, then these were to be placed on record. This course adopted by the Court to rely upon its own observations and failing to follow the mandatory procedure under Section 329 Criminal Procedure Code by ignoring the opinion of an expert, which is required to be taken into consideration in terms of the statutory provisions, certainly would not be legally sound mode to dispose of the plea raised before the Court. This mode adopted by the Court, as such, can not be accepted being opposed to the statutory provisions.

The words "it appears to the Magistrate or Court" occurring in this section cannot be interpreted to mean the subjective satisfaction of the Magistrate or the Court of Session. A plain reading of the section will at once go to show that whenever it comes to the notice of the Court that the accused is of unsound mind and incapable of making his defence, the Court is obligated to try the fact of such unsoundness and incapacity in the first instance. For that purpose, the Court is bound to take and consider such medical and other evidence as may be produced before it and to record its finding on such fact. It is not permissible for the Court to

hold, on the basis of submission made by the prosecution and the past conduct of the accused , that the plea of insanity is a got up story invented for the purpose of getting an adjournment of the trial by hook or by crook. ***Mayabala Dutta and others v. State (Calcutta) : Law Finder Doc Id # 549632, 1988(93) Cal. W.N. 115 .***

In case titled as **Amar Singh Versus State of Maharashtra Cri. Rivn. Appln. No. 148 of 2005. D/d. 16.9.2005.** Accused of unsound mind was released on bail under Section 330 Criminal Procedure Code. Accused becoming of sound mind .Bail cannot be cancelled under Section 439(2) Criminal Procedure Code. Order of cancellation of bail was set aside as Court has no jurisdiction to cancel the bail under Section 439(2) Criminal Procedure Code. Accused has to be released forthwith on the same terms and conditions on which he was released.

In case titled as ***Abdullah Jhat and another Versus State of J. and K. and another 1999 Cri. L.J 3034***. In case Report of Medical Officer that accused was in fit mental health has been placed on record then Such Medical Officer should be examined on oath like any other witness.In this case, plea of insanity was rejected without examining medical officer to prove its contents. Hence, Non-compliance of provisions of Section 465 resulting in serious miscarriage of justice and causing prejudice to accused. Trial was found vitiated.

The NHRC, in this conspectus, has made the following recommendations in case titled as ***Charanjit Singh Versus State and others on 4th March, 2005 (Bench of J.D. Jain, A. Sikri).***

1) Psychological or psychiatric counseling should be provided to prisoners as required in order to prevent mental illness and/or to ensure early detection. Collaborations of this purpose should be made with local psychiatric and medical institutions as will as with NGOs. (2) Central and District jails should have facilities for preliminary treatment of mental disorder. Sub-jails should take inmates with mental illness to visiting psychiatric facilities. All jails should be formally affiliated to a mental hospital. (3) Every central and district prison should have the services of a qualified psychiatrist who should be assisted by a

psychologist and a psychiatric social worker. (4) Not a single mentally ill person who is not accused with committing a crime should be kept in or sent to prison. Such people should be taken for observation to the nearest psychiatric centre, or if that is not available to the Primary Health Centre. (5) If an undertrial or a convict undergoing sentence becomes mentally ill while in prison, the State has an affirmative responsibility to the undertrial or convict. The State must provide adequate medical support. As such appropriate facilities should be provided in State-assisted hospitals for undertrials that become mentally ill in prison. The person should be placed under the observation of a psychiatrist who will diagnose treat and manage the person. In case such places are not available, the State must pay for the same medical care in a private hospital. In either case ,care must be provided until recovery of the undertrial/convict. (6) When a convict has been admitted to a hospital for psychiatric care, upon completion of the period of his prison sentence, his status in all records of the prison and hospital should be recorded as that of a free person and he should continue to receive treatment as a free person. (7) Mentally ill undertrials should be sent to the nearest prison having the services of a psychiatric and attached to a hospital, they should be hospitalized as necessary. Each such undertrial should be attended to by a psychiatrist who will send a periodic report to the Judge/Magistrate through the Superintendent of the prison regarding the condition of the individual and his fitness to stand trial. When the undertrial recovers from mental illness, the psychiatrist shall certify him as 'fit to stand trial'. (8) All those in jail with mental illness and under observation of a psychiatrist should be kept in one barrack. (9) If a mentally ill person, after standing trial following recovery from the mental illness is declared guilty of the crime, he should undergo term in the prison. Such prisoners, after recovery should not be kept in the prison hospital but should remain in the association barracks with the normal inmates. The prison psychiatrist will, however, continue to periodically examine him for reviewing his treatment and suggesting him other activities. 10) The State has a responsibility for the mental and physical health of those it imprisons. 11) Regarding those undertrials

whose trial has been suspended for even a single day due to mental illness, report should be sent to the relevant District and Sessions Judge as well as the Magistrate on a quarterly basis i.e. every three months. (12)

As soon as it comes to the notice of the trial court that an undertrial is mentally unsound and cannot understand the nature of proceedings against him, the trial court must follow the procedure under Chapter 25 CrPC and ensure strict compliance of Mantal Health Act 1987, relating to progress report of undertrial. In this regard the trial court must ask for periodic report of the progress of the undertrial as detailed by the proforma. (13) The Delhi Judicial Academy could include short-term capsule course to sensitize judicial officers likely to deal with mental health cases and to orient such officers to the Mental Health Act, 1987. These short-term courses could be institutionalized and provide to each batch of judicial officer. (14) When the trial of a mentally ill person is suspended for a period longer than 50% of the possible sentence (subject to a maximum of three years) the matter should be reported to the Registrar of the High Court of Delhi to be put up to the Hon'ble Chief Justice for information and appropriate action. (15) The State Government must strengthen legal aid services; they should extend beyond representation before magistrate when the case is taken up. Given the record of mentally ill persons not being produced for years before the court, preventive legal and is required to check the abuse of the law and dumping the mentally ill in prisons. Rejection by the family means that no one would be approached to provide help to the jailed person. Legal aid, in the person of duty counsel at police stations, can help enforce procedures and screen out the vagrant mentally ill from the criminal justice process even at the point of entry. Duty counsel in courts can ensure that no mentally ill persons is unrepresented. (16) The state must assume responsibility also for those persons who have been discharged from prison and hospital and no longer require full time care for mental illness, but are unable to take care of themselves.

CONCLUSION

We have ample legal provisions related to the persons of unsound mind in both civil as well as criminal matters as have been discussed in details already. The only need of the hour is the effective implementation of these provisions. Moreover, spreading of legal awareness among the people can actually help in better implementation of these provisions.