



# SJA NEWSLETTER

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Jammu & Kashmir State Judicial Academy

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April, 2011

## Topic of the Month

### Chief Patron

Hon'ble Mr. Justice  
F.M. Ibrahim Kalifulla  
Chief Justice (Acting)

### Judge-In-Charge

Hon'ble Mr. Justice  
Hakim Imtiyaz Hussain

### Editor

Rajeev Gupta  
I/c Director SJA

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“The concept of justice in a democratic society is not confined to the judiciary alone; it is true of all other pillars of democracy. If people lose faith in the justice dispensed to them, the entire democratic set up may crumble. It is the trust and confidence of the people in the responsiveness and ability of every organ of the state to deliver true, fearless and impartial justice, which is the foundation of democracy and also the bedrock of every civilized society. The edifice of Indian Constitutional democracy also stands on three pillars of which the guiding pillars is the judiciary. This is so, since the Indian Constitution has assigned to the judiciary the role of being the custodian of the Constitution and the watchdog of Indian Democracy, exercising power of judicial review over the acts of the legislature and the executive. The ultimate goal of the judiciary is to serve the people of the country and to uphold the letter and spirit of the Constitution and in this, the Constitution itself has defined and declared the common goals which should guide the judicial fraternity namely, “to secure to all the citizens of India, JUSTICE, social, economic and political; LIBERTY; EQUALITY and FRATERNITY.” Accordingly, the judiciary cannot be oblivious of its tremendous responsibilities and continue to play traditional roles when the demand of the time and the need of the hour is to don new robes. We are all bound to uphold the constitutional values and principles of democracy. The message is in fact clear and writ large: *if we do not save democracy, democracy will not save us*. The hopes of teeming millions are focused on us for protecting their life, liberty, property and all the rights which the Constitution of India and laws of the land grant and guarantee.

Having entered the new millennium and the new century, the judiciary, and in particulars, the Indian judiciary, is posed with certain challenges. Globalism has become the order of the day. Being parties to the international agreements and treaties like the GATT and the WTO, we have to march with the advancements in the fields of science, technology, trade and commerce if we are to have our share in international prosperity and achievements. In fact, the secret of our survival lies not in keeping away but in joining the race and competing, so as to achieve excellence as per international norms.”

[Taken from “*Quest for Judicial Excellence*” an article written by Hon'ble Mr. Justice R.C. Lahoti, Former Chief Justice, Supreme Court of India]

## ACADEMY NEWS

Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, Judge, High Court of Jammu and Kashmir took over as Acting Chief Justice of the High Court on 07-04-2011. In the capacity of being Acting Chief Justice of the High Court, His Lordship takes over as Chief Patron of the Jammu and Kashmir State Judicial Academy.



State Judicial Academy is fortunate to have His Lordship as Chief Patron of the Academy, since His Lordship has been actively involved in the activities relating to the Judicial education. His Lordship apart from being a regular Resource person for National Judicial Academy, had been the Incharge of Tamil Nadu State Judicial Academy.

His Lordship has started taking keen interest in the affairs and activities of the Academy. His Lordship visited Academy's campus at Jammu and took stock of Academy's infrastructure, academic programmes and undergoing as well as future projects concerning the development of State Judicial Academy. His Lordship appreciated the surroundings and the academic atmosphere of the Academy campus at Jammu and desired it to be developed further. His Lordship issued certain directions and guidelines for running the affairs and activities of State Judicial Academy, which shall go a long way in ensuring utilizing of Academy's potential to its optimum.

## NEWS AND VIEWS

### **Government officials cannot act in films, electronic media: Karnataka HC**

The Karnataka High Court today upheld the 2004 Government Order banning officials from acting in movies or television serials.

The State Government then headed by S.M. Krishna, now the Minister for External Affairs, in a notification, had banned IAS, IPS, KAS and other officers from acting in cinema even as a hobby.

The order was passed over a complaint filed in

a court against senior IAS officer K.Shivaram, who had acted in lead roles in several movies. Mr. Shivaram had appealed against the notification in the High Court.

A single judge bench comprising Justice Anand Reddy dismissed the petition and upheld the Govt. Order banning officers from acting.

(UNI/26-04-2011)

### **SC refuses divorce for the sake of child**

The Supreme Court decided to give a matrimonial relationship another chance to survive despite an eleven-year long separation between husband and wife, keeping in view the future of the child.

In the present case, spouses Hitesh Bhatnagar and Deepa Bhatnagar have been living separately since 2000 and they were blessed with a daughter in 1995, one year after their marriage.

In 2001, the parties filed a case for divorce by mutual consent under section 13(B) of the Hindu Marriage Act.

A Bench comprising Justices D.K. Jain and H.L. Dattu while dismissing the appeal of the husband for divorce noted, 'it is settled law that this court grant a decree of divorce only in those situations in which the court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair'.

Even if the chances are infinitesimal for the marriage to survive, it is not for this court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably'.

'We make it clear that we have not finally expressed any opinion on this issue.' Justice Dattu, writing a 17-page judgement for the bench, took note of the statement made by the wife that she was still willing to live with her husband putting away all the bitterness that has existed between the parties in order to secure the future of their minor daughter, though her husband wants the end of relationship.

The Apex Court noted 'in the light of these facts and circumstances, it would be a travesty of justice to dissolve this marriage as having broken down'. 'Though there is bitterness between the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter.' 'We conclude by quoting the great poet George Eliot 'what greater thing is there for two human souls than to feel that they are joined for life -- to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent unspeakable memories at the moment of the last party.' The Apex Court also wondered that marriages

are made in heaven but 'we are made to wonder what happens to them by the time they descend down to earth.'

(UNI/22-04-2011)

### **Sikkim State Legal Services Authority organizes five day orientation cum training for lawyers**

Sikkim State Legal Services Authority (SSLSA) organized a five-day orientation-cum-training program for lawyers at Chintan Bhawan.

The program was chaired by retired Chief Justice, High Court of Sikkim, Justice A N Ray, who is also the Chairman of Human Rights Commission, Sikkim. Also, present on the occasion were Executive Chairman, SSLSA, Justice S.P. Wangdi; Retired Judge, High court of Sikkim, Justice A.P. Subba and District, Session Judge, Special Division-I and member secretary (SSLSA), Mrs. K.C. Barphungpa.

Addressing the participants, Justice Ray stated that for attaining success in one's life, it is only through hard work, sincerity and dedication. Justice Ray informed the lawyers that entitlement that is money is temporary in the legal service profession and urged the participants not to chase money only, rather to do hard work, to do extensive research work and strengthen oneself and if that is achieved, then money will rather run after them.

Justice Ray urged the gathering to always respect all types of work that comes before them, and to respect the trainers during the training program to avail more knowledge in the legal service sector.

He urged the upcoming lawyers of the state to be diversified in this profession to avail more growth, knowledge and to move on to the metros for higher position or practice. He said the connection between Delhi's court and Sikkim's is similar as most of the North East Cases come forward in Delhi's courts so it will not be a problem for the Sikkim's lawyers to work there.

Justice Ray further requested the lawyers and students present during the program, never to refuse the brief of any case they handle in any court.

Justice Wangdi in his address said this kind of training program is first of its kind in any state across the nation, and urged the participants to concentrate maximum to avail maximum knowledge.

Adding further, Justice Wangdi stated that SSLSA has many major roles to play in the state as well as in the national level, and the main motive of conducting such training is to access justice to all. He said SSLSA would keep on conducting seminars, workshops and training program in future as well for improving the legal service in the state.

Justice A.P. Subba in his address urged the lawyers to learn, practice the profession extensively and to work dedicatedly for achieving success in life.

The main objectives of conducting the training program was for making the students and lawyers understand legal procedure, petition drafting, ethical moral values and responsibilities. The young lawyers, faculties and students of Law College, Gangtok along with designated members of Bar Association of Sikkim attended the function.

(UNI/19-04-2011)

### **SC bans employment of minors in circus shows**

The Supreme Court has banned the employment of children in circus shows.

A Bench comprising Justices Dalveer Bhandari and A.K. Patnaik directed the Centre Government to issue notification banning the employment of minor children by circus companies within two months.

The Apex Court also directed the government to carry out raids to rescue the children who were already working in circus shows.

Orders have been issued on a petition filed by an NGO called 'Bachpan Bachao Andolan'.

The owners of the circus companies will be prosecuted if they are found employing small children in circus shows.

A large number of children are employed and many of them are being virtually kept as bonded labour they were also being denied their fundamental Right to Education.

The employment of minors in any industry is a criminal offence under the law.

(UNI/18-04-2011)

## **LEGAL JOTTINGS**

### **Legal briefs from Supreme Court**

**(Case No: Civil Appeal No (s). 3072-73 of 2004 with Civil Appeal Nos. 3199 & 3200 of 2008 with No.3200 of 2008)**

**Shanta Talwar & Anr. v. Union of India & Ors.**

**Date of Decision: 05-04-2011.**

**Judge(s): Hon'ble Dr. Justice Mukundakam Sharma and Hon'ble Mr. Justice Anil R. Dave.**

Subject Index: Land Acquisition Act, 1894 - Sections 4,5-A, 6, 17(1) r/w section 17(4) - acquisition of lands on urgency basis for construction of metro station - Metro Railways Act, 1978 - provisions of whether applicable - acquisition proceedings challenged on the ground that in view of the provisions of the Metro Railways Act, which is applicable to the city of Delhi, the land for the purpose of construction of Metro Railway could and should only be acquired under the provisions of the said Act and not under the provisions of the LA Act - no express provision in the Metro Railways Act



repealing applicability of the provisions of the LA Act thus, it cannot be construed that the Metro Railways Act is a special Act, of such a nature, that with the enactment of the said Act the general law in LA Act would get obliterated and automatically repealed so far as acquisition of land for the purpose of Metro Railways - the Supreme Court found no reason to quash the notification issued under Section 4 of the LA Act so as to postpone the date of acquisition to a later period thereby allowing the appellants an opportunity of getting higher compensation - appeals dismissed.

**(Case No: Criminal Appeal No(s). 1438 of 2008)**

**Ashok @ Dangra Jaiswal v. State of M.P.**

**Date of Decision: 05-04-2011.**

**Judge(s): Hon'ble Mr. Justice Aftab Alam and Hon'ble Mr. Justice R.M. Lodha.**

Subject Index: NDPS Act, 1985 - sections 8/21 (b) - conviction and sentence under - on personal search, the smack powder alleged to have been recovered from the appellant and his 2 employees - the two independent witnesses of the seizure were declared hostile by the prosecution - from the time of the seizure till their deposit in the FSL, it is not clear where the samples were laid or were handled by how many people and in what ways. The alleged narcotic substance that was seized from the accused, including the appellant was deposited in the Malkhana about two months later and no explanation where the seized substance was kept in the meanwhile - the alleged narcotic powder seized was never produced before the trial court thus, no evidence to connect the forensic report with the substance that was seized from the possession of the appellant or the other accused - conviction orders set aside - appeal allowed - acquittal on benefit of doubt.

**(Case No: Civil Appeal No(s). 2206 of 2006)**

**Local Administration Department & Anr. v. M. Selvanayagam @ Kumaravel**

**Date of Decision: 05-04-2011.**

**Judge(s): Hon'ble Mr. Justice Aftab Alam and Hon'ble Mr. Justice R.M. Lodha.**

Subject Index: Compassionate appointment - claim for - the High Court directed the appellants to provide appointment to the respondent under the scheme of "compassionate appointments" for the death of his father while he was in service - appeal - an appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death would be directly in conflict with Articles 14 & 16 of the Constitution and hence, quite

bad and illegal - the respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made when he was a minor while another application was made on his behalf on attaining majority after 7 years and 6 months of his father's death - the Supreme Court held that the appointment cannot be said to sub-serve the basic object and purpose of the scheme the case of the respondent did not come under the scheme of compassionate appointments - impugned order of the Division Bench of the High Court set aside - appeal allowed - no costs.

**(Case No: Cr. Appeal No. 1362 of 2003)**

**Kuldeep Sharma v. State of H.P. & Anr.**

**Date of Decision: 04-04-2011.**

**Judge(s): Hon'ble Mr. Justice Harjit Singh Bedi and Hon'ble Mr. Justice Chandramauli Kr. Prasad.**

Subject Index: Indian Penal Code, 1860 - Sections 120-B, 467, 468, 471, 420 Prevention of Corruption Act - section 5(2) - conviction and sentence under - in challenge the State Government found that the appellant entered into criminal conspiracy with the co-accused and prepared false muster roll no. 146 in which names of casual labourers, who were not engaged, inserted - from the evidences of prosecution witnesses, it is evident that the muster roll was verified by the appellant. The muster roll has been exhibited which bears the signature of the appellant - at no point of time, the appellant ever complained about the mal-functioning of the Assistant-Engineer, the co-accused. Also, he never raised any objection about the alleged coercion and threat by the co-accused - sentence awarded to the appellant not interfered - appeal dismissed.

**(Case No: Civil Appeal No. 5514 of 2005)**

**Ganeshi through Lrs. & Ors. v. Ashok & Anr.**

**Date of Decision: 04-04-2011.**

**Judge(s): Hon'ble Mr. Justice Markandey Katju and Hon'ble Mrs. Justice Gyan Sudha Misra.**

Subject Index: Alienation of the immovable property - suit filed - the trial court held that the suit land was ancestral property of Ganeshi qua the plaintiffs. Defendant No.1 was governed by the custom in the matter of alienation, and under that custom ordinarily ancestral immovable property is inalienable except for legal necessity or with the consent of the male lineal descendants. However, the first appellate court held that the land was not ancestral property of Ganeshi because there was no proof that the land had descended from the father of Ganeshi - the High Court set aside the judgment of the



first appellate court and restored the judgment of the trial court - hence, the appeal - the Supreme Court opined that a family settlement is not a transfer of property - impugned judgment and order of the High court set aside and that of the first appellate court restored - appeal allowed - no costs.

**(Case No: Civil Appeal 2844 of 2011)**

**Revanasiddappa & Anr. v. Mallikarjun**

**Date of Decision: 31-03-2011.**

**Judge(s): Hon'ble Mr. Justice G.S. Singhvi and Hon'ble Mr. Justice Ashok Kumar Ganguly.**

Subject Index: Hindu Marriage Act, 1955 - Section 16(3) - legitimacy of children of void and voidable marriage - partition and separate possession suit filed for - the trial Court held that the properties were not self-acquired but ancestral properties and that the third plaintiff was the legally wedded wife of the first defendant - therefore, the plaintiffs and the first defendant were held entitled to 1/4th share each in all the suit properties - the High Court held that the first plaintiff, second plaintiff and the first defendant would be entitled to 1/3rd share each in the suit properties, which were coparcenary properties, and the claim of the third plaintiff and the second, third and fourth defendants in the suit property was rejected - appeal - whether illegitimate children are entitled to a share in the coparcenary property or whether their share is limited only to the self-acquired property of their parents under Section 16(3) - Section 16(3) as amended, does not impose any restriction on the property right of children born from void marriages except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral - matter referred for reconsideration by a larger Bench.

**(Case No: Civil Appeal 2795-2796 of 2011)**

**K.K. Velusamy v. N. Palanisamy**

**Date of Decision: 30-03-2011.**

**Judge(s): Hon'ble Mr. Justice R.V. Raveendran and Hon'ble Mr. Justice A.K. Patnaik.**

Subject Index: Civil Procedure Code, 1908 - Section 151, Order 18 Rule 17 - two applications filed under - to re-open the evidence - dismissed suit for specific performance of the agreement of sale - the trial court held that as the evidence of both parties was concluded and the arguments had also been heard in part, the applications were intended only to delay the matter, therefore, dismissed the application. The High Court affirmed the said orders - appeals - whether the applications for reopening/recalling ought to have been allowed - no - specific provision in the Code

enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination, thus, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications - neither the trial court nor the High court considered the question whether it was a fit case for exercise of discretion under section 151 or Order 18 Rule 17 of the Code. Both the courts mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings - impugned orders dismissing the application under Order 18 Rule 17 affirmed while dismissal of application under section 151 set aside - appeals partly allowed.

**(Case No: Civil Appeal No. 2691 of 2011)**

**Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar & Anr.**

**Date of Decision: 29-03-2011.**

**Judge(s): Hon'ble Mr. Justice R.V. Raveendran and Hon'ble Mr. Justice A.K. Patnaik.**

Subject Index: Arbitration and Conciliation Act, 1996 - Section 11 - petition under - for appointment of an Arbitrator - allowed - whether the appellant could be made a party to the arbitration, even though the appellant was not a party to the arbitration agreement contained in clause (7) of the construction agreement between the first respondent and the developer - held - no - if a person who is not a party to the arbitration agreement is impleaded as a party to the petition under section 11 of the Act, the court should either delete such party from the array of parties, or when appointing an Arbitrator make it clear that the Arbitrator is appointed only to decide the disputes between the parties to the arbitration agreement. The existence of an arbitration agreement in a contract between appellant and first respondent, will not enable the first respondent to implead the appellant as a party to arbitration in regard to his disputes with the developer.

**Legal briefs from High Court of J&K**

**(Case No. LPA(OW) 04 of 2010)**

**Onkar Singh & Ors. v. State of J&K & Ors.**

**Date of Judgment: 10-02-2011**

**Judge(s): Hon'ble Dr. Justice Aftab H. Saikia,**

### **Hon'ble Mr. Justice Mansoor Ahmad Mir**

Subject Index : J&K State Evacuee (Administration of Property ) Act, Svt. 2006 - J&K Tenancy Act, 1923 A.D., Agrarian Reforms Act, 1976 A.D. - Tenant - Protected Tenant - Mutation of inheritance - Respondent No. 6 being sole surviving member of family of Shukardin, who alongwith other members of family got killed in holocaust which followed partition, claimed inheritance of certain land held by her father Shukardin in Tehsil Ramnagar - Mutation of inheritance attested in her favour on 7-05-1978, which was confirmed by District Collector (Deputy Commissioner) Udhampur, Divisional Commissioner Jammu and finally by Division Bench of the High Court on 12-02-1981 - Appellants though non-State subjects were in occupation of land - on the application of Respondent No. 6, District Assistant Custodian, Udhampur on 14-06-1983 directed restoration of land in favour of Respondent No. 6 and deleting the land from Evacuee Property - further challenge befor higher forums - after adjudication of different forums in favour of Respondent No. 6, matter came up before High Court in writ petition -Single Bench of Hon'ble High Court vide Order dated 1-01-2010 dismissed the writ petition - upheld the orders of forums below which were in favour of Respondent No. 6 further Appeal - contended before Hon'ble Division Bench by appellants that they were in occupation of land right since 1948 and acquired the status of protected tenants, they could not be evicted unless by following procedure prescribed under Section 49 of Tenancy Act for resumption of land , thus basic order of District Assistant Custodian directing restoration of land in favour of Respondent No. 6 was illegal - held by Hon'ble Division Bench - Appellant do not qualify the definition of 'Protected Tenant' as they do not fall within the definition of 'Tenant' in terms of Tenancy Act, they were trespassers only - Respondent No. 6 was rightly held to be entitled to land in question on the basis of Mutation of Inheritance attested in her favour in 1978, being soled survivor of last title holder of the land - authorities directed to restore possession of land in favour of Respondent No. 6 within 90 days from the date of order - LPA dismissed.

### **(Case No. LPA(SW) 442 of 2002)**

**Union of India & Ors. v. Jeet Singh**

**Date of Judgment : 29-03-2011**

**Judge(s): Hon'ble Mr. Justice F.M. Ibrahim Kalifulla and Hon'ble Mr. Justice Mohammad Yaqoob Mir**

Subject Index - Service law - B.S.F Act - Section 11(R) Section 11(2) - B.S.F. Rules - Rules 14 - A, 20, 21, 22, 177 - overstay of leave - Driver

constable in Border Security Force, proceeded on leave but overstayed with effect from 26-05-1994 without any permission - informed on 29-06-1994 to report back to duty - did not turn back - on 8th August, 1994 show cause notice served - directed to show cause within 30 days against proposed penalty of dismissal from service - Application moved on 22-08-1994 for leave - on 26-08-1994 respondent directed to report back for duty within 15 days - not reported back - ordered on 19-09-1994 to be dismissed from service - dismissal challenged in writ petition - impugned order set aside, respondent directed to be reinstated with consequential benefits, however, authorities were free to hold fresh enquiry - challenged in appeal - contended on behalf of respondent - procedure envisaged under Rules 20 and 21 of B.S.F. Rules not followed - appellants contended that those rules would not apply to respondent, Rule 22 applies which has been fully complied while holding enquiry - held - Rule 14-A of B.S.F. Act clearly indicates that constable does not fall wihtin the rank of officer as such Rule 22 and not Rules 20, 21 would apply -Respondent was given fair opportunity to defend himself in enquiry, of which show cause notice was sent to respondent - respondent neither appeared in enquiry not chose to reply to show cause notice - requirement of Rule 22 and of principles of natural justice were fully met - order of dismissal was perfectly legal - appeal allowed - Judgment of Single Bench set aside - Order of dismissal upheld.

### **(Case No. LPA 86 of 2008)**

**Naseer Ahmad v. State and Ors.**

**Date of Judgment : 01-04-2011**

**Judge(s): Hon'ble Mr. Justice H. Imtiaz Hussain and Hon'ble Mr. Justice Muzaffar Hussain Attar**

Subject Index : Service Law - Removal from Service - J&K Police Manual, rule 187 - Appellant was appointed as constable on compassionate grounds - directed to undergo basic recruitment training at PTC, Manigam - while on training appellant absented himself with effect from 25-05-2001 - reverted back to District Police - SSP of District Kupwara vide order dated 30-07-2001 removed appellant from service as he would not prove to be good police official - statutory appeal filed - dismissed by D.I.G holding that it amounted to misconduct - orders of SSP and DIG challenged in writ petition - petition dismissed holding that since appellant was on probation, no enquiry was needed - appeal - held - On consideration of the facts of the present case and going through the case law cited above, we find authorities relied upon by the learned Single Judge are distinguishable and cannot be made applicable to the facts of the present case. Another

important issue, which arises for determination in the case is regarding the nature of the order, impugned dated 30.7.2001. Under Rule 187, a police official who is on probation can be discharged from service if the prescribed authority finds that such police official is not likely to prove a good police official. Thus the rule empowers the prescribed authority to discharge an employee who is on probation. Prescribed authority is under this rule vested with the power only to discharge a police official, he cannot remove him/her from service. For a penalty of removal provisions of Rule 395 of the Police Manual are required to be complied with and where no such formalities are complied with, the order of removal cannot stand. In the present case, we find the respondents have instead of discharging the appellant, removed him from service and that too without any enquiry - LPA and writ petition allowed - order impugned set aside.

**(Case No. Cr. Rev. 57 of 2006)**  
**Sushant Bakshi v. Manju Ghosh**  
**Date of Judgment : 30-03-2011**

**Judge(s): Hon'ble Mr. Justice J.P. Singh**

Subject Index : Negotiable Instruments Act, Section 138, 142 - Dishonour of Cheque - Delayed filing of complaint - Condonation of delay - petitioner issued a cheque in discharge of certain liability to respondent - dishonoured - notice issued to make payment of cheque amount - not paid and no reply to notice - complaint filed after a month along with application for condonation of delay - CJM Jammu issued process after condoning delay in filing complaint - revision against - dismissed by Ist Additional Sessions Judge, Jammu holding petitioner herein was not entitled to be heard before issuance of process - orders of CJM and Ist Additional Sessions Judge challenged - contended that petitioner was not heard before the delay was condoned and process was issued - observed by the Hon'ble Court - the issue as to whether or not there was sufficient cause for not making the complaint within the prescribed period of limitation, is a matter essentially between the complainant and the court and if satisfied, on whatsoever material the complainant may place before the court as to the existence of sufficient cause contemplated by the proviso, the court may take cognizance of the complaint and thereafter deciding on merits, decide on the issuance or otherwise of process against the accused - the position in law being settled that an accused is not entitled to hearing before issuance of process, no opportunity of hearing to him at a stage prior thereto may be conceived of. Yet another reason which justifies the above view is that an accused does not come into picture unless the process was issued against him and even after the issuance of

process, he has no right to question the legality or otherwise of the process issued by the Court, before the Magistrate, unless the case reaches the stage, where he would be required to enter upon the defence. It is at this stage that he would be at liberty to take all such defences, as may be available to him to defeat his prosecution and punishment - held - the accused is not entitled to hearing before a court may consider taking cognizance of a time barred complaint for commission of offence punishable under section 138 of the Negotiable Instruments Act, 1881.

**(Case No. CIMA 546 and Cross Appeal 04 of 2009)**

**Bajaj Allianz General Insurance Co. Ltd. v. Anshul Verma & Ors.**

**Date of Judgment : 25-03-2011**

**Judge(s): Hon'ble Mr. Justice Hasnain Massodi**

Subject Index : Motor Vehicles Act - Section 166 - Accident claim - Petitioner aged 8 yrs. suffered accident involving motor vehicle and received multiple injuries including crushing of left foot - after trial, Claim Tribunal awarded Rs 90,000/- for loss of income, Rs 80,000/- for pain and suffering, Rs 80,000/- on account of loss of amenities of life, Rs 70,000/- on account of medical expenses, Rs 20,000/- for special diet and Rs 10,000/- for transportation charges, totaling Rs 3.50 lacs with interest @ 7.5% P.A. - Appeal by Insurance Company and Cross Appeal by the petitioner - contended by Insurance company that award was huge, imaginary and without any basis as also interest awarded was also on higher side - contended by petitioner that Tribunal did not appreciate the assessment of compensation as projected and also did not award for future medical treatment - held - evidence rightly appreciated by the Tribunal, however, as against transportation charges Rs 5,000/- claimed by the petitioner, Rs 10,000/- awarded which can not be done being a case of actual expenditure made - assessment projected in the petition under different heads was appreciated rightly by the Tribunal and right amount awarded under the head 'loss of amenities of life' - however, 50 per cent of amount awarded under 'medical expenses' added as 'future medical expenses - appeal and cross appeal partly allowed.

## CASE COMMENTS

**Kolla Veera Raghav Rao**

**Versus**

**Gorantla Venkateshwara Rao & Anr.**

**2011 Cri.L.J. 1094**

Hon'ble Supreme Court, in the above noted case has explained the principle of 'Double



Jeopardy' in the context of provisions of Article 20(1) of Constitution of India and Section 300(1) of Code of Criminal Procedure (corresponding to Section 403(1) of the J&K Code of Criminal Procedure).

It has been observed by the Hon'ble Apex Court that though both the provisions are based on the principle of 'Double Jeopardy', however, Section 300(1) of Cr.P.C. is wider in scope as against Article 20(1) of the Constitution. Whereas Article 20(1) provides for prohibition of 'prosecution and punishment for the same offence more than once', Section 300(1) provides for prohibition of 'trial for the same offence, as also on the same facts which may constitute distinct offence, if the person has been tried earlier and convicted or acquitted'.

This means that a person, who has already faced trial and has either been convicted or acquitted, can neither be tried again for the same offence, nor can be tried for distinct offence on the same facts.

In the present case a person, who was convicted under Section 138 Negotiable Instruments Act, was sought to be prosecuted for offence against Section 420 Indian Penal Code, on the same facts. Hon'ble Supreme Court held that Section 300(1) of Code of Criminal Procedure prohibits subsequent trial as such second complaint was not maintainable.

**Hari Ram v. Jyoti Prasad and Anr.**  
**AIR 2011 Supreme Court 952**

Hon'ble Supreme Court, in the above titled judgment, has laid down two principles of law, in the cases involving encroachment of public street. The principles of law are as under:

1. Encroachment of public street is a continuing wrong, as such cause of action is created as long as injury continues. Suit for removal of such encroachment can be filed at any time so long as the wrongful act of encroachment continues.

2. Suit for removal of encroachment filed by affected person individually is maintainable without impleading other affected persons. There is no need to file suit in representative capacity in terms of Order 1 Rule 8 CPC.

Observation of Hon'ble Supreme Court are quoted as under :-

"Any act of encroachment is wrong committed by the doer. Such an encroachment when made to a public property like an encroachment to public road would be a graver wrong, as such, wrong prejudicially affects a number of people and, therefore, is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source

of wrong and injury, cause of action is created as long as the doer is responsible for causing such injury..... Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order 1 Rule 8 of the CPC".

**Bashir Ahmad Bashir v. State of J&K & Ors.**  
**OWP No. 369/2011**

In an order passed in the above noted case, Hon'ble High Court of Jammu & Kashmir noted that some Court while referring citations, report head-notes of the Reporters only. Hon'ble Court has reminded the Subordinate Courts that this practice of reporting head-notes only is not proper way to cite the authority and rely on it.

State Judicial Academy has been asked to organize a programme for the Judicial Officers, so that the officers are better equipped to refer to and cite judgments appropriately. Academy shall shortly organize a comprehensive programme on the subject both at Jammu and Srinagar.

**LEGAL MIND - TEASER**

Problem posed for consideration of Judicial Officer is as under :-

"During trial in a civil suit, statement of plaintiff is postponed with the leave of the Court because of serious ailment of plaintiff. Statements of plaintiff's witnesses are recorded. Plaintiff could not recover in time and was not in a position to make his deposition even on commission. Evidence of defendant is recorded. Moreover, after the completion of defendant's evidence, plaintiff was not able to record his statement and is certified by a doctor to be incapable of making statement. Court proceeds to hear arguments in the case. A question arises before the Court as to the effect of non-examination of plaintiff as witness for himself. It is argued on behalf of defendant that the suit should fail merely on the basis of non-examination of plaintiff, which amounts to withholding of best available evidence."

Suggest the procedure to be followed in the given situation and the options which may be exercised by the Court.

*"The great tides of and currents which engulf the rest of men, do not turn aside in their course, and pass judges by. We like to figure to ourselves the processes of justice as coldly objective and impersonal. The law, conceived of as the real existence, dwelling apart and alone, speaks, through the voices of priests and ministers, the words which they have no choice except to utter. That is an idea of objective truth toward which every system of jurisprudence tends..... It has a lofty sound; it is well and finally said; but it can never be more than partly true."*

-Justice Benjamin N. Cardozo in 'The Nature of the Judicial Process'