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Random Thoughts

"Judicial decisions must in principle be reasoned and the quality of a judicial decision depends principally on the quality of its reasoning. Proper reasoning is an imperative necessity which should not be sacrificed for expediency. The statement of reason not only makes the decision easier for the parties to understand and many a times such decisions would be accepted with respect. The requirement of providing reasons obliges the judge to respond to the parties' submissions and to specify the points that justify the decision and make it lawful and it enables the society to understand the functioning of the judicial system and it also enhances the faith and confidence of the people in the judicial system."

"Judicial determination has to be seen as an outcome of a reasoned process of adjudication initiated and documented by a party based mainly on events which happened in the past. Courts' clear reasoning and analysis are basic requirements in a judicial determination when parties demand it so that they can administer justice justly and correctly, in relation to the findings on law and facts. Judicial decision must be perceived by the parties and by the society at large, as being the result of a correct and proper application of legal rules, proper evaluation of the evidence adduced and application of legal procedure. The parties should be convinced that their case has been properly considered and decided."

K.S. Panicker Radhakrishnan, J.
in State of Uttaranchal* v. *Sunil Kumar Vaish,
(2011) 8 SCC 670, para 18 & 19

"The jural reach and plural range of the judicial process to remove injustice in a given society is as sure index of the versatile genius of law-in-action as a delivery system of social justice. By this standard, our constitutional order versus vests in the summit court of jurisdiction to do justice, at once omnipresent and omnipotent but controlled and guided by that refined yet flexible censor called judicial discretion."

V.R. Krishna Iyer, J.
in P.S.R. Sadhanantham* v. *Arunachalam,
(1980) 3 SCC 141, para 6

From Editor's Desk

'Judge' has always been in the centre stage in the Judicial Processes and focus has always been on capacity building and enhancement of excellence from the perspective of a Judge. However, a Judge though the most important component of Judicial dispensation system, there are other considerably important components of the system. Court Staff and the infrastructure are essential to support the justice delivery system. They act as life limbs in the process of dispensation of Justice. Enhancement of excellence of the court processes from the perspective of capacity building of court staff and that of courts' infrastructure is also of immense importance for overall capacity building of the Judicial Institutions.

In an effort to ensure the capacity building of Judicial Institutions in the state of J&K, the Hon'ble High Court under the able and dynamic leadership of Hon'ble the Chief Justice Ms. Gita Mittal & Hon'ble Mr. Justice Rajesh Bindal, Chairman, e-Courts Committee has taken various initiatives that would act as catalyst in enhancing excellence of Court processes. At the initiative of Hon'ble the Chief Justice and the e-Courts Committee, special training programmes for the Court Staff & Personal Staff has been taken up by the Hon'ble High Court. Use of Computers & ICT in the court processes has been in the focus in these training programmes. State Judicial Academy has collaborated with the Hon'ble High Court in organizing these training programmes. Resource Persons arranged by the e-Courts Committee have started series of such programmes, aimed at ensuring minimum use of manual processes and maximizing the use of Computers & ICT. Time available to the Court Staff & Personal Staff in the vacation has been used for optimum benefit by their participation in these training programmes.

Many of the members of High Court Staff also attended training programme specially organized for the benefit of High Court of J&K at Chandigarh Judicial Academy. This was arranged on the initiative of Hon'ble Mr. Justice Rajesh Bindal, Chairman, e-Courts Committee. Coincidentally Hon'ble Mr. Justice Bindal happened to be chairing e-Courts Committee in the High Courts of Punjab & Haryana before his Lordship's transfer to the High Court of J&K. Undoubtedly, the High Court of Punjab & Haryana is marching ahead in the use of Computers & ICT in court processes and there are few areas where it is leading by leaps and bounds. The officials & court staff from the High Court of J&K received training from the experts in Computer & ICT who are at helms of affairs in High Court of Punjab & Haryana. The interactions and deliberations held at Chandigarh Judicial Academy has exposed the officials & court staff from the High Court of J&K to the new horizons and also have sensitized them to the urgent need to switch from manual processes to Computer & ICT based automated court processes.

Use of Computer & ICT in the court processes shall ensure better Court & Docket management. Manual processes already in vogue consume lot of time and energy of the persons working in different sections of the court registry, which puts lot of pressure on the available human resources. Use of Computer & ICT ensures ease of doing the business and optimizing the potential of available human resources. Excellence of Judicial Institutions shall be

ensured by maximizing the capacity and the potential of the human resources and in turn of the court processes. It is expected that in a very short time Judicial Institutions in the state of J&K shall also be counted among the front runners in excellence based on use of Computer & ICT.

It is needed that all the stakeholders in the dispensation of Justice, including Judges and the court staff working at all levels, understand the importance of enhancing excellence by maximizing the use of Computers & ICT in court processes. So for as District Courts are concerned, Case Information System (CIS version 3.0) is already in place and it is required that every person working in the court is exposed to working of CIS so as to get optimum potential of the court processes. In the near future the process serving, which is essential component of Judicial Processes, shall be brought to the main stream of e-Governance. Web and App-based process serving has already started in various High Court jurisdictions, Delhi being the pioneer. Taking benefit of the Apps developed by the e-Courts and the experience of the High Court jurisdictions using these Apps, effective implementation of the same mechanism in the High Court jurisdiction of this State would also be ensured.

LEGAL JOTTINGS

Criminal

Criminal Appeal No. 1550 of 2018
M. Arjunan v. State represented by its Inspector of Police
Date of Decision : 4-12-2018

Hon'ble Supreme Court held that the act of the accused insulting the deceased, by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/ abetment to commit suicide are satisfied, accused cannot be convicted under section 306 RPC.

Criminal Appeal No. 1443 of 2018
Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra & Ors.
Date of Decision : 22-11-2018

Hon'ble Supreme Court has ruled that there is a clear distinction between rape and consensual sex. The court in such cases must very carefully examine whether the complainant had actually wanted to marry the way? or had *mala fide* motives, and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix and to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not on account of the misconception created by the accused, or where an accused on account of circumstances, which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do that. The acknowledged consensual physical relationship between the parties would not constitute an offence under section 376 of the IPC.

Criminal Appeal No. 1560 of 2013
Farida Begum v. State of Uttrakhand
Date of Decision : 4-12-2018

Hon'ble Supreme Court *suo moto* considered the case of one of the accused who had not presented the appeal, while hearing appeal filed by other co-accused. It has been held as under:-

"At this stage, it is also required to be noted that so far as the original Accused No.

4 is concerned, he has not preferred any appeal against his conviction and sentence. However, there may be number of reasons for that, including the financial constraint. However, we cannot loose sight of the fact that his case is similar to that of the original Accused No. 5 and even original Accused Nos. 6 and 7. Therefore, we take *suo moto* cognizance and we are of the opinion that the original Accused No. 4 is also entitled to acquittal by giving him benefit of doubt, as the case of the original Accused No. 4 is similar to that of original Accused No. 5 and even the original Accused Nos. 6 and 7.''

Hon'ble Supreme Court reiterated the law that the benefit of contradictions cannot be given to the accused, unless those are such material contradictions as may destroy the case of the prosecution.

Criminal Appeal No. 576 of 2010
Ram Lal v. State of Himachal Pradesh
Date of Decision : 3-10-2018

Hon'ble Supreme Court held that extra-judicial confession is a weak piece of evidence, and the court must ensure that the same inspires confidence, and is corroborated by the prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and confidence inspiring.

Hon'ble Supreme Court further observed as under:

"It is well settled that conviction can be based on a voluntary confession but the rule of prudence requires that wherever possible, it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated. In *Madan Gopal Kakkad* v. *Naval Dubey and Another* (1992) 3 SCC 204, this court after referring to *Piara Singh and Others* v. *State of Punjab* (1977) 4 SCC 452 held that the law does not require that the evidence of an extrajudicial confession issued in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated.''

Criminal Appeal No. 1980 of 2008
Ashish Jain v. Makrand Singh & Ors.
Date of Decision : 4-01-2019

Hon'ble Supreme Court held that the confessions which led to the recovery of incriminating material were not voluntary, but caused by inducement, pressure, or coercion, and the confession which is involuntary, is hit by Article 20(3) of the Constitution, and is inadmissible. There is an embargo on self-incriminating evidence. But if it leads to the recovery of material objects in relation to crime, it is most often taken to hold evidentiary value as per the circumstances of each case. However, if such a statement is made under undue pressure and compulsion from the investigating officer, the evidentiary value of such a statement, leading to recovery is nullified.

With regard to relationship between Section 27 of Evidence Act and Article 20 (3) of the Constitution, the judgments in *Selvi* v. *State of Karnataka,* (2010) 7 SCC 263 as also *Kathi Kalu Oghad* v. *State of Maharashtra*, AIR 1961 SC 1808 were also relied upon.

While noting the observations made by it in *Mohammad Aman* v. *State of Rajasthan,* (1997) 10 SCC 44, the Hon'ble Supreme Court also held, in reference to fingerprints of the accused under sections 4 and 5 Identification of Prisoners Act, 1920, that there cannot be any hard and fast rule that there should be a magisterial order for lifting the fingerprints in every case. It cannot be held that fingerprint evidence was illegally obtained, merely due to the absence of a magisterial order authorizing the same (see *para* 27). Though it is imminently desirable that the fingerprints are taken under the order of Magistrate, yet that does not mean that absence of such an order would make the process of such lifting as illegal.

Criminal Appeal Nos. 45-46 of 2019
Santosh Maruti Mane v. State of Maharashta
Date of Decision : 09-01-2019

While noting that the High Court had

specifically dealt with and analyzed the subject matter under the following heads: (i) conduct of the appellant a day prior to the incident; (ii) conduct of the appellant immediately prior to the incident; (iii) conduct of the appellant during the incident; (iv) evidence to show that the appellant was aware of what he was doing during the incident; and (v) defence evidence of the appellant, Hon'ble Supreme Court held that it did not find any error in the approach adopted by the High Court in discussing the aforesaid aspects. As a result, the conviction of the appellant was maintained.

However, the death sentence of appellant was commuted into life imprisonment in view of the possibility of his reformation, with the observation that he had already become a reformed person.

Criminal Appeal No. 170 of 2009
Bharat Sanchar Nigam Limited v. Suryanarayanan & Anr.
Date of Decision : 13-12-2019

It is held that the exercise of discretion in release of property, under section 452 CrPC, is inherently judicial function. The manner of disposal is not to be chosen arbitrarily, but judicially in accordance with the sound principles founded on reason and justice, keeping in view the nature of property.

Hon'ble Supreme Court observed as under:

"We are unable to subscribe to the submission which has been urged on behalf of the first respondent that when it makes an order under Section 452, the court is merely required to determine the source from which the property was seized. Indeed, if this construction were to be placed, it would mean that the right of a person who claims title to the property would be subordinate to the claim of a person from whose possession the property was seized. A claim of title to the goods which have been seized is a relevant consideration while passing an order under Section 452. Where there are conflicting claims of entitlement to the property, the Magistrate may deal with them or, where it is found that the rival claims need to be resolved after an evidentiary trial, relegate the conflicting claimants to prove their rights and entitlements before a competent court. Indeed this is the basis of the decision of this Court in Madhavan (supra)."

Having noted the observations recorded in *N. Madhavan* v. *State of Kerala,* (1979) 4 SCC 1, the Hon'ble Supreme Court held as under:

''The observations in the decision of this Court in Madhavan (supra) clearly indicate that ordinarily the person from whom the property was seized would be entitled to an order under Section 452, when there is no dispute or doubt that the property belongs to him. It is only when the property belongs to the person from whom it was seized that such an order can be passed. Where a claim is made before the court that the property does not belong to the person from whom it was seized, Section 452 does not mandate that its custody should be handed over to the person from whose possession it was seized, overriding the claim of genuine title which is asserted on behalf of a third party.''

Criminal Appeal No. 94 of 2019
Nand Kishore v. State of Madhya Pradesh
Date of Decision : 18-01-2019

Having noted its judgments on the subject, Hon'ble Supreme Court held as under, in this case:

''14. The learned counsel appearing for the State has placed reliance on the judgment of this Court in the case *Mukesh & Anr.* v. *State (NCT of Delhi) & Ors*. [known as *Nirbhaya* case] in support of her case and submitted that applying the ratio laid down in the aforesaid judgment, the case falls in the 'rarest of rare' cases attracting death penalty. With reference to above said arguments of learned counsel for the State, it is to be noticed that the case of Mukesh (*supra*) 8 (2017) 6 SCC 1 is distinguishable on the facts from the case on hand. It is to be noticed that Mukesh (*supra*) is a case of

gang-rape and murder of the victim and an attempt to murder of the male victim. It was the specific case of the prosecution that the crimes were carried out pursuant to a conspiracy and the accused were convicted under Section 120-B of the IPC apart from other offences. Further, as a fact, it was found in the aforesaid case that the accused-Mukesh had been involved in other criminal activity on the same night. Further, it is also to be noticed that in the aforesaid case, there was a dying declaration, eye witness to the incident etc. So far as the present case is concerned, it solely rests on circumstantial evidence. It is the specific case of the appellant that he was denied the proper legal assistance in the matter and he is a manhole worker. The appellant was aged about 50 years. Further, in this case there is no finding recorded by the courts below to the effect that there is no possibility of reformation of the appellant. We are of the view that the reasons assigned by the trial court as confirmed by the High Court, do not constitute special reasons within the meaning of Section 354(3) of the CrPC to impose death penalty on the accused. Taking into account the evidence on record and the totality of the circumstances of the case, and by applying the test on the touchstone of case law discussed above, we are of the view that the case on hand will not fall within the 'rarest of rare' cases. In that view of the matter, we are of the view that the death sentence imposed by the trial court, as confirmed by the High Court, requires modification…."

Criminal Appeal No(s). 148 of 2010
Devi Lal v. State of Rajasthan
Date of Decision : 8-01-2019

Hon'ble Supreme Court held as under:

"It is true that an extra judicial confession is used against its maker but as a matter of caution, advisable for the Court to look for a corroboration with the other evidence on record. In *Gopal Sah* v. *State of Bihar,* 2008 (17) SCC 128, this court while dealing with extra judicial confession held that extra judicial confession is, on the face of it, a weak evidence and the Court is reluctant, in the absence of a chain of cogent circumstances, to rely on it, for the purpose of recording a conviction….."

It is also held that though the material on record established some suspicion yet the prosecution had failed to elevate its case from the realm of ''may be true'' to the plane of ''must be true'' as is indispensable required for conviction on a criminal charge. In a criminal trial, suspicion, howsoever grave, cannot substitute proof.

Hon'ble Court further reiterated that if two views are equally possible, in the case of circumstantial evidence, one pointing to the guilt of accused and other to his innocence, the accused is entitled to have the benefit of view which is favourable to him.

Criminal Appeal No. 1261 of 2008
Mahadevappa v. State of Karnataka
Rep. By Public Prosecutor
Date of Decision : 7-01-2019

Hon'ble Supreme Court held in this case that there was no reason to discard the evidence of the father and mother of the deceased who are the most natural and material witnesses to speak on such issues. In such circumstances, the daughter, a newly married girl would always like to first disclose her domestic problems to her mother and father, and then to close relatives because they have access to her, and are always helpful in solving her problems.

Hon'ble Court also held as under:

''We have not been able to notice any kind of contradiction on any of the material issues in the evidence of these four witnesses despite they being subjected to lengthy cross-examination by the defense. That apart, why should a mother and a father speak lie unless there are justifiable reasons behind it. We do not find any such reason in this case. Not only that, even their relatives, i.e. Bhimappa and Kristappa supported their version.''

It is further held that the fact that some of the witnesses turned hostile, did not have any significance in the present

case where four witnesses had supported the case of prosecution.

Criminal Appeal Nos. 84-85 of 2019
Yogendra @ Jogendra Singh v. State of Madhya Pradesh
Date of Decision : 17-01-2019

Hon'ble Supreme Court held that a second conviction for murder would warrant the imposition of a death sentence only if there is a pattern discernible across both the cases.

Hon'ble Court held as under:

"**8.** ....Unquestionably, if there is a pattern discernible across both the cases then a second conviction for murder would warrant the imposition of a death sentence. ....

9. .....

10. ....In *Bachan Singh* v. *State of Punjab,* (1980) 2 SCC 684, this Court held as follows: -

"**209.** There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be overemphasized that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore directed along the highroad of legislative scrupulous care and humane concern, policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

Following which, this Court in *Machhi Singh* v. *State of Punjab* classified instances of rarest of rare cases where death sentence can be justifiably imposed. In para 39, this Court laid down the following tests:

"39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

Criminal Appeal Nos. 26-27 of 2019
M/s Sicagen India Ltd. v. Mahindra Vadineni & Ors.
Date of Decision : 8-012019

Hon'ble Supreme Court held that a complaint based on second statutory notice after the re-presentation of a cheque, is maintainable.

Hon'ble Court held that there is no real or qualitative difference between a case where default is committed and prosecution immediately launched, and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.

Hon'ble Court also took note of 2013 (1) SCC 177, *MSR Leathers* v. *S. Palaniappan and Another* wherein it is held that there is nothing in the provisions of

Section 138 of the Act that forbids the holder of the Cheque to make successive presentation of the cheque and institute the criminal complaint based on the second or successive dishonour of the cheque on its presentation.

CrMC No. 127 of 2018
Arshad Iqbal v. Nusrat Naz
Decided on 14-12-2018
(High Court of Jammu and Kashmir)

Hon'ble High Court held that Protection of women against Domestic Violence Act (D.V. Act) is a social legislation and has been legislated for more effective protection of the rights of women guaranteed under Constitution.

It is held as under:

"13. As already held D.V. Act is social legislation and has been legislated for more effective protection of the rights of women guaranteed under Constitution, who are victim of violence. The strict law of pleading is not applicable. Second complaint on same facts cannot be dismissed on the ground that already first petition was pending at the time of filing second petition, especially when there is specific plea that under bonafide mistake respondent thought that first petition has been withdrawn on account of settlement. The law cited by counsel for petitioner is not applicable, because, it is pertaining to criminal complaint. The petition under section 12 of D.V. Act cannot be termed as complaint in clear terms. Petition means request for providing relief, whereas complaint as per section 4 (e) means allegations made orally or in writing to Magistrate for taking action under code against offender for commission of offence."

CrMC No. 555 of 2018
Vikram Sodhi v. State of J&K & Anr.
Date of Decision: 14-12-2018
(High Court of Jammu and Kashmir)

The instant petition was filed under Section 561-A of the Code of Criminal Procedure seeking quashment of charge sheet under Sections 452/307/109 RPC and 4/25 Arms Act. The parties to the petition had settled all matrimonial disputes resultant into decree of divorce by mutual consent and also executed a compromise deed whereby parties also agreed to settle all other litigations including charge sheet. Since the charge sheet pending before court of learned Principal Sessions Judge, Jammu contained offences which are not compoundable; the instant petition was preferred before the Hon'ble Court.

The Hon'ble High Court placed reliance upon various Supreme Court judgements and held that the charge sheet be quashed in view of compromise arrived at between the parties. The High Court can quash a criminal proceeding in exercise of its power under Section 561-A of the Code having regard to the fact that parties have amicably settled their disputes even though the offences are non compoundable. Offences which involve moral turpitude, grave offences, cannot be effaced by quashing the proceedings. However, when the High Court is convinced that offences are entirely personal in nature and do not affect public peace and tranquillity and where, on account of compromise quashing of proceedings would bring about peace and would secure ends of justice, it should quash them. Trial of petitioners may not be fruitful when parties have entered into a compromise.

Lakhbir Kour & Ors. v. State of J&K
Date of Decision: 17-12-2018
(High Court of Jammu and Kashmir)

Petition filed under Section 561-A CrPC for quashment of FIR No. 05/2011 along with the challan filed by Police Station Arnia, Jammu under Sections 498-A, 323, 34 RPC pending disposal before the court of learned Judicial Magistrate 1st class R.S. Pura Jammu, to the extent of petitioners only on account of compromise.

The Hon'ble Court after perusing the statement of parties and their counsel which was placed on record by Registrar Judicial, found that the parties have entered/arrived at compromise and the deed of compromise stands executed on

16/05/2018 wherein petitioner no. 1 has agreed not to press the complaint filed under Section 498-A RPC against petitioner No. 2 and undertakes to live peacefully with her husband and petitioner No. 2 (Husband) is serving to the best of his capacity as a good husband to her wife.

CrMC No. 266 of 2018
Sanjeev Sharma & Ors. v. State of J&K
Date of Decision: 28-12-2018
(High Court of Jammu and Kashmir)

Hon'ble High Court of J&K has held that continuance of the criminal proceedings, after a compromise has been arrived at between the complainant and the accused, would amount to abuse of process of Court & an exercise in futility since the trial would be prolonged and ultimately, it may end in a decision which may be of no consequence to any of the parties. While exercising inherent jurisdiction of the Court should encourage genuine settlements of the cases arising out of matrimonial disputes. There is every likelihood that non -exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier.

Cr. Rev. No. 62/2007
State of J&K v. Ranjit Singh & Ors.
Date of Decision: 14-12-2018
(High Court of Jammu and Kashmir)

Revision petition is filed in the Hon'ble High Court against the order of discharge by 3rd Addl. Session Judge, Jammu by virtue of which 3 accused persons have been discharged in case FIR No. 116 of 2003 on the grounds of contradictions in FIR and the challan produced with regard to role of these accuse persons.

Hon'ble High Court held-At the stage of framing charges court is not required to conduct a mini-trial and appreciate evidence; as regards whether material produced is sufficient to come to a conclusion whether accused has committed offence or not. Rather court at this stage has to form an opinion as to whether the accused might have committed the offence or not.

CrMC No. 264 of 2018
Gur Dayal v. State of J&K & Anr.
Date of Decision : 21-12-2018

This instant petition is for quashing of FIR No. 70/2017 dated: 15.12.2017 filed with Police Station, Ramgarh, Tehsil & District Samba under Section 561-A CrPC, against the petitioner. The law laid down in this petition was that if civil & criminal proceedings are going on between two parties both can proceed simultaneously. It is not a universal rule, that civil litigation between same parties regarding the same subject if pending then criminal proceeding cannot be initiated with regard to the same, as all criminal proceedings have some civil element in it. There is no bar to the same in the code or any law.

Cr. Revision No. 40 of 2018
Angat Kumar v. State of J&K and Ors.
Date of Decision : 14-12-2018
(High Court of Jammu and Kashmir)

The petitioner has been charged for commission of offence under Section 376-C/109 RPC in case FIR No. 183/2013 and he is in custody since 4th September, 2013. The other co-accused was granted bail by the trial court. However, the bail application of the petitioner was rejected. The petitioner challenged the impugned order by virtue of instant criminal revision on the ground that petitioner is also entitled to bail as in granted to the co-accused in the light of 'Rule of Parity'.

The Hon'ble Court dismissed the petition on the ground that there is prima facie case against the accused and bail cannot be granted in the light of Section 497-C CrPC. Further the ground taken that other co-accused has already been enlarged on bail, is not plausible ground to grant bail to the petitioner in such heinous offences.

CrMC No. 377 of 2017
Harmohinder Singh & Anr. v. State
Date of Decision: 21-12-2018
(High Court of Jammu and Kashmir)

The instant petition was filed under Section 561-A of CrPC wherein petitioners seek quashing of criminal proceedings out

of P.V. no. 61/2017, being inquired by the respondents against the petitioners.

Hon'ble High Court relying on various judgements of Hon'ble Supreme Court held that:-

- Keeping in view the fact that the criminal case was at stage of investigation by the Police, quashment at this stage would amount to gross abuse of process of court.
- Filling of an independent criminal proceeding although initiated in terms of some observation made by civil court is not barred. It is also well settled law that civil proceedings and criminal proceedings can proceed simultaneously.

CrMC No. 36 of 2017
Shakeel Ahmad Sofi v. Dilshada Akhter
Date of Decision: 18-12-2018
(High Court of Jammu and Kashmir)

The instant petition was filed seeking quashment of order dated: 19.08.2014 passed by learned Munsiff, Shopian in petition under Section 488 CrPC and also order dated: 04.06.2016 passed by the Session Judge, Shopian in an appeal filed by the petitioner.

Hon'ble High Court refused to exercise inherent power under Section 561-A CrPC as the power is to be exercised sparingly when otherwise there would miscarriage of justice by non-interference. As a matter of fairness, it was the petitioner herein to clear all the doubts and divorce if executed had to be vouched by petitioner and no one else but he failed to examine himself as witness. Hon'ble Court refers to the observation of His Lordship T.S. Thakur "J" while explaining inherent powers:-

"The plenitude of the power under S. 482, CrPC by itself, makes it obligatory for the High Court to exercise the same with utmost care and caution. The width and nature of the power itself demands that its exercise is sparing.....it is neither necessary nor proper for us to enumerate the situations in which the exercise of power under S. 482 may be justified. All that we need to say is that the exercise of power must be for securing the ends of justice and only in case where refusal to exercise that power may result in the abuse of process of law. "

Accordingly, no ground having been made out in the petition for quashment of the orders of Trial Court and Appellate Court, and the petition being without merit is dismissed.

Civil

Civil Appeal No. 11932 of 2018
Gangappa and Anr. v. Fakkirappa
Date of Decision : 14-12-2018

Hon'ble Supreme Court held that the Deputy Commissioner has the discretion of imposing penalty of 10 times or lesser of the amount of duty or portion thereof. There is a clear contradistinction between the power under section 33 and 39. Section 33 applies to every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office. And section 39 deals with the Deputy Commissioner's power to stamp the instruments impounded. The legislative scheme does not indicate any distinction between the court receiving an insufficiently stamped instrument, in evidence, and other authorities. All have to impose penalty 10 times of the duty or deficit portion, if it exceeds Rs. 5. This provision is for the purpose of maintaining a uniformity in imposing a fixed penalty of 10 times without adverting to any adjudicatory process regarding quantifying the quantum of penalty. Also, the language of section 34 provides a flat rate of penalty when the amount of proper duty exceeds five rupees i.e. 10 times of such court. But the Deputy Commissioner is empowered to impose a penalty lesser than 10 times the amount of proper duty, by virtue of a specific provision in the form of section 39.

Civil Appeal No. 4453 of 2009
Kamal Kumar v. Premlata Joshi & Ors.
Date of Decision : 7-01-2019

Hon'ble Supreme Court held that it is a settled principle of law that the grant of relief of specific performance is a

discretionary and equitable relief, and that the material questions, which are required to be gone into for the grant of relief of specific performance, are as under, while also observing that aforementioned questions are part of the statutory requirements (Sections 16 (c), 20, 21, 22, 23 of the Specific Relief Act, 1963, and the forms 47/48 of the Appendix A to C of the Code of Civil Procedure):-

- whether there exists a valid and concluded contract between the parties for sale/ purchase of the suit property;
- whether the plaintiff has been ready and willing to perform his part of contract, and whether he is still ready and willing to perform his part as mentioned in the contract;
- whether the plaintiff has, in fact, performed his part of the contract, and, if so, how and to what extent, and in what manner, and whether such performance was in conformity with the terms of the contract;
- whether it will be equitable to grant the relief of specific performance to the plaintiff, against the defendant, in relation to suit property, or it will cause any kind of hardship to the defendant, and, if so, how and in what manner, and the extent if such relief is eventually granted to the plaintiff; and
- whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and if so, on what grounds.

Civil Appeal No. 117 of 2019
Sushil Thomas Abraham v. Skyline Build. through its partner & Others
Date of Decision : 7-01-2019

Having discussed the provisions as to the powers of the court to allow the filing of appeal and suit as an indigent person, incorporated in Orders 44 and 33, Hon'ble Supreme Court held that though the appellant/plaintiff was not allowed by the trial court/High Court to institute a suit as an indigent person under Order 33 Rule 1 of the Code (CPC), in the earlier round of litigation, yet he is entitled to file an application/appeal under order 44 Rule 1 of the Code, and seek permission from the Appellate Court, for allowing him to file the appeal as an indigent person. The dismissal of an application under order 33 Rule 1 of the Code, by the trial court, in the earlier round of litigation, is not a bar against the plaintiff, to file an application/appeal under Order 44 Rule 1 of the code, before the appellate court. The grant and rejection of such prayer by the trial court is confined only up to the disposal of the suit. This is clear from the reading of rules 3 (1) and 3 (2) of Order 44 which contemplate holding of inquiry again into the question at appellate stage, as to whether the applicant is an indigent person or not since the date of decree appealed from. However, the same is subject to the provision contained in rule 3 (1) itself that no further inquiry is necessary where the applicant is already allowed by the trial court, to sue as an indigent person subject to the condition that he files an affidavit stating that he has not ceased to be an indigent person, unless said statement on affidavit is disputed by the Government lawyer or the respondent.

Civil Appeal Nos. 1965-1966 of 2014
Shashi Prakash Khemka v. NEPC Micon
Date of Decision : 8-01-2019

In a matter involving transfer of shares, and exercise of power under section 111-A of the Companies Act, 1956 (as amended in 1988) and Depositories Related Laws (Amendment) Act, 1997, Hon'ble Supreme Court held that the appropriate course of action would be to relegate the appellants to remedy before the NCLT under the Companies Act 2013, in view of section 430 of the Act.

It is held as under:

"The effect of the aforesaid provision is that in matters in respect of which power has been conferred on the NCLT, the jurisdiction of the civil court is completely barred."

Civil Appeal No. 116 of 2019
Sneh Lata Goel v. Pushplata & Others
Date of Decision : 7-01-2019

It is held that an objection as to jurisdiction of court does not go to the root of, or to the inherent lack of jurisdiction of a civil court to entertain the suit. The same needs to be taken at the earliest possible. It has to be raised before the court of first instance at the earliest opportunity, and in all cases where issues are settled, on or before such settlement. Where the defect in jurisdiction is of a kind which falls within Section 21 of the CPC or Section 11 of the Suits Valuation Act 1887, an objection to jurisdiction cannot be raised except in the manner and subject to the conditions mentioned thereunder.

Hon'ble Court referred to a few other judgments as well and observed thus: "The objection which was raised in execution in the present case did not relate to the subject matter of the suit. It was an objection to territorial jurisdiction which does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. An executing court cannot go behind the decree and must execute the decree as it stands"

Hon'ble Court also referred the observations made in *Hiralal* v. *Kalinath,* AIR 1962 SC 199 as under:

"The objection to its [Bombay High Court] territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. …… It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."

The law laid is that it is not within the jurisdiction of the executing court to decide whether the decree was passed in the absence of territorial jurisdiction.

Hon'ble Court also rejected the contention that the impugned order of the High Court, being an order of remand, is in the nature of an interlocutory order which does not brook any interference.

Civil Appeal No. 219-222 of 2019
Regional Transport Officer & others v. K. Jayachandra & Anr.
Date of Decision : 9-01-2019

While considering various provisions relating to alteration of vehicle, under the Motor Vehicles Act, Hon'ble Supreme Court held that such alteration in vehicle as makes the certificate of registration at variance with the particulars originally specified by the manufacturer, can not be effected.

It is held as under:

''32. ……..The alteration under the Rules is permissible except as prohibited by section 52. The specification of the rules would hold good with respect to the matters as not specifically covered under Section 52(1) and not specified therein by manufacturer. The emphasis of Section 52 (1) is not to vary the "original specifications by the manufacturer". Remaining particulars in a certificate of registration can be modified and changed and can be noted in the certificate of registration as provided in Section 52(2), (3) and (5) and the Rules. Under Section 52(5), in case a person is holding a vehicle on a hire purchase agreement, he shall not make any alteration except with the written consent of the original owner.''

Hon'ble Court further held as under:

"33. In our considered opinion the Division Bench in the impugned judgment of the High Court of Kerala has failed to give effect to the provisions contained in section 52(1) and has emphasized only on the Rules. As such, the decision rendered by the Division Bench cannot be said to be laying down the law correctly. The Rules are subservient to the provisions of the Act and particulars in certificate of registration can also be changed except to the extent of the entries made in the same as per the

specifications originally made by the manufacturer….''.

Civil Appeal No. 27 of 2019
Government of Haryana v. M/s G.F. Toll Road Pvt. Ltd. & Ors.
Date of Decision : 3-01-2019

Hon'ble Supreme Court held that a former employee is not disqualified under Arbitration and Conciliation Act 1996, from acting as an arbitrator provided that there are no doubts as to his independence and impartiality.

It is held as under:

''3.9. The 1996 Act does not disqualify a former employee from acting as an arbitrator, provided that there are no justifiable doubts as to his independence and impartiality. The fact that the arbitrator was in the employment of the State of Haryana over 10 years ago, would make the allegation of bias clearly untenable.

3.10. The present case is governed by the pre-amended 1996 Act. Even as per the 2015 Amendment Act which has inserted the Fifth Schedule to the 1996 Act which contains grounds to determine whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. The first entry to the Fifth Schedule reads as under :

"Arbitrator's relationship with the parties or counsel

1. The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party." (Emphasis supplied)

Entry 1 of the Fifth Schedule and the Seventh Schedule are identical. The Entry indicates that a person, who is related to a party as an employee, consultant, or an advisor, is disqualified to act as an arbitrator. The words "is an" indicates that the person so nominated is only disqualified if he/she is a present/current employee, consultant, or advisor of one of the parties.

An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees.''

Contempt Petition (C) NO. 817 of 2018
Badri Vishal Pandey v. Rajesh Mittal
Date of Decision : 4-01-2019

Hon'ble Supreme Court held that contempt jurisdiction can not be invoked a party, merely on the basis of impressions about the court orders, drawn by it.

It is held as under:

''25. Still further there is no direction in the order passed by this Court to reinstate the petitioners or to place them in minimum or regular pay scale. The contempt jurisdiction cannot be invoked on the basis of impressions, when the order of the Court does not contain any direction for reinstatement or for grant of regular pay scale. The contempt would be made out when there is wilful disobedience to the orders of this Court. Since the Order of this Court is not of reinstatement, the petitioners under the garb of the contempt petition cannot seek reinstatement, when nothing was granted by this Court.''

LPASW No. 13 of 2015
Meena Sharma v. State of J&K and Others
Date of Decision : 31-12-2018
(High Court of Jammu and Kashmir)

Hon'ble Court held as under:

"46. Even otherwise, it needs no elaboration that there is no absolute proposition that delay and laches would defeat the remedy of writ jurisdiction in every case. Such objections have to be objectively assessed in the facts and circumstances of the case. It is only unexplained delay and laches in approaching the court which could defeat the remedy.''

LPA No. 28 of 2018
M/s Singh Hospitality & Resorts v. Punjab & Sind Bank & Anr.
Date of Decision : 31-12-2018
(High Court of Jammu and Kashmir)

While considering different aspects

settlement of disputes in Lok Adalat, as well as the role and authority of authorized persons and Advocates, Hon'ble High Court held that the same must be centered around *bona fide* of such authorized persons, and the benefit of their clients.

Hon'ble High Court held as under:

"It has to be held that the settlement has been reached was not only without authority but was an absolute breach of the rights of the appellant bank.

Conclusions

I. There was no reference of the subject matter of the suit to the Lok Adalat in terms of Section 19 of the Legal Services Act.
II. The settlement dated 6th December, 2014 was not for the benefit of the respondent Bank and caused huge loss to it.
III. The counsel for the respondent in entering into the settlement has not acted either in good faith or for the benefit of the client and implied power to enter into the settlement, the counsel also therefore, failed.
IV. There was more than sufficient time and opportunity for the counsel to inform the respondent-bank of the proposed referral to the Lok Adalat and to take its consent with regard to matters which were noted by the trial court in its order dated 28th November 2014.
V. Even if it could be held that the advocate for the bank had implied authority to enter into the settlement, in the instant case, while entering into the settlement on 6th December 2014, there was no exigency or circumstances demanding immediate settlement of the suit by a compromise on 6th December 2014, precluding obtaining instructions from the respondent bank or signature of the person authorized by the bank to enter into a settlement.
VI. The learned Single Judge had rightly held that the consent of the respondent-bank for arriving at the compromise before the Lok Adalat LPA No.28/2018, IA No.01/2018 Page 26 of 26 which was the sine-qua-non for making of the award before the Lok Adalat was lacking and, therefore, no sanctity could be attached to the award dated 6th December 2014 passed by the Lok Adalat.''

OWP No. 243 of 2016
State of J&K v. Gul Mohammad Bhat
Date of Decision : 18-01-2019
(High Court of Jammu and Kashmir)

Hon'ble High Court laid the ratio that the deposit of award amount in J&K Bank did not have any consequence, for the purpose of compliance of section 32 Land Acquisition Act.

Hon'ble Court held as under:

"In terms of Section 32 of the Act, on making of an award under Section 11, it is incumbent upon the Collector to tender payment of the compensation awarded by him to the persons interested /entitled thereto, according to the award, and in case they do not consent to receive it or there be no person competent to alienate the land or there be any dispute with regard to title to receive the compensation or as to the apportionment of it, the Collector is obligated to deposit the amount of compensation in the reference court. The provisions of Section 32 are mandatory in nature."

Hon'ble High Court also held as under:

"Section 21 of the Act when read in conjunction with Section 19 of the Act, would leave no doubt that the reference court is competent enough to direct the Collector to deposit not only the amount of compensation but the statutory interest accrued thereon in terms of Section 35 of the Act."

OWP No. 2672/2018
Sheikh Zaffar Ahmed v. Sukhdev Singh
Date of Decision : 28-12-2018
(High Court of Jammu and Kashmir)

The scope of interference by the courts exercising supervisory jurisdiction under Article 227 of Indian Constitution read along with Article 104 of the J&K

can interfere only in case it finds that the court below has failed to exercise jurisdiction vested in it or there is a perversity in the order passed by the court below or that the same is violation of the principles of Natural Justice.

In *Shalini Shyam Shetty and another* v. *Rajendra Shankar Patil*, (2010) 8 SCC 329, the Apex Court proceeded to crystallize the issues.

Civil Revision No. 17/2017
Sona (dead) & Ors. V. Malik & Others
Date of Decision : 14-12-2018
(High Court of Jammu and Kashmir)

The Hon'ble High Court held that the power under Article 227 of Constitution read with under Section 104 Constitution of Jammu and Kashmir are not unbridled power and have to be exercised most sparingly to keep subordinate courts within their bounds and not for correcting the mere errors. It cannot be exercised at the drop of hat to interfere with the orders of tribunals or courts inferior to it.

Reliance placed on '*Shalini Shyam Shetty & Anr.* v. *Rajendra Shankar Patil,* (2010) 8 SCC 329 and *Laxmikant Revchand Bhojwani & Another* v. *Pratap Singh Mohan Singh Pardeshi,* (1995) 6 SCC 576.

ACTVITIES OF ACADEMY

OATH CEREMONY

Jammu and Kashmir State Judicial Academy organized Oath ceremony for newly enrolled Advocates of Jammu province at District Court Complex, Jammu on 2nd January, 2019.

Hon'ble Mr Justice Rajesh Bindal, Chairman, Governing Committee, J&K State Judicial Academy administrated Oath to the newly enrolled Advocates.

In his address to the newly enrolled Advocates, His Lordship highlighted the need of maintaining highest standards of professional ethics and conduct for the Advocates.

Addressing the Advocates, Mr. Justice Bindal said, Legal education does not stop when you join the profession. Law is a profession that demands constant learning. New laws are being passed with regularity which was not the case before. Success of a lawyer in the profession depends to a large extent on what they learn through their experience in practice, research and interaction with colleagues and Judges rather than on what they already know. Compared to the years gone by, most of the lawyers are now entering the profession with more education and technological skills. Some of them have post graduate degrees, some are professionals in their own right in other fields. It is hoped that these extra competencies and capabilities would assist the new entrants in coping with the fast changing legal landscape. Mr. Justice Bindal stressed on the need for the Advocates to catch up with the technology and to use ICT in their professional management.

Enrollment Certificates issued by Hon'ble High Court, in exercise of powers of State Bar Council, were distributed among 250 newly enrolled Advocates belonging to Jammu Province.

Mr. Vinod Chatterjee Koul, Principal District & Sessions Judge, Jammu, Mr. Rajeev Gupta, Director J&K State Judicial Academy and Mr. Himanshu Sharma Joint Secretary, Representative of Bar Association, Jammu were present in the function.

Training Programme of Officers/Staff members of the High Court of J&K held on 2nd to 4th of January, 8th of January, 16th & 17th of January, 21st & 22nd of January and 23rd & 24th of January, 2019.

The State Judicial Academy collaborated with main wing of the High Court and the e-Courts for organizing training of High Court Staff on 'Use of Computers & ICT' in the functions relating to court processes. In a series of training programmes all the staff members in the sections dealing with court work were introduced to the modern concept of ICT,

which would enable them to do away with manual processing of court files and other related jobs, and to shift to the automated processes by use of computer & ICT. The trainees were also given insight into the e-Court services specially the Court Information System (CIS) pertaining to working in High Court.

Training of Judges on 'Family Court Matters' at Delhi Judicial Academy with effect from 8th to 12th January, 2019.

At the initiative of Hon'ble Chief Justice, High Court of Jammu and Kashmir, Ms. Gita Mittal, the officers posted in the Kashmir province were sent for the said training programme organized by Delhi Judicial Academy. The officers were introduced to the working of family courts in Delhi and they actually saw the courts working at District Court, Saket. The officers also got introduced to the functions of counselors and physiologists who are part of family court setup. Special Infrastructural requirements of the family court and the resources employed in working of family courts were also noticed by them.

Training Programme of Principal Magistrates of Juvenile Justice Boards from Kashmir province at Delhi Judicial Academy with effect from 8th to 12th January, 2019.

At the special request of Hon'ble Chief Justice, High Court of Jammu and Kashmir, Ms. Gita Mittal, Delhi Judicial Academy organized training-cum-awareness programmes for the Principal Magistrates of Juvenile Justice Boards posted in Kashmir province. The Principal Magistrates got firsthand experience of the functioning of Juvenile Justice Boards, observation homes and correctional centers working in Delhi . The officers interacted with the Principal Magistrates of Juvenile Justice Boards and the members of boards as also with the officials dealing with correctional centers. The officers also got benefitted by receiving useful inputs from the resource persons at Delhi Judicial Academy, concerning the matters coming up before the Juvenile Justice Boards and the issues related to rehabilitation of Juveniles in conflict with law. Officers were immensely benefitted by the deliberations held during the training programme.

Training Programme of High Court Registry Staff at Chandigarh on 10th January, 2019.

At the initiative of Mr. Justice Rajesh Bindal, Chairman, e-Courts Committee, Staff of the High Court of Jammu and Kashmir were sent to Chandigarh Judicial Academy to receive training on "Reader Module" in the working of court registry. The court staff were introduced to the concepts and practices adopted at High Court of Punjab & Haryana, as also the processes involved in listing of the cases before various benches of the High Court. The court staff received useful inputs from the resource persons, which shall be of immense help in discharge of their duties in the court registry. This training programme is likely to enhance their productivity.

LEGISLATIVE UPDATE

The J&K Real Estate (Regulation & Development) Act, 2018 (Governor Act No. LIII of 2018)

The Act has been published in the Government Gazette and has come into force on 16th December, 2018.

Chapter VIII deals with offences, penalties and adjudications. Section 59 to 68 provide for various penalties and offences. Section 69 deals with offences committed by companies. Section 59(2) concerns non-registration under Section 3, punishable with imprisonment for a term which may extend upto 3 years or with fine extending upto 10% of estimated cost of the Real Estate Project, or both.

In terms of Section 70, the offences under the Act have been made compoundable on payment of such sum not exceeding the amount of fine that can be

imposed for commission of such offence.

Section 79 provides for bar of jurisdiction of the civil court in entertaining any suit or proceeding which are within the domain of the Authority or the Adjudicating Officers or of the Appellate Tribunal.

Section 80 provides for cognizance of offences punishable under the Act or Rules & Regulations, to be taken only by the court not inferior to that of District Judge (Sic for Sessions Judge).

Judicial Officers' Column

High Court's pronouncements as Catalyst for Ecological and Social Transformation

Hon'ble High Court of J&K in the recent past through its landmark judicial pronouncements has acted as catalyst in getting Social and Ecological change. Hon'ble High Court has in various public interest litigation matters filled by various public spirited individuals or institutions and in *suo motu* entertained Public Interest matters, has passed various orders which would have far reaching consequences for the betterment of Social Order and Ecology.

In PIL No. 159/2002 titled **Syed Iqbal Tahir Geelani** v. **State of J&K and others**, Hon'ble DB headed by the Hon'ble the Chief Justice Ms. Gita Mittal and Mr. Justice Dhiraj Singh Thakur passed a landmark order on 18/9/2018 pertaining to world famous Dal Lake in Srinagar town. Taking stock of the situation and Ecological degradation faced by Dal Lake, owing to its rampant misuse by the civil society and the Government functionaries at the helms of affairs. Hon'ble High Court in the order dated 18/9/2018 has constituted an expert committee comprising of world known experts in the field of management of large public enterprises and Ecological Preservation, namely Mr. Elattuvalapil Sridharan (IES Retd., Former Chairman, Delhi Metro Rail Corporation & Member, Mata Vaishno Devi Shrine Board), Dr. Nivedita P. Haran, IES (Retd.), Former Addl. Chief Secretary, Home Department, Govt. Of Kerala and Mr. M.C. Mehta, renowned Environmentalist hailing from the state of J&K. In the terms of reference of the committee of experts, Hon'ble High Court has directed the committee to:

1. Ascertain the status of Dal Lake;
2. Ascertain all measures required to be undertaken for its restoration, maintenance and preservation as well as all ancillary issues, including securing the banks of the Dal Lake;
3. Consider and suggest remedial measures on the issues pertaining to resettlement, relocation and rehabilitation of the persons residing in or carrying on business in Dal Lake or around its banks;
4. Oversee Digital Mapping of the lake and Digital Monitoring or any other issue or matter requisite in the interest of the Dal Lake.

Various directions have been issued by the Hon'ble Court which shall be implemented by the senior most functionaries of the Government, including looking into financial aspects, enabling the expert committee to undertake and carry out the activities as per the elaborate guidelines issued by the Hon'ble Court.

It is expected that the committee of experts shall be able to come up with a plan for preservation of the Dal Lake and consequently to preserve the ecology. Taking queue from guidelines issued by the Hon'ble Court, the State Government can device similar plans for other equally important water bodies in the Kashmir province and in Jammu province, for the larger interest of Ecological Preservation of the water bodies and for preservation of environment. In another landmark judgement, the Hon'ble High Court has directed the State Government and its functionaries to retrieve a large chunk of land, roughly about hundred Kanals, that was occupied by the commercial establishment. The retrieved land can now be put to best use by the State Authorities,

land, roughly about hundred Kanals, that was occupied by the commercial establishment. The retrieved land can now be put to best use by the State Authorities, it being State largesse and can be used for the public interest which is of paramount consideration. The Hon'ble High Court DB comprising of Hon'ble the Chief Justice Ms. Justice Gita Mittal and Mr. Justice Alok Aradhe was considering the case titled '**Hotel Nedous through Umer Khaleel Nedous** v. **State through Chief Secretary to Government of J&K and others'**, OWP No. 847/2015. In the order dated 6/9/2018 has dismissed the claim of the writ petitioner, holding primarily that there cannot be an endless occupation of public premises by an individual on the basis of lease which has served its term. On the expiry of team of lease, the concerned authority can get the public premises vacated under the provision of J&K Public Premises (Eviction of Unauthorized Occupants) Act, 1988. Mere deposit of rent, without authority of law doesn't *per se* extend the term of lease. It is further held by the Hon'ble Court that public owned property can't be dealt with in any manner other than ensuring public interest and has to be done in a fair and equitable manner. Not only grant of lease or license of public property is dispensation of State largesse, but renewal thereof is a privilege. Grant of lease as well as its renewal has to be effected by an open and transparent process. It has further been held that no person can urge a plea of discrimination premised on an illegality. After completion of the period of lease, a lessee becomes an unauthorized occupant and has no right at all to continue in occupation of the demised premises.

Therefore, merely because the State authorities have not proceeded against similarly placed unauthorized occupancies, a person cannot claim to have legal right to be treated in a like manner.

This judgement of far reaching consequences has paved the way for the State authorities to proceed in similar manner against the illegal occupancies and to retrieve the State land and to put it to the optimum use actuated by the larger public interest.

Hon'ble high Court has taken *suo motu* cognizance in the matter of deficiency of sports facilities in the State of Jammu & Kashmir. Hon'ble Court has observed that most of the sports in which India is competing at the International level are completely absent from the State. PIL No. 25/2018, **Court of its own motion** v. **Union of India & Ors.**, has been entertained vide order dated: 24-10-2018. It has been observed by the Hon'ble Court that the State Government which was vested with the responsibility to secure to the children their right to a happy childhood has done precious little. The State authorities can not be permitted to maintain a blind eye to the hard reality that, more than for adults, a childhood and youth, spent without the freedom of playing in open spaces or participating in orgainsed games and sports, could actually distort their development and the young minds.

To ensure mandate of Constitution of India as well as the Constitution of Jammu & Kashmir as regards the rights of children and the youths, the Hon'ble High Court has initiated legal debate and has taken unto itself to administer justice.

River Tawi is the lifeline for Jammu and is considered by the people of Jammu region as a sacred river. Owing to geographical and demographic changes over a period of time Tawi has not only changed its course but has become highly polluted. Because of natural change in the course of the river, some land of the river bed has fallen dry and the land hungry people or land mafia has grabbed the dry lands. This activity does not only pollute the waters of the river but also causes obstruction to smooth flow of water during rainy season.

Hon'ble High Court of J&K is seized of Public Interest Litigation, **Ashish Sharma & Anr.** v. **State of J&K & Ors.**, PIL No. 19/2012, highlighting various issues involving the conservation and preservation of river Tawi. From time to

time orders have been issued by the Hon'ble Court directed towards restoring the glory of the river from social and ecological point of view. Construction activities around the river have been banned and the State Authorities have been directed to implement the Court orders strictly and effectively. Only permission has been granted to the State functionaries for raising structures like protection walls on embankments, essentially meant to save the private and public property from damages caused by the floods or the changing course of the river.

In the latest order dated: 13th December 2018 Hon'ble Court has directed that earlier orders passed by the Hon'ble Court as to removal of encroachments and demolition of the illegal structures raised around the Tawi River be implemented in letter and spirit.

The State authorities, including Jammu Development Authority and Jammu Municipal Corporation have been asked to act to fulfil their statutory obligations. In the earlier orders, Hon'ble Court had directed retrieval of State land and the embankment land of River Tawi occupied illegally by unscrupulous persons, from Nagrota to Phallan Mandaal. It has been observed that the State authorities have not been prompt to carry out the directions in this regard. The authorities have been directed to show utmost expedition to claim back the land so illegally occupied. Various directions passed as to removal of pollution from Tawi River have also been directed to be implemented.

The people and the Government agencies have a responsibility in protecting the river. The people have to understand that polluting the water and obstructing free and smooth flow of flood water is something that does great harm to the society at the end of the day.

Orders passed by the Hon'ble Court have definitely brought back conservation and preservation needs for Tawi River in focus and have generated a lot of awareness among masses.

Hon'ble High Court has been instrumental in getting a new legislation introduced by the State Legislature, bringing to the fore concept of 'Sextortion' which has in its sweep to elements of criminality viz. 'Sex' and 'Extortion'. While hearing a habeas corpus petition 15/2012, titled **Mohammad Amin Beigh** v. **State of J&K & Others**, vide order dated: 15-10-2018 the Hon'ble Court has entertained the matter as Public Interest Litigation, titled **Court of its own motion** v. **State of J&K & Another**. Taking note of the factual background and the circumstances reported in the habeas corpus petition found that its prevalent practice to seek and solicit sexual favours for performing or forbearing to some act which a person in authority is obliged to do or forebear from doing. Instead of money or other forms of consideration for performing such acts, constituting the offence of illegal gratification punishable under the provisions of Prevention of Corruption Act, sexual favour is also solicited that partakes the character of illegal gratification. In the strict sense this kind of illegal gratification would not fall within the ambit of Prevention of Corruption Act, though it may have the elements of criminality punishable under other legislations.

Hon'ble High Court considered the matter of 'Sextortion' from the criminal jurisprudential aspect and tracked its genesis in various jurisdictions at International level. Having considered the research documents, the Hon'ble Court observed that the concept of sextortion means extortion of a sexual favour rather than that of a property or valuable security. As in case of extortion of property, there is no physical force applied but a psychological force, whereby the victim, due to fear of injury, himself/herself delivers the property to the assailant. Likewise, in case of sextortion also the assailant does not necessarily force the victim to concede to a sexual favour, but the victim is coerced into relenting to concede that favour because of certain compulsion of fear of loss/deprivation/injury to. Hon'ble High Court found that the existing

Hon'ble High Court considered the matter of 'Sextortion' from the criminal jurisprudential aspect and tracked its genesis in various jurisdictions at International level. Having considered the research documents, the Hon'ble Court observed that the concept of sextortion means extortion of a sexual favour rather than that of a property or valuable security. As in case of extortion of property, there is no physical force applied but a psychological force, whereby the victim, due to fear of injury, himself/herself delivers the property to the assailant. Likewise, in case of sextortion also the assailant does not necessarily force the victim to concede to a sexual favour, but the victim is coerced into relenting to concede that favour because of certain compulsion of fear of loss/deprivation/injury to. Hon'ble High Court found that the existing laws were insufficient to cater to the situation and highlighted the urgent need to have sextortion as an offence and the proposed the definition of the offence to include a sexual and a corruption component, involving a request, whether implicit or explicit, to engage in any kind of unwanted sexual activity, and the person who demands the sexual favour occupies a position of authority, vis-à-vis the person who is abused. It was also suggested that a sexual favour could encompass anything from an inappropriate suggestion, improper touch to sexual intercourse.

The State Legislature has responded positively to the urgent need to legislate the law on the lines suggested by Hon'ble High Court in the said PIL, and has come up with Criminal Laws (Sexual Offence) (Amendment) Bill, 2018 (Governor's Act No. XLVII) dated: 13-12-2018. Section 354-E has been added to the Ranbir Penal Code, providing for offence of 'Sextortion', giving texture to the conceptual idea provided by the Hon'ble High Court. Section 161 of the same Act has been amended so as to include within its sweep sexual favour as mode of illegal gratification, punishable under the provisions of Prevention of Corruption Act. Definition of Offence of Rape, under Section 375, now includes in its ambit consent obtained in exchange for exercising or misusing authority. State of Jammu & Kashmir has, thus, become the first State in India to conceptualise and put in practice 'Sextortion' as penal provision.

Contributed by : Ms. Rupali Ratta,
District & Sessions Judge,
Leave Reserve, High Court of J&K

Practice and Procedure for referring the parties to ADR modes

Section 89 of Code of Civil Procedure provides for making efforts for settlement of disputes through alternative dispute resolution mechanism. It provides for the alternative modes of arbitration, conciliation, judicial settlement, Lok-Adalat and mediation as the alternative modes for settlement of disputes. Rule 1-A of Order X mandates that the court shall direct the parties to the suit to adopt any of the modes provided under Section 89, for settlement of the dispute. The parties are left free to choose any of the modes. However, each of these modes is suitable for specific nature of the dispute and has to be applied in that manner.

The intended purpose of Section 89 seems to have been not fully realized. There has been general reluctance on the part of the parties to the suit to go for alternative disputes resolution mechanism instead of formal judicial process. There has also been lack of initiative on the part of courts in inspiring the parties to adopt any of these modes as an alternative to the regular court proceedings.

Hon'ble Supreme Court of India in case law titled **Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. and Ors, (2010) 8 SCC 24**, has thread bare discussed the importance and necessity of the mechanism provided by Section 89. Some infirmities in the language of the provision have been clarified and the concept of alternative dispute resolution has been made crystal clear. Directions

passed by Hon'ble Supreme Court in the case law (supra) are worth to be taken note of and applied by every civil court in letter and spirit. The following observations worthwhile to be noted:

"We may summarize the procedure to be adopted by a court under Section 89 of the Code as under:

a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.

b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.

d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.

e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator(s), the court can refer the matter to conciliation in accordance with Section 64 of the AC Act.

f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes:

(a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.

(g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.

(h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.

(i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by Section 74 of the AC Act (if it is a Conciliation Settlement) or Section 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). If the settlement is through mediation and it relates not only to disputes which are the subject matter of the suit, but also other disputes involving persons other than the parties to the suit, the court may adopt the principle underlying Order Rule 3 of the Code. This will be necessary as many settlement agreements deal with not only

the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.

(j) Settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.

32. The Court should also bear in mind the following consequential aspects, while giving effect to Section 89 of the Code:

(i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.

(ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.

(iii) The requirement in Section 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.

(iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.

(v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.

(vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case."

Contributed by :
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UPCOMING EVENTS

1. Training of Judges on Family Court matters, is being organized by Academy at Jammu Campus, on 9th & 10th of February, 2019.

2. Training Programmes for Principal Magistrates & Members of Juvenile Justice Board, at Srinagar & Jammu Campuses, in the week commencing from 11th February, 2019.

3. Orientation Programme on recent amendments in Civil and Criminal Laws, in 3rd week of February, 2019.