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Contents

From the Editor's Desk

It must be acknowledged by the Judicial Officers that the Gender Justice issues need sensitive approach, compared to the routine cases coming up for the consideration of the courts. These issues are to be understood from the perspective of constitutional morality rather than the binary of right or wrong, legal or illegal and moral or immoral based on religious, societal, community or localized biases. There has to be a multidimensional approach towards Gender Justice Issues, primarily focus being on the constitutional vision of Justice. Gender Justice Issues are also required to be seen in the backdrop of rights; either guaranteed under the constitution of India or the basic Human Rights.

The Constitution of India provides for making special provisions for the under privileged and marginalized sections of the society, therefore we shall be failing in our constitutional obligation if we do not offer special treatment to such classes of citizenry. The concept of equality as enshrined in Article 14 of the Constitution prescribes for treating only equals as equal. This cannot be forgotten that the social and community based inequalities still exists and until these are completely eradicated, there cannot be a society based on the principles of equality. So long as the inequalities exist, in any form, it would require some special benefits to be conferred upon the under privileged and marginalized sections of the society. These benefits would include giving special treatment in the institutions of Justice and creating accessible environment.

One of the marginalized communities i.e. Transgender has received attention of the legislature, having covered a long road of struggle. The parliament has passed a special legislation namely, The Transgender Persons (Protection of Rights) Act, 2019, which has come into effect on 10th January, 2020. This Act takes the discourse of gender rights further from the binary of male or female to multidimensional approach. It recognizes the right of every citizen to decide about ones gender based on personal orientation.

Similar approach is needed in other gender sensitive issues, seeing the things from the prism of constitutionalism.

"Any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law protects the dignity of a citizen in a society governed by law. It cannot be forgotten that the welfare State is governed by the rule of law which has paramountcy."

Dipak Misra,J.* in *Mehmood Nayyar Azam v. State of Chattisgarh, (2012) 8 SCC 1, para 36

Criminal

Criminal Appeal No. 1843 of 2019
Mahipal v. Rajesh Kumar @ Polia & another
Decided on: December 5, 2019

Hon'ble Supreme Court held that merely recording "having perused the record" and "on the facts and circumstances of the case" does not sub-serve the purpose of a reasoned judicial order. It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty bound to explain the basis on which they have arrived at a conclusion. Where an order refusing or granting bail does not furnish the reasons that inform the decision, there is a presumption of the non-application of mind which may require the intervention of this Court. Where an earlier application for bail has been rejected, there is a higher burden on the appellate court to furnish specific reasons as to why bail should be granted.

Hon'ble Court reiterated that the power to grant bail under Section 439 is of wide amplitude. But it is well settled that though the grant of bail involves the exercise of the discretionary power of the court, it has to be exercised in a judicious manner and not as a matter of course.

Hon'ble Court also held that the determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straight jacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused sub-serves the purpose of the criminal justice system.

Where bail has been granted by a lower court, an appellate court must be slow to interfere and ought to be guided by the principles set out for the exercise of the power to set aside bail.

Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to consider whether the order granting bail suffers from a non-

application of mind or is not borne out from a prima facie view of the evidence on record.

The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted.

A court assessing a plea of bail is required to find a prima facie view of the possibility of the commission of the crime by the accused and not conclude that the alleged crime was in fact committed by the accused beyond reasonable doubt.

Criminal Appeal No. 1837 of 2019
Station House Officer CBI/ACB/ Bangalore v. B.A. Srinivasan and another
Decided on: December 05, 2019

Hon'ble Supreme Court held that it has consistently been laid down that the protection under Section 197 of the Code is available to the public servants when an offence is said to have been committed 'while acting or purporting to act in discharge of their official duty', but where the acts are performed using the office as a mere cloak for unlawful gains, such acts are not protected.

While referring S.A. Venkataraman vs. The State [1958] SCR 1037, wherein the Hon'ble Court, while dealing with the requirement of sanction under the pari materia provisions of the Prevention of Corruption Act, 1947, had laid that the protection under the concerned provisions would not be available to a public servant after he had demitted his office or retired from service. And it is further held that the law so declared by the Hon'ble Court has consistently been followed.

In the circumstances involved in this case, Hon'ble Court held that there was no occasion or reason to entertain any application seeking discharge in respect of offences punishable under the Act, on the ground of absence of any sanction under Section 197 of the Act.

Criminal Appeal No. 1842 of 2019
Abdul Sattar v. The State of Uttar Pradesh and another
Decided on: November 29, 2019

Hon'ble Court has reiterated that the fact that victim of rape is habituated to sex, cannot be a valid defence against the act of rape.

Criminal Appeal No. 1820 of 2019
Bhawana Bai v. Ghanshyam and others
Decided on: December 03, 2019

Hon'ble Supreme Court reiterated that only prima facie case is to be seen at the time of framing the charge, and it is not to be seen at this stage whether case is beyond reasonable doubt. At this stage, the court has to see if there is sufficient ground for proceeding against the accused, and strict standard of proof is not required while evaluating the materials, and only prima facie case against the accused is to be seen. The judge is not required to record detailed reasons for framing the charge under Section 228 Cr.P.C.

Criminal Appeal No. 438 of 2011
Ramphal v. State of Haryana & another
Decided on: November 27, 2019

Hon'ble Supreme Court held that the compromise in the matters relating to the offence of rape and similar cases of sexual assault, is of no relevance. In this case, each of the appellants had paid Rs. 1.5 lakhs in favour of the prosecutrix, and she had accepted the same willingly for getting the matter compromised.

Criminal Appeal No. 1885 of 2019
Suraj Jagannath Jadhav v. The State of Maharashtra
Decided on: December 13, 2019

Hon'ble Supreme Court reproduced

inter alia the following from the case of Santosh v. State of Maharashtra (2015) 7 SCC 641:

"15. The decision in Kalu Ram case [(2000) 10 SCC 324 : 2000 SCC (Cri) 86] cannot be applied in the instant case. The element of inebriation ought to be taken into consideration as it considerably alters the power of thinking. In the instant case, the accused was in his complete senses, knowing fully well the consequences of his act. The subsequent act of pouring water by the accused on the deceased also appears to be an attempt to cloak his guilt since he did it only when the deceased screamed for help. Therefore, it cannot be considered as a mitigating factor. An act undertaken by a person in full awareness, knowing its consequences cannot be treated on a par with an act committed by a person in a highly inebriated condition where his faculty of reason becomes blurred."

Hon'ble Court also reproduced the following from the case of Bhagwan Tukaram Dange v. State of Maharasthra (2014) 4 SCC 270:

"12. Intoxication, as such, is not a defence to a criminal charge. At times, it can be considered to be a mitigating circumstance if the accused is not a habitual drinker, otherwise, it has to be considered as an aggravating circumstance. The question, as to whether the drunkenness is a defence while determining sentence, came up for consideration before this Court in Bablu v. State of Rajasthan [(2006) 13 SCC 116 : (2007) 2 SCC (Cri) 590] , wherein this Court held (SCC p. 129, para 12) that the defence of drunkenness can be availed of only when intoxication produces such a condition as the accused loses the requisite intention for the offence and onus of proof about reason of intoxication, due to which the accused had become incapable of having particular knowledge in forming the particular intention, is on the accused. Examining Section 85 IPC, this Court held that the evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into account with the other facts proved in order to determine whether or not he had the intention. The Court held that merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. This Court, in that case, rejected the plea of drunkenness after noticing that the crime committed was a brutal and diabolic act."

Criminal Appeal Nos. 62-63 of 2014
Anokhi Lal v. State of Madhya Pradesh
Decided on: December 18, 2019

Hon'ble Supreme Court held that expeditious disposal is undoubtedly required in criminal matters, and that would naturally be part of guarantee of fair trial, but the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

Hon'ble Court also held that all that it could say by way of caution was that in matters where death sentence could be one of the alternative punishments, the courts must be completely vigilant and see that full opportunity at every stage is afforded to the accused.

Hon'ble Court further held as under:

"22. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:-

In all cases where there is a possibility of life sentence or death sentence, learned Advocates who have put in minimum of 10 years practice at the Bar alone be considered to be appointed as Amicus Curiae or through legal services to represent an accused.

In all matters dealt with by the High Court concerning confirmation of death

sentence, Senior Advocates of the Court must first be considered to be appointed as Amicus Curiae.

Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any hard and fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the concerned accused. Such interactions may prove to be helpful as was noticed in Imtiyaz Ramzan Khan ". **(Reading of full judgment is advised.)**

Review Petition (Criminal) D No.44603 of 2019
Akshay Kumar Singh v. State (NCT of Delhi)
Decided on: December 18, 2019

Hon'ble Supreme Court held that it is no longer res integra that scope of review is limited, and review cannot be entertained except in cases of error apparent on the face of the record. Review is a not a rehearing of the appeal over again. In a review petition, it is not for the Court to re-appreciate the evidence and reach a different conclusion.

Hon'ble Court reproduced the following from the judgment in the case of Sow Chandra Kante and Another v. Sheikh Habib (1975) 1 SCC 674,:

"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition through different counsel of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."

In a criminal case, culpability or otherwise of the accused are based upon appreciation of evidence adduced by the prosecution and also the evidence adduced by the defence. The materials or the news emerging in the media and press as also the news channels cannot be taken note of in arriving at a conclusion on the culpability of the accused or to test credibility of the witness. Such events cannot be urged as a ground for review.

Criminal Appeal No. 1850 of 2010
Jatinder Kumar v. State of Haryana
Decided on: December 17, 2019

Hon'ble Supreme Court reproduced the following from the judgment in the case of Rajinder Singh v. State of Punjab (2015) 6 SCC 477:-

"20. Given that the statute with which we are dealing must be given a fair, pragmatic, and commonsense interpretation so as to fulfil the object sought to be achieved by Parliament, we feel that the judgment in Appasaheb case followed by the judgment of Vipin Jaiswal do not state the law correctly. We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise."

Hon'ble Court observed that it was also held in the Rajinder Singh (supra) that the expression "soon" is not to be construed as synonymous with "immediate", and reproduced the following:-

"23. We endorse what has been said by these two decisions. Days or months are not what is to be seen. What must be borne in mind is that the word "soon" does not mean "immediate". A fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of section 304B would make it clear that the expression is a relative expression. Time lags may differ from case to case. All that is necessary is that the demand for dowry should not be stale but should be the continuing cause for the death of the married woman under section 304B."

Criminal Acquittal Appeal No. 36/2010
State of J&K v. Jagdev Singh and anr
Decided on: December 28, 2019

In this case, the trial court while dismissing the case of prosecution has acquitted the accused in FIR NO. 121/2001 for the offences punishable u/s 4 & 5 of the Explosive Substances Act. The trial court on considering and appreciating the evidence available on record so produced by the prosecution found flaws in it and acquitted the accused. Hon'ble High Court has observed that the High Court while hearing an acquittal appeal can re-appreciate the evidence, however, it should not interfere with the order of acquittal if the view taken by the trial court is also a reasonable view of the evidence on record and the findings recorded by the trial court are not manifestly, erroneous, contrary to the evidence on record or perverse.

Hon'ble High Court has taken the view of the following judgment;'Bindeshwari Prasad Singh v/s State of Bihar',(2002) 6 SCC 650:-

".....In absence of any manifest illegality, perversity and miscarriage of justice, the High Court would not be justified in interfering with the concurrent finding of acquittal of the accused, merely because on re -appreciation of evidence it found the testimony of the Pws to be reliable whereas the trial court had taken an opposite view."

CRMC NO. 502/2018
Mohd Aslam & ors. v. State through SHO Police Station Bahu Fort & Anr.
Decided on: December 31, 2019

Hon'ble High Court held that the law with regard to exercise of inherent jurisdiction by the High Court under section 561-A CrPC which corresponds to Sec. 482 of central code, is well settled. This section was added by the legislature in the CrPC as the High Courts were unable to render complete justice even if in a given case, the illegality was palpable and apparent.

Relying on State of Haryana v Bhajan Lal reported in AIR 1992 SC 604, in which the Hon'ble Supreme Court discussed in detail the provisions of sec. 482 CrPC and the power of the High Court to quash criminal proceedings or FIR. The aforesaid judgment has been followed by this court in a recent judgment titled Harmohinder Singh & Anr. V State of J&K & ors reported in 2019(3) JKJ (HC) 105. But in this case, the contents of the complaint disclose the commission of a non-cognizable offence. The allegations leveled in the FIR are quite serious in nature and deserves to be put to test in a criminal trial. This court cannot sit as a court of trial to investigate into the genuineness of the serious allegations that have been leveled in the complaint. It is well settled that only in the absence of a prima facie case against the accused, the court can quash the criminal proceedings. In this case, all the ingredients of the offence having been committed are found from the complaint and the FIR impugned. It cannot, in any manner, be said that the FIR impugned or the complaint does not disclose the commission of an offence by the accused calling upon this court to exercise its inherent jurisdiction. The petition was accordingly dismissed.

Petition under section 561-A No. 661/2017
Baljeet Singh v. Kulbir singh
Decided on : January 14, 2020

The petitioner being the accused filed the petition under section 561-A CrPC against the order dated 2.12.2016 whereby the trial court has taken cognizance on a complaint filed by the respondent/complainant under section 138 Negotiable instruments act, 1881 read with section 420 RPC on the grounds that entire complaint was filed without any basis, as there was no debt which was to be discharged by the petitioner towards the respondent/complainant and petitioner in support of said claim placed the reliance upon the retirement-cum-partnership deed executed on 4th march 2016 wherein the respondent/ complainant was one of the two retiring partners who had specifically agreed that they were retiring as partners after settlement of their accounts with the complainant. Hon'ble High Court of Jammu and Kashmir after placing reliance

on catena of judgments delivered by Hon'ble Apex court dismissed the petition and held that the question whether the cheque issued by the accused was issued in discharge of legally enforceable debt or not, cannot be gone into by this court in exercise of powers u/s 561-A CrPC rather there is a presumption in terms of sec 139 of the Act in favour of respondent/complainant. Reliance placed by the petitioner on the retirement-cum-partnership deed is only a fact which may be required to be proved during the course of trial and it is for the trial court to see whether the accused had successfully rebutted the presumption created in favour of the respondent/ complainant and quashing the proceedings based only on the facts which have been highlighted would be premature for the High Court. Reliance was placed upon the following judgments i.e Suryalakshmi Cotton Mills ltd. Vs Rajvir Industries ltd. (2008) 13 SCC 678, HMT Watches ltd Vs M.A. Abida (2015) 11 SCC 776, Rallis india ltd. Vs Poduru Vidya Bhusan & Ors. 2011 (13) SCC 88.

CR 01/2020
Krishan Kumar v. Sushil Kumar and others
Decided on: January 14, 2020.

Hon'ble High court held that it is a well settled that injunction is an interim discretionary relief granted pending adjudication of the suit. Discretion has to be exercised keeping in mind the principle governing grant of injunction. Appellate court would not normally interfere with the exercise of discretion if the conclusion reached by the trial court is based on the material on record.

The Appellate court held that the trial court has rightly modified its order by allowing the defendants exparte to sow the crop on the suit land as it will not prejudice the rights of petitioner. Keeping the suit land in possession of defendants fallow during the pendency of suit, would benefit none.

CRM(M) No.125/2019
Altaf Ahmad Rather & anr. v. State of J&K
Decided on: December 12, 2019

While not finding the present case to be a case of inordinate delay which could be said to be infringing the right of the petitioners to speedy trial, Hon'ble High Court of J&K held that due adherence to the procedural rules framed by this Court to achieve speedy disposal of the cases needs to be kept in mind.

Crl R No.27/2019
Ghulam Qadir Lone v. Union Territory of J&K through CBI
Decided on: December 16, 2019

In this case, the Trial Court had closed the right of the petitioner for cross - examination of the Investigating Officer who figured as a prosecution witness on the ground that despite repeated opportunities in that regard, the said witness had not been cross-examined by the petitioner's counsel. And an application filed by the petitioner under Section 311 of the Cr.P.C. making a prayer for recalling of the Investigating Officer for purposes of cross- examination had also been dismissed.

Hon'ble High Court of J&K held that on a perusal of the proceedings on the dates mentioned in the order, it was clear that the Court below had given ample opportunity to the petitioner's counsel to appear and cross examine the prosecution witness on as many as four occasions when the said witness was present in the Court but was either not cross examined despite the presence of the petitioner's counsel or was sought to be avoided on flimsy pretext, and that the order impugned which was a well reasoned order required no interference.

"The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies. It is plain that the procedural issue is important and the substantive issue portentous."

V.R. Krishna Iyer, J. in Raj Kapoor v. State, (1980) 1 SCC 43, para 9

CIVIL

Civil Appeal Nos. 8899-8900 of 2019
The State of Mizoram and others etc. v. M/s Pooja Fortune Private Limited etc.
Decided on: November 15, 2019

Hon'ble Supreme Court reiterated that while granting stay, the Court must consider three aspects-
(i) Balance of convenience
(ii) Irreparable harm or injury
(iii) That there is a prima facie case

Civil Appeal No. 9407 of 2019
Sri Prabodh Ch. Das and another v. Mahamaya and others
Decided on: December 13, 2019

Hon'ble Supreme Court held that Order 41 Rule 17(1) read with its explanation makes it explicit that the Court cannot dismiss the appeal on merits where the appellant remains absent on the date fixed for hearing. In other words, if the appellant does not appear, the Court may if it deems fit dismiss the appeal for default of appearance but it does not have the power to dismiss the appeal on merits.

Civil Appeal No. 9244 of 2019
M/S N.V. International v. The State of Assam and others
Decided on: December 06, 2019

Hon'ble Supreme Court held as under:

"5) We may only add that what we have done in the aforesaid judgment is to add to the period of 90 days, which is provided by statute for filing of appeals under Section 37 of the Arbitration Act, a grace period of 30 days under Section 5 of the Limitation Act by following Lachmeshwar Prasad Shukul and Others (supra), as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned."

Hon'ble Court also reproduced inter alia the following from order dated 17.09.2018 in the case of SLP (C) No. 23155/2013 [Union of India vs. Varindera Const. Ltd.,:

" …… One of the important points made by the Division Bench is that, apart from the fact that there is no sufficient cause made out in the grounds of delay, since a Section 34 application has to be filed within a maximum period of 120 days including the grace period of 30 days, an appeal filed from the self-same proceeding under Section 37 should be covered by the same drill.

Given the fact that an appellate proceeding is a continuation of the original proceeding, as has been held in Lachmeshwar Prasad Shukul and Others vs. Keshwar Lal Chaudhuri and Others, AIR 1941 Federal Court 5, and repeatedly followed by our judgments, we feel that any delay beyond 120 days in the filing of an appeal under Section 37 from an application being either dismissed or allowed under Section 34 of the Arbitration and Conciliation Act, 1996 should not be allowed as it will defeat the overall statutory purpose of arbitration proceedings being decided with utmost despatch."

Civil appeal Nos. 9488-9489 of 2019
University of Delhi v. Union of India & Ors.
Decided on: December 17, 2019

Hon'ble Supreme Court reiterated that a liberal approach is to be taken in the matter of condonation of delay. The consideration for condonation of delay would not depend on the status of the party namely the Government or the

public bodies so as to apply a different yardstick but the ultimate consideration should be to render even- handed justice to the parties. Even in such case, condonation of long delay should not be automatic since the accrued right or the adverse consequence to the opposite party is also to be kept in perspective. In that background while considering condonation of delay, the routine explanation would not be enough but it should be in the nature of indicating "sufficient cause" to justify the delay which will depend on the backdrop of each case, and will have to be weighed carefully by the Courts based on the fact situation.

In the present case, where there was a delay of 916 days in the filing of LPA, the consideration to condone the delay could be made only if there was a reasonable explanation, and the condonation cannot be merely because the appellant is public body. Hon'ble Court noted that the entire explanation in this case depicted the casual approach unmindful of the law of limitation despite being aware of the position of law. That apart when there is such a long delay and there is no proper explanation, laches would also come into play while noticing as to the manner in which a party has proceeded before filing an appeal.

It is true that that every day's delay need not be explained with such precision, but the fact remains that a reasonable and acceptable explanation is very much necessary.

Civil Appeal No. 4726 of 2010
Vinay Eknath Lad v. Chiu Mao Chen
Decided on: December 18, 2019

Hon'ble Supreme Court referred the following from the case of Apollo Zipper:-

"40... It is a settled principle of law laid down by this Court that in an eviction suit filed by the landlord against the tenant under the rent laws, when the issue of title over the tenanted premises is raised, the landlord is not expected to prove his title like what he is required to prove in a title suit."

However, the Hon'ble Court also held that it is not the law that in a landlord-tenant suit the landlord cannot be called upon at all to prove his ownership of a premises, but onus is not on him to establish perfect title of the suit property, and that, in a landlord-tenant suit, the landlord is not required to prove his title in the subject property as in a title-suit. But when the landlord's derivative title is challenged, the same has to be established in some form.

Hon'ble Court also referred inter alia the following from the judgment in the case of Appollo Zipper India Limited Vs. W. Newman and Company Limited (2018) 6 SCC 744:-

"42... Similarly, the law relating to derivative title to the landlord and when the tenant challenges it during subsistence of his tenancy in relation to the demised property is also fairly well settled. Though by virtue of Section 116 of the Evidence Act, the tenant is stopped from challenging the title of his landlord, yet the tenant is entitled to challenge the derivative title of an assignee of the original landlord of the demised property in an action brought by the assignee against the tenant for his eviction under the rent laws. However, this right of a tenant is subject to one caveat that the tenant has not attorned to the assignee. If the tenant pays rent to the assignee or otherwise accepts the assignee's title over the demised property, then it results in creation of the attornment which, in turn, deprives the tenant to challenge the derivative title of the landlord."

In reference to requirement for payment of stamp duty equivalent to that of transfer or conveyance of property, Hon'ble Court also referred inter alia the following from the judgment in the case of S.V. Chandra Pandian Vs. S. V. Sivalinga Nadar (1993) 1 SCC 589:

".....when a dissolution of the partnership takes place and the residue is distributed among the partners after settlement of accounts there is no partition, transfer or extinguishment of interest attracting Section 17 of the Registration Act."

CSA No. 17/2017
Ghulam Rasool v. Mohammad Sharief and others
Decided on: November 05, 2019

Hon'ble High Court of J&K noted the case of Venkataraja and others v. Vidyane Doureadjaperumal (D) Thr. Lrs and others, 2013 (3) RCR (Civil) 176, and, while considering the earlier judgments on the issue, held that, it was opined therein that a simpliciter suit for declaration is not maintainable. Hon'ble Court further held that the very purpose of proviso to Section 34 of the Specific Relief Act is to avoid multiplicity of litigation and also to check loss of revenue of court fees. History of the law and report of the Law Commission was discussed. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking amendment of the plaint.

Hon'ble Court reproduced inter alia the following from the case of Venkataraja and others v. Vidyane Doureadjaperumal (D) Thr. Lrs and others, 2013 (3) RCR (Civil) 176:

"…. In Muni Lal v. The Oriental Fire & General Insurance Co. Ltd & Anr., 1996 (1) R.R.R.418, this Court dealt with declaratory decree, and observed that 'mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief."

Also, while referring Vinay Krishna v. Keshav Chandra & Another, AIR 1993 SC 957, Hon'ble High Court of J&K held that the opinion expressed in para 17 of the said judgment is that there is no bar upon a party from seeking amendment of the plaint to include the unsought relief, provided that it is saved by limitation, and that the needful has to be done at the earliest.

It is not for the court to grant permission for amendment of the plaint without any prayer made for the same. It is always for the parties to seek permission to amend the pleadings. The court is to decide the *lis* as presented to the court. Any application for amendment of the pleadings has to be considered in the light of the provisions of law, and the stage of the case. Hon'ble Court also noted that in the case in hand, the respondents/ defendants had taken the plea at the very first instance, in the written statement that they were in physical possession of property in dispute, as they had been delivered the possession in pursuance of sale of the land in their favour, the consideration money was also paid, and that despite this plea having been taken by the respondents/ defendants in the written statement filed, no steps were taken by the appellant/ plaintiff to amend the suit for claiming the relief of possession.

CM (M) No.57/2019
Feroz Ahmad Dar and Anr. v. J&K Bank Ltd.
Decided on: December 20, 2019

Hon'ble High Court of J&K held that a party to a litigation does not have any license to protract the litigation to an extent which defies logic or reasoning. Neither does a defendant have any inherent right to claim that *ex parte* proceedings must necessarily be set aside at a time which suits their interest or choice.

Hon'ble Court observed that on a perusal of the application filed by the petitioners for setting aside *ex parte* proceedings, it did appear that the same was cryptic, and did not actually explain the reasons for the absence of the petitioners or their counsel, and held that the basis for rejection of the application by the Court below, in those circumstances, cannot be said to be suffering from any illegality or perversity, nor does it suffer from any error of jurisdiction. The Court below having not been satisfied at all with the grounds taken in the application, was justified in rejecting the same.

Mac Appeal No.51/2019
United India Insurance Co. Ltd. v. Rafiqa and others
Decided on: December 10, 2019

Hon'ble High Court of J&K held as under:

"10) From plain reading of Section 149 (supra), it clearly transpires that its clause 2(a)(i)(a) relates to the vehicle not covered by a permit to ply for hire or reward and it is being used as such. A

careful reading of Section as a whole would make it abundantly clear that violation of route permit is not envisaged as one of the defences available to the insurance company. Clause 2(a)(i)(c) provides that the insurance company may raise defence that the vehicle at the time of accident was being used for a purpose not allowed by the permit under which a transport vehicle is permitted to be used. This clause cannot be stretched to mean that the use of a vehicle on a route other than the one for which it has been granted permit would amount to using the vehicle for a purpose not allowed by the permit. The offending vehicle, admittedly a transport vehicle, at the time of accident was being used as such. That being the admitted position, it cannot be said that the appellant insurance company is absolved of its liability to indemnify the owner on the ground that the offending vehicle, at the time of accident, was plying on the route not permitted by its permit. Bearing this distinction in mind and without disputing the proposition of law cited by the learned counsel for the appellant, I am of the view that the first ground of challenge taken by the appellant is devoid of merit and deserves to be rejected."

Relying on the judgment passed by the Hon'ble Apex Court in Civil Appeal No. 9581 of 2018 titled Magma General Insurance Company Limited v. Nanu Ram Alias Chuhru Ram and others decided on 18-09-2018 which held that each of the dependants-claimants are required to be compensated for loss of consortium, and that in the case of children who lost their parents, parental consortium is to be awarded and in a case where a parent has lost a minor child or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of 'Filial consortium', and wherein the Hon'ble Court had proceeded to award the father and the sister of the deceased an amount of Rs. 40,000/- each for loss of 'Filial consortium' in the aforementioned case, Hon'ble High Court of J&K held that the awarding of Rs. 40,000/- each to the parents of the deceased was totally in accord with the ratio of the apex Court judgment in Magma General Insurance Company Limited's case.

OWP No. 73/2018
Sukhdev Singh v. Vigilance Organization, Jammu & Ors.
Decided on: January 14, 2019

The petitioners in this case had challenged the order of framing of charge against them under sections 5(1) (d) and 5 (2) of PC Act for conferring undue benefit to co-accused, the General Secretary of Engineers Association, by allotting the land belonging to Irrigation Department. In this case, the Court observed that Executive Engineer has no vested authority to allot the state land, which could be done by following prescribed procedure. The Court, relying upon various legal precedents, held that trial Court while framing the charge is not required to pass a detailed order specifying reasons for same and the framing of charge is itself a prima facie order that there were sufficient grounds for presuming that the accused has committed the said offence. The Court also observed that power under section 482 Cr.P.C for quashing the charge framed by the Trial Court should be exercised only when the allegations are patently absurd and inherently improbable as not to constitute a charged criminal offence.

SWP No. 673/2017
Abdul Rashid Mir v. State of J&K & Ors.
Decided on: December 20, 2019

The Hon'ble High Court held that according to the provisions of the Regulation 35-AA, as inserted vide F.D. Notification No. SRO 310-F of 1995 dated 29.11.1995, the employees have a right to seek correction in the recorded particulars within six months from the date of issuance of the said notification. However, the petitioner cannot at the fag end of his tenure when he is scheduled to retire, be permitted to continue in service on flimsy pretext or grounds.

OW104 No. 83/2013
Devinder Singh v State & Ors.
Decided on: January 14, 2020

The Deputy Commissioner, who may be Ex-officio, a collector under the Land Revenue Act, 1996 does not act as collector

when he proceeds under Section 15 of the Land Alienation Act Svt, 1995 thus the order passed by the Deputy Commissioner under Section 15 of the Act is neither appealable before Divisional Commissioner nor the revision lies before the Division commissioner or Financial Commissioner.

The Hon'ble High court held that the petitioner if had any right to reclaim the subject land has lost such right by his conduct or the conduct of his predecessor-in -interest. The conversion of agricultural land to commercial use is with the consent and at the instance of petitioner predecessor-in-interest. In the given facts and circumstances, the doctrine of 'Waiver and Estoppel' would be clearly attracted. However with regard to waiver Hon'ble High Court placed reliance on judgment rendered in case of Municipal corporation of Greater Bombay v Dr. Hakimwadi Tenants Association 1988Supp. SCC55, in which supreme court has held as under:-

"In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case."

On the touchstone of principles laid down by the Supreme Court in the above mentioned judgment when this court examine the facts of the instant case, it is clearly seen that there was complete waiver of rights by the petitioner. Since the case in hand is a case of abandonment of rights by the petitioner, if at all there were any. The voluntary relinquishment of rights in the given circumstances also amounts to 'waiver' in the eyes of law.

OWP No. 133/2015
Chaman Lal Sharma v. Chandu Ram Sharma
Decided on: January 14, 2020

The powers which are otherwise exercisable by the custodian for the purposes of evicting an unauthorized occupant and for the purposes of putting an allottee in the possession upon demarcation under J&K State Evacuees' (Administration of Property) act Svt. 2006 , if exercised by Civil Court would be prohibited in terms of section 31(1) (iii) of the Act of 2006 which clearly says that the civil court's jurisdiction is barred in regards to any of the matters which the custodian general or custodian is empowered by or under this Act to determine.

Hon'ble High Court of Jammu and Kashmir held that the custodian, in terms of Rule 14(3)(vi) of the rules of 2008 has the power to cancel the allotment in the case and if the allottee is found to have permitted any other person to occupy the property so allotted, such a person would be removed or evicted as an unauthorised person as defined under section 2(g) of the Act of 2006.

The suit admittedly have been filed by the plaintiff who is not at all allottee of the evacuee property, the only right which he claims is one of the possession of that land which otherwise is an evacuee land. The allegation is that the defendant, petitioner herein is trying to interfere in the peaceful possession of the plaintiff over the suit land.

Section 25 of the Act of 2006 envisages that no transfer of any right or interest in any evacuee property would be effected so as to confer any rights or remedies on the parties to such transfer or on any person claiming under them unless it is confirmed by the Custodian General. Section 27 of Act envisages the right of the Custodian General to take possession of the Evacuee property in certain circumstances. Section 30 provides a comprehensive mechanism for filing an appeal, review and revision against the orders passed by the authorities mentioned herein. The court put concern over Rule 14 of the 2008 Rules - which deals with cancellation or variation of allotments made by the custodian.

The Court held that in the present facts and circumstances, the Civil Court did not have the jurisdiction to deal with the issue in question in regard to the land to the extent the same was evacuee property.

VISIT OF INDUCTION TRAINEE OFFICERS, 2019-2020 BATCH TO CHANDIGARH JUDICIAL ACADEMY

J&K State Judicial Academy collaborated with Chandigarh Judicial Academy in organizing special sessions of Induction Training Programme for officers of 2019-20 batch. This two weeks of training programme was organized on the initiative of Hon'ble the Chief Justice, Ms Justice Gita Mittal, Hon'ble High Court Committee for Judicial Academy and Hon'ble Mr Justice Rajesh Bindal. Justice Bindal actively supervised and guided the training programme at Chandigarh. Mr Balram Gupta, Director (Academics) and Ms Shalini Nagpal, Director (Administration) extended full support and cooperation in effective and fruitful completion of the training program. Two weeks of training programme was conceptualized and guided by the permanent faculty of the Chandigarh Judicial Academy, working in close association of Director (Academics) and Director (Administration). The programme commenced on 8th January, 2020 with Inaugural Session attended by Hon'ble Mr Justice Rajesh Bindal as Chief Guest, Director (Academics) and Director (Administration) from Chandigarh Judicial Academy, Director, J&K State Judicial Academy, permanent and guest faculty of Chandigarh Judicial Academy and the trainee officers. During the training programme, the trainee officers were guided on vast ranging subjects of knowledge, skill and attitude. The programme concluded with valedictory function on 25th January, 2020. The trainee officers returned back after attending Republic Day celebrations in the Punjab and Haryana High Court on 26th January, 2020.

A detailed report prepared by the trainee officers is being published separately in this issue of Newsletter.

SPECIAL TRAINING PROGRAMME ON REPRODUCTIVE RIGHTS AND TRANSGENDER RIGHTS

On 27th January, 2020, the J&K State Judicial Academy organized sensitization programme on Reproductive and Transgender Rights. The Programme was conducted by Prof. Dipika Jain, Jindal Global Law School and Ms Kavya Kartik, Senior Research Fellow at Jindal Global Law School. Prof. Dipika Jain has done research on Gender Sensitization Issues especially focusing on the issues of Reproductive Rights and Transgender Rights. She has also extensively written on such issues. Ms Kavya Kartik has also done extensive study and has written on Gender Issues.

Hon'ble the Chief Justice, Ms Justice Gita Mittal and Hon'ble Mr Justice Rajesh Bindal also attended a session and guided the participants on the role of judges in upholding the rights of citizens. Hon'ble the Chief Justice exhorted the participants that an attitudinal change is required to

see the Gender Issues from the perspective of constitutional morality and the rights guaranteed to the citizens. The inflexible notions and the Gender bias prevalent in the society needs to be given a goodbye. Hon'ble the Chief Justice also stressed that the Judicial Officers must work relentlessly to remove inequalities. Hon'ble Mr Justice Rajesh Bindal also highlighted that the position of Judicial Officers is unique were they can do every effort within the limits of law to uphold the rights of every citizen.

Prof. Dipika Jain highlighted that the law does not address issue of abortion as a choice. The law states abortion as permissible when the fetus is less than 20 -weeks old under some circumstances. While it is a right, it is a qualified right, not an absolute one: not atleast a woman can demand or request for it. The resource persons stressed upon the fact that the Women's sexual and reproductive rights need recognition and active reinforcement, and safe abortion is a positive step in that direction. The Medical Termination Of Pregnancy Act, 1971, (MTP Act) , POCSO, PCPNDT Acts were discussed in detail. The resource persons also highlighted the issues related to Gender Diversity in India, discussed the rights of Transgender persons in India and overviewed the Transgender Persons (Protection of Rights) Act, 2019. Various provisions of the Act were critically analyzed and some deficiencies and difficulties were highlighted. Now the shift in the focus is based on the rights approach.

SPECIAL TRAINING PROGRAMME ON GENDER JUSTICE, JUVENILE JUSTICE AND JUDICIAL ETHICS

On 31st January, 2020, J&K State Judicial Academy has commenced a workshop for the trainee Munsiffs of 2019-20 Batch on "Gender Justice, Juvenile Justice and Judicial Ethics". The workshop shall continue on 1st & 2nd February as well. Prof. Ved Kumari from Delhi University (Former Chairperson, Delhi Judicial Academy) is the resource person for the workshop. She is an eminent scholar on the Gender Issues and has extensively worked on the Gender Issues and Juvenile Justice. To her credit there is lot of written literature on the subject and she is much sought after resource person in various Judicial Education discourses.

On the first day of the workshop, Prof. Ved Kumari spoke on the Gender Issues and highlighted that the Constitution of India provides for special beneficial provisions for the welfare of women and children. These provisions are aimed at bringing equality in the true sense by removing the personal biases in the society and the discriminatory laws. The Constitution also mandates to provide an enabling environment for full opportunities and development of the marginalized sections of the society, including women and children. She also stressed that it is needed to give full effect to the provisions of Constitution of India to realize the constitutional goal of Justice-Economic, Political & Social.

REPORT OF THE TRAINEE OFFICERS OF 2019-20 BATCH OF MUNSIFFS, REGARDING SPECIAL SESSIONS OF INDUCTION TRAINING , AT CHANDIGARH JUDICIAL ACADEMY (FROM 8th JAN TO 25th JAN, 2020)

Subject-wise report prepared by the Trainee Officers is given as under:

A. JUDICIAL ETHICS

John Marshall has said:

"The power of the judiciary lies not in deciding cases, not in imposing sentences, not in punishing for contempt but in the trust, faith and confidence of common man".

If the judiciary loses trust, faith and confidence of the common man that will be the end of rule of law and democracy.

This public trust and confidence in the judicial system of our country which seems to have lost its relevance and importance needs a revival in the present scenario. Highlighting this aspect, the Hon'ble Judge, Justice Rajesh Bindal (Judge High court of Jammu and Kashmir) discussed its pros and cons while imparting training to the newly selected judicial officers from Jammu and Kashmir at Chandigarh Judicial academy. Commenting upon the said topic, the Hon'ble judge at the very inception quoted Socrates:

Four things belong to a judge:

1. To hear courteously.
2. To answer wisely.
3. To consider soberly.
4. To decide impartially.

Proceeding further, the Hon'ble Judge highlighted following important qualities which a judge must adhere to in order to be termed as ethically sound judge.

1. Thorough knowledge: Knowledge does not only mean the knowledge of the subject, but all round developments and recent amendments in the relevant legal field.
2. Impartiality: It does not mean only deciding independently, but it also includes freedom from bias- both explicit as well as implicit.
3. Integrity and Honesty: A Judge should never compromise on the principles of integrity and honesty while delivering justice.
4. Judicial Temperament: A judge should be fearless of public clamor and regardless of public praise and indifferent to the private political or partisan influences while discharging his duties.
5. Punctuality: Regularity in attending the court is worthless unless it is accompanied by punctuality. A judge should always be punctual in the performance of his duties, both judicial and administrative.
6. Curtailing delay: A Judge should ensure speedy disposal of cases by curbing the unnecessary adjournments devised to prolong the cases.

While most of the judges stop here, Hon'ble Justice Rajesh Bindal proceeded further by referring to the concept of public trust and confidence in the judicial system, which seems to be ignored, despite being the most important source of power and prestige of the judiciary.

Dealing with the question of restoration of public trust and confidence in the judicial system, the Hon'ble Judge laid emphasis on the fact that until and unless a judge does not adhere to the above stated qualities, it is not possible to restore public trust and confidence in the judicial system. The Hon'ble Judge went on by saying that the restoration of public trust and confidence in the judicial system should be the primary task of every judicial officer of the country. Here the Hon'ble Judge added that the above stated qualities could go a long way in this respect and hence must be adhered to at all costs.

While concluding the topic, the Hon'ble Judge referred to Bangalore Principles of Judicial Conduct 2002 and stressed upon adhering to these principles which are:

1. Impartiality.
2. Integrity.
3. Independence.
4. Equality.
5. Propriety.

6. Competence and Diligence.

The bottom line touched our hearts, when the Hon'ble judge, Justice Rajesh Bindal said that mere knowledge of these ethical principles is not sufficient. In fact it is the actual and factual application of these principles at every moment in the life of a judicial officer that will help in restoring public trust and confidence in the judicial system of the country.

B. Constitutional Vision of Justice

1. INTRODUCTION

The Constitution is the grundnorm of the people. All the statutory laws emanate from the Constitution and all the procedural and substantive laws are subordinate to the parent act i.e. the Constitution. Therefore, it is mandatory on the legislature, executive and the judiciary to not exceed the vires inferred upon them by the Constitution. The subordinate Judiciary must uphold the constitutional principles while delivering justice.

Part III of the constitution forms the basic structure of the constitution. The subordinate Judiciary has a mandatory duty on its shoulders to see that such rights of the litigants are not violated. Statistically speaking, the subordinate judiciary has much more litigation in comparison to the Higher Judiciary.

2. THE CONSTITUTION VIS-A-VIS THE POWERS OF JUDICIAL OFFICERS.

The part III of the Constitution of India is its Basic structure. Article 14 and 19 are the provisions which envisage the equality of citizens and their freedoms. The magistrates in subordinate judiciary must always keep in mind that all the parties before the court of law have these inherent rights and they should be given equal opportunity to contest the trial. This is to overcome the arbitrariness in the system, and uphold the Rule of law.

Article 20 of the constitution provides for Protection in respect of conviction for offences. The article provides that:

- The rule against ex-post facto laws
- The rule against double jeopardy
- The rule against self incrimination

This provision of rule against self-incriminate shall mandatory be followed by the judicial magistrates while performing judicial functions, e.g. while recording statements and confession, the magistrate is bound to aware the accused and witness of such provisions as it is a basic principle of natural justice.

Article 21 is an ocean of rights. The subordinate judicial officers have to keep in mind the life and liberty of the persons while granting bail, remand, or issuing process. This article plays a vital role in justice dispensation as it envisages that the principles of natural justice viz. 'Nemo Judex in causa sua' and 'Audi alteram Partem' must always be kept in mind as the basic principle of life and liberty. The Constitutional intent behind is to uphold the 'Rule of Law' and not to arbitrarily harass anybody without sufficient reasons. Liberty and freedom are issues of serious nature and must never be taken lightly. Therefore, the libertly of persons must not, in any circumstances, be curtailed arbitrarily.

Article 22 also plays a key role in subordinate judiciary. While recording statements, confessions, admissions, the magistrate is bound to aware the accused about his fundamental rights of legal service/aid, to give his ample opportunity and representation to ensure a fair trial. The magistrates are bound to keep in mind these rights while granting remand and bail etc.

Article 39A of the constitution provides for the Equal justice and free legal aid. It is the duty of the magistrate to see whether both the parties have equal access to justice or not. In case, it appears that a party is unable to represent due to economical or any other reason, the magistrate shall take appropriate steps or direct the appropriate authority to provide legal aid for a fair trial. The judicial officers must also take responsibility regarding the medical and legal aids to persons in Judicial lockup.

Article 141 of the constitution

envisages the Doctrine of Stare-decises. It provides that the law declared by Supreme Court shall be binding on all Courts within the territory of India. Therefore, the subordinate judiciary has a duty to apply the precedents made by the High Court and the Supreme Court.

3. THE CONSTITUTION AND THE SUBORDINATE JUDICIARY

Ch. VI in Part VI of the Constitution deals with subordinate Courts. Art. 233 provides that appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such States. Cl. (2) of Art. 233 provides that a person not already in the service of the Union or of the State shall only be eligible to be appointed as district judge if he has been for not less than 7 years an advocate or pleader and is recommended by the High Court for the appointment. Art. 234 provides for recruitment of persons other than district judges to the judicial service. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such States. Art. 235 provides that the control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of a district judge shall be vested in the High Court. A conspectus of these articles would show that the subordinate judiciary would consist of a district judge and persons other than and subordinate to district judge. Recruitment to the cadre of district judge can be made from two sources, viz. promotion from the subordinate judiciary and direct recruitment from the Bar. In the matter of promotion from the subordinate judiciary, power is conferred on the Governor to give promotion in consultation with the High Court exercising jurisdiction in relation to it. In the matter of recruitment from the Bar, the appointment can be made on the recommendation of the High Court. Thus, the High Court has a preponderating voice in the matter of recruitment to the cadre of district judge, whereas power of making appointments vests in the Government.

4. CONCLUSION & SUGGESTIONS.

As a general rule, the courts in the lowest rung are approached by the general public and hence, the judicial officers must be competent enough to deliver complete justice. This is what the Rule of law envisages. This attribute of the judicial system creates public trust and confidence in it. The subordinate judiciary shall always keep in mind the provisions of the Constitution as the judicial functions must not be ultra-vires. Therefore, the judicial officers must interpret the statutory laws vis-a-vis the Constitution. The subordinate judiciary has a pro-active role in protecting the fundamental rights of the citizens because it is directly approached by the general public at a grass root level. Therefore, the subordinate judiciary must take the constitutional provision with utmost seriousness.

C. Civil Procedure

As per schedule prepared by CJA proper training/interactive sessions were conducted on the Code of Civil Procedure by the Faculty members, Mr. Gopal Arora (ADJ), Mr. Baljinder Singh Sra (ADJ) and Ms. Ranjana Aggarwal (ADJ).

Starting from the base of the subject, we were taught that the Code of Civil Procedure is a procedural law, related to the administration of Civil proceedings in India. The Code is divided into two parts, the first part containing 158 sections and the other comprises of The First Schedule which has 51 orders and rules as such. As per the curriculum, we had interactive sessions on the following topics;-

1. Suits by and against government
2. Execution proceedings
3. Framing of issues

The sessions on the aforesaid topics

were held as under:-

1. SUITS BY OR AGAINST GOVERNMENT

Section 80 provides that where a suit is to be instituted against the government or by any public official for any act purported to be done in his official capacity, the person filing the suit must give a notice of at least two months before filing of the suit. The notice must state the cause of action, the name, description and place of residence of the plaintiff and the relief sought by him. It must be dated in the plaint that such a notice has been sent. It is pertinent to mention here that in case of urgencies, this notice can be waived off by the plaintiff by filing an affidavit for dispensation of such notice.

2. EXECUTION

The proceedings by which a party moves the court for satisfaction of the decree is called as Execution Proceedings. Execution is the medium by which the Decree Holder seeks the Judgment Debtor obey the command of the decree. It empowers the decree holder to recover the products of the judgment. The domain of execution can be explained under the following heads:

* Nature of the decree:

There may be an execution for preliminary or final decree, decree for declaration, decree for specific performance, decree for conjugal rights, decree for rendition of accounts, etc.

* Who can file execution:

Execution can be filed by decree holder or transferee of decree by assignment or operation of law.

* Against whom execution can be filed:

The judgment debtor or the legal representative of the judgment debtor.

* Which court is competent court for execution:

It may be the court of first instance or the transferee court.

* Against which property decree can be executed:

It may be executed against movable as well as immovable property. However, there are some exceptions under Section 60 of CPC which includes the necessary wearing apparels, cooking vessels, beds and beddings, personal ornaments as in accordance with religious usage, tools of artisans, book of accounts, stipends. Gratuities allowed to pensioners of government, wages of labourers, etc.

* Procedure of notice to Judgment debtor:

Where an application for execution is made more than 2 years after the date of decree, the court executing the decree has to issue a notice first.

* Mode of execution:

Execution can be done by attachment and sale; however, other modes also include arrest, detention and appointment of the receiver. More so, the procedure for attachment is different for movable and immovable property. However, other steps may include proclamation of sale warrant, sale and confirmation of sale to Judgment debtor, removal of resistance, rights of tenants, objections of parties/third parties/auction purchaser/adjustments, cross-decrees/cross-claims/garnishee orders/limitation issues.

3. FRAMING OF ISSUES

The domain of framing of issues can be explained under following heads:

- What is an issue?

Issues are the crux of a civil case. When one party affirms and other party denies a material proposition of law or fact, then only issue arises. If there is no specific denial, then the question of framing issues does not generally arise.

- What is material proposition of law or fact:

Plaintiff's allegations showing right to sue and defendant's allegations constituting his defence.

Kinds of issue:

- Issues of fact
- Issue of law
- Mixed issue of fact or law

- Materials for framing issue:

Issues have to be framed on the basis of Affidavit by parties/pleader (allegations on oath), Pleadings and interrogatories in the suit, Documents produced by either party. Court can examine witnesses or documents before framing issues if its

helpful in framing such issues.

- Preliminary issues:

Issues preliminary in nature like maintainability of the suit or limitation are to be preferably decided first. These are instances where suits are dismissed at the threshold by the courts on the basis of preliminary issues only.

- Preference:

While solving the issue, preference shall be given as follows; first preference to the issues of law, Second preference to the mixed issues of law and fact and Third preference to the issues of fact.

D. Forensic Evidence (Legal Scenario)

Simply put, "forensic science is the use of the science in the service of the law". Forensic science could also be defined as application of science or scientific techniques to the law and to solve crime.

- Brief History

Till the mid of the 19th century, natural science had begun to develop by leaps and bounds. Logic and scientific experiment took over the mystic theories shedding a new light on the mysteries of the universe and thereby setting a new trend. This apparent transition from the mystic to scientific soon reflected not only in criminal investigation but also in the different facets of the legal system. This led to emergence of two sides of a single case – one was the side stated and the other proved from the scientific viewpoint. This led to emergence of era of "forensic science" gradually.

- Application

Analysis of forensic evidence is used in the investigation and prosecution of the civil and the criminal proceedings. Forensic evidence is also used to link crimes that are thought to be related to one another. For Example DNA evidence can link one offender to several different crimes or crime scenes (or exonerate the accused).

Linking crimes helps law enforcement authorities to narrow the range of the possible suspects and to establish patterns of crimes, which are useful in identifying and prosecuting suspects. They also work in developing new techniques and procedures for the collection and analysis of evidence. In this manner, new technology can be used and refined not only to keep forensic scientist on the cutting edge of science but to maintain the highest standards of quality and accuracy.

- Methodology

During an investigation, forensic evidence is collected at a crime scene, analysed in a laboratory and often presented in court. Each crime scene is unique and each case presents its own challenges. Some complex cases may require the collection, examination and analysis of a large amount of evidence. These cases may involve multiple forensic experts with backgrounds in biology, chemistry, physics, computer science and other disciplines. As stated earlier, sciences used in forensics include any discipline that can aid in the collection, preservation and analysis of evidence such as Chemistry (for the identification of explosives), Engineering (for the examination of structural design), Biology (for the DNA identification or matching).

Daubert-Frye Standards

As a general rule, it is up to the lawyers, not the experts, to determine what evidence must be presented in court to meet a specific jurisdiction's admissibility standards. That having been said, experts often want to know the requisite standard, as doing so allows them to better prepare for both direct and cross examination.

If we take Frye first, Frye is commonly referred to as the "general acceptance test". Scientific methods that are generally accepted are admissible, and scientific methods that are on the fringe, or not "sufficiently established" are not admissible.

Unlike the Frye standard, Daubert is a "flexible standard". Under Daubert, cross examination, the introduction of the contrary evidence, and the court's careful instruction regarding the burden of proof, rather than a bright line rule of scientific consensus, allows juries to

properly evaluate evidence. Considering the practical application of both, under Daubert, the judge, not the scientific community, is the gatekeeper determining evidence admissibility. Because the factors under the Daubert can be re-evaluated, and because things such as additional information on error rates or additional peer reviewed publication takes place, the court has an ever changing landscape. This allows for a case by case evaluation rather than a single finding of admissibility, in theory.

While Frye offers a bright-line rule, Daubert provides courts with "flexibility". There is nothing that requires the court to consider all the Daubert factors, or requires the court give more weight to one factor over other factors. In other words, it is up to the court to decide based on a wide variety of possible factors including "widespread acceptance", whether a certain scientific method or technique is admissible.

In theory, Daubert admits evidence which courts may find reliable, yet not generally accepted, methodologies, keeps out evidence which relies on a scientifically accepted method yet yields "bad science". Conversely under Frye, new methods that produce "good science" are excluded if they have not yet reached the level of "general acceptance".

Indian Scenario

Typically there is no specific provision for "forensic evidence" as such but we usually take it within the domain of "expert" opinion. Section 45 of the Indian Evidence Act says that when the court has to form an opinion upon a point of foreign law of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled, science or art or in the questions as to the identity of handwriting, or finger impressions are relevant facts. Such persons are called experts.

Further as per section 46 of the Indian evidence Act, it is stated that facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Malimath Committee Set Up

The Home Ministry, Government of India, constituted a committee under the chairmanship of Dr. Justice V.S.Malimath to suggest reforms in the criminal justice system. This committee suggested comprehensive use of forensic science in crime investigation. According to the committee DNA experts should be included in the list of experts given in section 293 (4) of Cr.P.C in 1973.

Conclusion

Needless to say that forensic evidence plays a crucial role in helping the courts of law to arrive at logical conclusions and if collected, examined and appreciated properly could play a very pertinent role in facilitation of course of justice but for that we have to take care in handling the whole scenario from the time evidence is collected from a crime scene. In adversarial system of criminal justice system like ours, police usually is overburdened with both investigation and law and order handling leading to such a situation where often forensic experts do not accompany police as police rushes to the crime scene. Since police usually collects the first evidence itself and often negligently this leads to tampering of evidence and sometimes we miss the basic forensic things which experts could have handled properly. So there is need to take care of all this so that there is proper appreciation of this evidence to help judges in reaching conclusions and thereby administering justice in a proper way.

Contributed by:
Trainee Munsiffs, Batch 2019-20

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 NO. 40 OF 2019
[5th December, 2019.]

An Act to provide for protection of rights of transgender persons and their welfare and for matters connected therewith and incidental thereto.

BE it enacted by Parliament in the Seventieth Year of the Republic of India as follows:—

CHAPTER I
PRELIMINARY

1 (1) This Act may be called the Transgender Persons (Protection of Rights) Act, 2019.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. In this Act, unless the context otherwise requires,—

(a) "appropriate Government" means,—

(i) in relation to the Central Government or any establishment, wholly or substantially financed by that Government, the Central Government;

(ii) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, the State Government;

(b) "establishment" means—

(i) any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013, and includes a Department of the Government; or

(ii) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;

(c) "family" means a group of people related by blood or marriage or by adoption made in accordance with law;

(d) "inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students;

(e) "institution" means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons;

(f) "local authority" means the municipal corporation or Municipality or Panchayat or any other local body constituted under any law for the time being in force for providing municipal services or basic services, as the case may be, in respect of areas under its jurisdiction;

(g) "National Council" means the National Council for Transgender Persons established under section 16;

(h) "notification" means a notification published in the Official Gazette;

(i) "person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body;

(j) "prescribed" means prescribed by rules made by the appropriate Government under this Act; and

(k) "transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.

CHAPTER II
PROHIBITION AGAINST DISCRIMINATION

3. No person or establishment shall discriminate against a transgender person on any of the following grounds, namely:—

(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;

(b) the unfair treatment in, or in relation to, employment or occupation;
(c) the denial of, or termination from, employment or occupation;
(d) the denial or discontinuation of, or unfair treatment in, healthcare services;
(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public;
(f) the denial or discontinuation of, or unfair treatment with regard to the right of movement;
(g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;
(h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; and
(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be.

CHAPTER III
RECOGNITION OF IDENTITY OF TRANSGENDER PERSONS

4. (1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.
(2) A person recognised as transgender under sub-section (1) shall have a right to self-perceived gender identity.
5. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and accompanied with such documents, as may be prescribed:
Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.
6. (1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating the gender of such person as transgender.
(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).
(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.
7. (1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.
(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.
(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:
Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act.

CHAPTER IV
WELFARE MEASURES BY GOVERNMENT

8. (1) The appropriate Government shall take steps to secure full and effective participation of transgender persons and their inclusion in society.
(2) The appropriate Government shall take such welfare measures as may be prescribed to protect the rights and interests of transgender persons, and facilitate their access to welfare schemes

framed by that Government.
(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.
(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of transgender persons to address the needs of such persons.
(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.

CHAPTER V
OBLIGATION OF ESTABLISHMENTS AND OTHER PERSONS

9. No establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.
10. Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to transgender persons as may be prescribed.
11. Every establishment shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.
12. (1) No child shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such child.
(2) Every transgender person shall have—
(a) a right to reside in the household where parent or immediate family members reside;
(b) a right not to be excluded from such household or any part thereof; and
(c) a right to enjoy and use the facilities of such household in a non-discriminatory manner. (3) Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre.

CHAPTER VI
EDUCATION, SOCIAL SECURITY AND HEALTH OF TRANSGENDER PERSONS

13. Every educational institution funded or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others.
14. The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment.
15. The appropriate Government shall take the following measures in relation to transgender persons, namely:—
(a) to set up separate human immunodeficiency virus Sero-surveillance Centres to conduct sero-surveillance for such persons in accordance with the guidelines issued by the National AIDS Control Organisation in this behalf;
(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;
(c) before and after sex reassignment surgery and hormonal therapy counselling;
(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;
(e) review of medical curriculum and research for doctors to address their specific health issues;
(f) to facilitate access to transgender persons in hospitals and other healthcare institutions and centres;
(g) provision for coverage of medical expenses by a comprehensive insurance scheme for Sex Reassignment Surgery, hormonal therapy, laser therapy or any other health issues of transgender persons.

CHAPTER VII
NATIONAL COUNCIL FOR TRANSGENDER PERSONS

16. (1) The Central Government shall by notification constitute a National Council for Transgender Persons to exercise the

powers conferred on, and to perform the functions assigned to it, under this Act.

(2) The National Council shall consist of—

(a) the Union Minister in-charge of the Ministry of Social Justice and Empowerment, Chairperson, ex officio;

(b) the Minister of State, in-charge of the Ministry of Social Justice and Empowerment in the Government, Vice-Chairperson, ex officio;

(c) Secretary to the Government of India in-charge of the Ministry of Social Justice and Empowerment, Member, ex officio;

(d) one representative each from the Ministries of Health and Family Welfare, Home Affairs, Housing and Urban Affairs, Minority Affairs, Human Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and National Institute for Transforming India Aayog, not below the rank of Joint Secretaries to the Government of India, Members, ex officio;

(e) one representative each from the National Human Rights Commission and National Commission for Women, not below the rank of Joint Secretaries to the Government of India, Members, ex officio;

(f) representatives of the State Governments and Union territories by rotation, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members, ex officio;

(g) five representatives of transgender community, by rotation, from the State Governments and Union territories, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members;

(h) five experts, to represent non-governmental organisations or associations, working for the welfare of transgender persons, to be nominated by the Central Government, Members; and

(i) Joint Secretary to the Government of India in the Ministry of Social Justice and Empowerment dealing with the welfare of the transgender persons, Member Secretary, ex officio.

(3) A Member of National Council, other than ex officio member, shall hold office for a term of three years from the date of his nomination.

17. The National Council shall perform the following functions, namely:—

(a) to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;

(b) to monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of transgender persons;

(c) to review and coordinate the activities of all the departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons;

(d) to redress the grievances of transgender persons; and

(e) to perform such other functions as may be prescribed by the Central Government.

CHAPTER VIII
OFFENCES AND PENALTIES

18. Whoever,—

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence; and

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

CHAPTER IX
MISCELLANEOUS

19. The Central Government shall, from time to time, after due appropriation made by Parliament by law in this behalf, credit such sums to the National Council as may be necessary for carrying out the purposes of this Act.

20. The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force.

21. No suit, prosecution or other legal proceeding shall lie against the appropriate Government or any local authority or any officer of the Government in respect of anything which is in good faith done or intended to be done in pursuance of the provisions of this Act and any rules made thereunder.

22. (1) The appropriate Government may, subject to the condition of previous publication, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the form and manner in which an application shall be made under section 5;

(b) the procedure, form and manner and the period within which a certificate of identity is issued under sub-section (1) of section 6;

(c) the form and manner in which an application shall be made under sub-section (1) of section 7;

(d) the form, period and manner for issuing revised certificate under sub-section (2) of section 7;

(e) welfare measures to be provided under sub-section (2) of section 8;

(f) facilities to be provided under section 10;

(g) other functions of the National Council under clause (e) of section 17; and

(h) any other matter which is required to be or may be prescribed.

(3) Every rule made by the Central Government under sub-section (1), shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

(4) Every rule made by the State Government under sub-section (1), shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such legislature consists of one House, before that House.

23. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the date of commencement of this Act.

(2)Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.