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Topic of the Month

"Courts both in India and in America have taken an activist approach in upholding the civil liberties and rights of the citizens because freedom and liberty is essential for progress, both economic and social. Without freedom to speak, freedom to write, freedom to think, freedom to experiment, freedom to criticize (including criticism of the Government) and freedom to dissent there can be no progress. Scientific ideas initially were often condemned because they were regarded as opposed to religious dogma. For instance, Charles Darwin's theory or Copernicus' theory at one time were condemned because they were regarded as opposed to the Bible. It was only by freedom of speech, freedom to think and freedom to dissent that human progress was possible. And it is for this reason that our Founding Fathers in their wisdom provided for the fundamental rights in Part III of the Constitution. It is the solemn duty of the courts to uphold the civil rights and liberties of the citizens against executive or legislative invasion, and the court cannot sit quiet in this situation, but must play an activist role in upholding civl liberties and the fundamental rights in Part III.

While a statute is made by the peoples' elected representatives, the Constitution too is a document which has been created by the People (as is evident from the Preamble). The courts are guardians of the rights and liberties of the citizens, and they will be failing in their responsibility if they abdicate this solemn duty towards the citizens. For this, they may sometimes have to declare the act of the executive or the legislature as unconstitutional."

(Markandey Katju, J. in Govt. of A.P. v/s Laxmi Devi, (2008)4 SCC 720)

SOME RECENT SUPREME COURT JUDGMENTS OF PUBLIC IMPORTANCE (Delivered from 01-08-2007 to 31-12-2007)

1. On 4th October, 2007, a two Judges Bench in State of Gujarat vs Turabali Gulamhussain Hirani & Anr [Criminal Appeal No.1338 of 2007] deprecated "frequent, casual and lackadaisical summoning of high officials by the Court." The Bench observed that "summoning a senior official, except in some very rare and exceptional situation, and that too for compelling reasons, is counter productive and may also involve heavy expenses and valuable time of the official concerned."

"The judiciary must have respect for the executive and the legislature", the Bench said.

2. On 9th October, 2007, a three Judges Bench in Inder Mohan Goswami & Another vs State of Uttaranchal & Others [Criminal Appeal No.1392 of 2007] held that the Courts should be "extremely careful before issuing non-bailable warrants." The Bench held that non-bailable warrant "should be issued to bring a person to Court when summons of bailable warrants would be unlikely to have the desired result". It said that this "could be when it is reasonable to believe that the person will not voluntarily appear in Court; or the police authorities are unable to find the person to serve him with a summon; or it is considered that the person could harm someone if not placed into custody immediately."

The Bench held that in "complaint cases, at the first instance, the Court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the Court, in the second instance should issue bailable-warrant. In the third instance, when the Court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to."

The Bench observed that "personal liberty is paramount", and therefore, the "Courts at the first and second instance" should "refrain from issuing non-bailable warrants."

3. On 4th December, 2007, a two Judges Bench In Mohd. Akram Ansari vs Chief Election Officer & Ors [Civil Appeal No.4981 of 2006] held that "if a point is not mentioned in the judgment of a Court", the presumption that "that point was never pressed before the Judge and it was given up", is a rebuttable presumption.

"In case the petitioner contends that he had pressed that point also (which has not been dealt with in the impugned judgment), it is open to him to file an application before the same Judge (or Bench) which delivered the impugned judgment, and if he satisfies the Judge (or Bench) that the other points were in fact pressed, but were not dealt with in the impugned judgment, it is open to the concerned Court to pass appropriate orders, including an order of review", the Bench said.

4. On 6th December, 2007, a two Judges Bench in Divisional Manager, Aravali Golf Club & Anr. Vs Chander Hass & Anr. [Civil Appeal No. 5732 of 2007] held that "creation and sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organization."

Before parting with the case, the Bench observed that "in the name of judicial activism, Judges cannot cross their limits and try to take over functions which belong to another organ of the State."

It said that though "sometimes judicial activism is a useful adjunct to democracy" such as in the School Segregation and Human Rights decisions of the U.S. Supreme Court" or the decisions of the Supreme Court of India which expanded the scope of Articles 14 and 21 of the Constitution, but this "should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society but always keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not the judiciary."

5. On 6th December, 2007, a two Judges Bench in Election Commission of India vs St. Mary's School and Others [Civil Appeal No.5659 of 2007] while examining the action of appellant and the State agencies in utilizing the services of Government school teachers for non-educational purposes such as polling duties etc. during school hours, observed that "holding of an election is no doubt of paramount importance", but "for the said purpose the education of the children cannot be neglected."

The Bench directed "that all teaching staff" "be put on the duties of roll revisions and election

works on holidays and non-teaching days".

"Teachers should not ordinarily be put on duty on teaching days and within teaching hours. Non-teaching staff, however, may be put on such duties on any day or at any time, if permissible in law", the Bench said.

6. On 7th December, 2007, a two Judges Bench in Vinay Devanna Nayak vs Ryot Seva Sahakari Bank Ltd. [Criminal Appeal No.1679 of 2007] while examining the issue as to whether an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 can be compounded, held that the provision "is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied."

Taking into consideration Section 147 inserted by the Negotiable Instruments (Amendment and Miscellaneous Provisions Act, 2002) and the primary object underlying Section 138, the Bench held that "there is no reason to refuse compromise between the parties."

7. On 10th December, 2007, a two Judges Bench in State of Rajasthan vs Ganeshi Lal [Civil Appeal No.3021 of 2006] held that "a decision is a precedent on its own facts."

"The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi", the Bench said.

8. On 12th December, 2007, a two Judges Bench in Eastern Book Company & Ors. vs D.B. Modak & Anr. [Civil Appeal No. 6472 of 2004] held that the "principle where there is common source the person relying on it must prove that he actually went to the common source from where he borrowed the material, employing his own skill, labour and brain and he did not copy, would not apply to the judgments of the Courts because there is no copyright in the judgments of the Court, unless so made by the Court itself."

The Bench held that "to secure a copyright for the judgments delivered by the Court, it is necessary that the labour, skill and capital invested should be sufficient to communicate or impart to the judgment printed" "some quality or character which the original judgment does not possess and which differentiates the original judgment from the printed one."

9. On 12th December, 2007, a two Judges Bench in National Insurance Company Ltd vs Indira Srivastava & Ors [Civil Appeal No. 5830 of 2007] while examining the connotation of the term 'income' for the purpose of determination of 'just compensation' envisaged under Section 168 of the Motor Vehicles Act, 1988, held that "the term 'income' has different connotations for different purposes."

"A Court of law, having regard to the change in societal conditions must consider the question not only having regard to pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family", the Bench observed.

NEWS AND VIEWS

Lok Adalat

In the month of April 2008, 1111 cases were settled in the Lok Adalats held in the different parts of the State of Jammu & Kashmir. Out of these, 246 cases were settled at pre-litigation stage. Compensation to the tune of Rs 23.48 lacs was awarded in Motor Accident Claim cases during the month. These Lok Adalats were organized by different District Legal Services Authorities / Tehsil Legal Services Committees of the State. Beside this, 103 eligible persons were given free legal aid during the month.

HC slams relief for firm accused of fraud

Delhi High Court has severely criticised the Debt Recovery Appellate Tribunal for granting a stay against debt recovery to a business firm accused of defrauding a public sector bank of nearly Rs 40 crores.

Setting aside the stay order recently, a division bench of justice Mukul Mudgal and justice V K Shali wondered how the DRAT could restrain the bank from seeking recovery of dues from a man who allegedly took credit from the bank and then defaulted, forcing the bank to also lodge an FIR with the Economic Offences Wing of Delhi Police. Interestingly, DRAT is also presided over by a high court judge as it sits in appeal on debt recovery case.

"The finding arrived at by the tribunal is totally arbitrary and unreasonable which no reasonable person would arrive at," HC observed in a strongly worded judgement, even as it asked the defaulter firm to cough up Rs 30,000 immediately to Jammu & Kashmir Bank which calculated a total

liability of Rs 52 crore against the firm, including interest.

The bank, through its lawyer Tanveer Ahmed Mir, had moved HC after DRAT barred it from taking possession of a Safdarjung Enclave property belonging to the firm. This firm, in the meanwhile, leased out this property to another firm which, as HC found out, was actually owned by the same person.

Placing documents before the bench, Tanveer argued that the tenancy was a sham transaction to obstruct recovery of the loan amount by the bank. HC saw through the sham and lashed out at DRAT for "perpetrating the gross illegality in favour of the borrower firm."

HC also took umbrage at the fact that DRAT "instead of arriving at a just and fair conclusion" posed irrelevant questions related to total area of the Safdarjung property, carpet area, rent etc in order to justify granting of stay to the firm.

"In our view these questions have absolutely no relevance to the transaction and defeat the ends of justice... this will lay a ground for borrower as well as tenant to ensure property possession is not recovered from them," the two HC judges noted while trashing the DRAT order.

(TOI/23.06.2008)

Courts heavily burdened with cases - CJI for out-of-court settlements

Chief Justice of India K. G. Balakrishnan said that people were being driven to courts in many land acquisition cases by the government. Instead, the State governments should evolve a system to settle cases out of court, he said. Speaking at the bicentenary celebrations of the constitution of the Thanjavur district court on 24th June, 2008, Justice Balakrishnan said that India needed more courts and a huge number of judges.

"Our courts are heavily burdened with cases. Our disposal rate is 23 per cent, but the piling up of cases is at 30 to 32 per cent," he said. Governments could settle a lot of cases by paying the right compensation on claims and people could also help by approaching the Lok Adalat and using other alternative modes of dispute resolution.

The Chief Justice allayed the misconception among some State governments that courts were in confrontation with governments. "While discharging their duties, courts set aside some government orders. This does not mean that courts are in confrontation with governments," he said.

(TOI/25.06.2008)

Hard to pin conspiracy charge : Experts says police must collect evidence to prove there was an agreement to murder

Legal experts say proving criminal conspiracy in the murder case could be a tough task for the police, as a few phone calls are not enough to prove the charge under section 120-B of the IPC.

The Mumbai crime branch, based on telephonic conversations between naval officer Jerome Mathew and actress Maria Monica Susairaj, has said that the duo actually conspired to murder Neeraj Grover.

Police had claimed the murder was a conspiracy soon after Susairaj had pleaded in a sessions court that she did not kill Grover and that the other charge against her - destruction of evidence - was a bailable offence. But with the police invoking Section 120-B for conspiracy to kill, Susairaj's role in the crime becomes grave as well.

The gist of any criminal conspiracy under the law is an agreement between two or more accused to do or commit an illegal act.

In a 1982 judgment, Madras High Court had ruled that a charge of conspiracy must give details of the places where it was hatched, how it was hatched and what was the purpose. In the Grover murder case, police will have to collect evidence to show that Mathew and Susairaj entered into an agreement to kill Grover during their conversations.

Until now, police have only said Susairaj told Mathew that Grover had misbehaved with her. They have been silent on whether there is any evidence to show that the duo actually agreed to murder Grover.

In fact, in 1988 the Supreme Court acquitted one of the men charged with conspiring to murder Late Prime Minister Indira Gandhi after the prosecution failed to show he had entered into an agreement with the other three accused.

The Court said certain documents recovered from him did not indicate any agreement but showed his agitated state of mind, which was in the grip of an avenging mood.

In the Grover murder case, what Susairaj allegedly told Mathew over the phone may be construed as provocative, but police will have to produce some concrete evidence to show there was an agreement to murder.

Courts do recognize that conspiracy is often hatched in utmost secrecy and therefore is mostly impossible to prove through direct evidence. Thus reliance can be placed upon acts, statements and

conduct of accused to infer if there was actually an agreement to carry out a crime.

(TOI/9.06.2008)

LEGAL JOTTING

(Case No. Criminal Appeal No. 799 of 2008) Madhuban Versus State of U.P. - Date of Decision : 5/5/2008.

Judge(s) Hon'ble Mr. Justice C.K. Thakker and Hon'ble Mr. Justice D.K. Jain

Subject Index : Indian Penal Code, 1860 - Ss. 302, 323 & 394 - conviction - confirmed by High Court - appeal - it appears that the learned advocate appearing on behalf of the appellant before the High Court could not make oral submissions because of infection in vocal cord - end of justice would be met if this court allows this appeal, set aside the order passed by the High Court and remit the matter to the High Court for fresh disposal in accordance with law.

(Case No. Criminal Appeal No. 838 of 2008) Aneeta Hada Versus M/s Godfather Travel & Tours Pvt. Ltd. - Date of Decision : 8/5/2008.

Judge(s) Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice V.S. Sirpurkar

Subject Index : Negotiable Instruments Act, 1881 - section 138 - complaint - the Company which is a juristic person was not arrayed as an accused - the learned Magistrate took cognizance of the offence against her. Respondent had not even served any notice upon the Company in terms of Section 138 of the Act. It served a notice only on the appellant presumably on the premise that she was in charge and responsible to the company for its day to day affairs - the High Court by reason of the impugned judgment refused to quash the proceedings - in view of the difference of opinion, let the matters be placed before three-Judges Bench. The Registry is directed to place the record before Hon'ble the Chief Justice of India.

(Case No. Civil Appeal No.1694 of 2006) State of West Bengal & Ors. Versus Kamal Sengupta &Anr. - Date of Decision : 16/6/2008.

Judge(s) Hon'ble Mr. Justice B.N. Agarwal and Hon'ble Mr. Justice G.S. Singhvi

Subject Index : Adminisstrative Tribunal decision - review - whether a Tribunal established under Section 4 of the Administrative Tribunals Act can review its decision on the basis of subsequent order/decision/judgment rendered by a co-ordinate or larger Bench or any superior Court or on the basis of subsequent event/development is the question which arises for determination of this appeal filed by the State of West Bengal and others against the judgment of the High Court of Calcutta.

CASE COMMENTS

(Note : Some typographical errors have occurred in the below 'case comment' published in the last issue, therefore, the full text of the same is reproduced.)

State of Haryana & Ors. v. Dinesh Kumar
AIR 2008 SC 1083

Person, whose control is taken over by law, whether by officer with coercive power or on voluntary surrender before court, is in 'custody' as regards criminal proceedings or not, came as a question of law, for consideration before the Apex Court. The concept of 'arrest' and 'custody' with Criminal Procedure Code and question as to what would amount to 'arrest' and 'custody' being question of public importance has been the subject matter of decision of different High Courts and Supreme Court. Apex Court in ' *Niranjan Singh v. Prabakar*', AIR 1980 SC 785 held "that equivocatory quibbling that the police have taken a man into informal custody but have not arrested him, have detained him in interrogation but have not taken him to formal custody, were unfair evasion of the straight forwardness of the law. Supreme Court further held that when is a person in custody, within the meaning of Section 439 Cr.P.C ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of court having been remanded by Judicial Order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in physical hold of an officer with coercive power is in custody for the purpose of Section 439 Cr.P.C".

A Full Bench in Madras High Court in case, *Roshan Beevi and another vs. Joint Secretary to the Govt of Tamil Nadu',* 1984 Cr. L.J 134 held " that custody and arrest are not synonymous terms and that in every arrest there is custody but not vice-versa. A custody may amount to arrest in certain cases, but not in all cases. Full Bench came to the conclusion that person who is taken by the customs officer either for purposes of enquiry or interrogation or investigation can not be held to have come into custody and detention of customs officer and he can not be deemed

to have been arrested from the moment he was arrested."

The Full Bench of Madras High Court observed that the decision rendered by Apex Court in AIR 1980 SC 785 could not be availed of that the mere taking of a person into custody amount to arrest.

Apex court in the present case, after discussing both the authorities overruled the decision of Madras High Court in 1984 Cr.L.J (1)4 Mad (F-B) and re-iterated the decision of the court in AIR 1980 SC 785.

By the judgment of the Apex Court the controversy has set at rest and it has been held that the precondition to apply for bail under section 439 Cr.P.C corresponding with Section 497 J&K Criminal Procedure Code is that a person who is an accused must be in custody and his moments must have been restricted before he can move for bail.

(Ghous-ul-Nisa Jeelani)
Special Judge, Anti-corruption
Kashmir-Srinagar

State of U.P. v. Synthetic & Chemicals Ltd. (1991)4 SCC 139

Very often we come across the situations where there are two divergent views expressed by Hon'ble Supreme Court or High Courts on a point of law. Such situations have increased with the advent of large number of law journals that often publish even the unreportable judgments/orders of superior courts. The question which arises is, whether the conclusion arrived at by a superior court i.e. Supreme Court or the High Court in every case is binding on the subordinate courts. This question has been considered by Hon'ble Supreme Court in the aforesaid case.

Hon'ble Supreme Court has held that doctrine of precedents as a matter of law which is embodied in Art. 141 of the Constitution does not apply to a conclusion of law which was neither raised nor preceded by any consideration. In other words such conclusion cannot be considered as declaration of law. Hon'ble Apex Court noted that an exception has been carved out to the rule of precedents by English Courts that has been explained as rule of Sub-silentio. A decision passes Sub-silentio, when the particular point of law involved in the decision is not perceived by the court or present to its mind. Hon'ble Court held that a decision which is not express and is not founded on reasons nor it proceeds on consideration of issues cannot be deemed to be a law declared to have a binding effect as is contemplated by Art. 141 of the Constitution. Hon'ble Court further observed that restraint in dissenting or over-ruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

Thus the courts before relying upon any precedent have to be satisfied that the precedent is express and founded on reason. Further it has to proceed on consideration of the issue. But that, which escapes in the judgment without any occasion, is not ratio decidendi, hence not a binding precedent. A precedent has to be avoided or ignored if it is per-incuriam i.e. rendered in ignorance of a statute or a binding authority.

The understanding of aforesaid principles laid down by the Hon'ble Apex Court is certainly going to dispel many confusions which are being faced by the subordinate courts when confronted with conflicting judgments of superior courts on a point of law.

(Sanjay Dhar)
District & Sessions Judge
Secretary
High Court Legal Services Committee

Balu alias Bakthavatchalu v. State of T.N. AIR 2008 SC 1434

Determination of age of a person accused of an act of commission or omission made punishable under the Penal law of the Land is of primary importance if the accused is alleged to be / claims to be a Juvenile or appears to be so. Finding on the vital aspect of age determines the jurisdiction of Juvenile Court to take cognizance of offence and try the accused. Determination of age is not limited to the cases of Juvenile Delinquents only. Street children, truants, neglected children and children who have become victims of abuse at the hands of their guardians are required to be dealt with by the Juvenile Board to make provision for their care and protection which necessarily involves determination of the age of the victim. The latest pronouncement of the Hon'ble Apex Court in Balu v/s State of Tamil Nadu reported in AIR 2008 SC 1434 emphasizes necessity of holding enquiry for determination of age. Broader contours of the judgment under comment are as under :-

1. Under the Juvenile Justice Act, 1986, a Juvenile was defined as a boy, who had not attained the age of 16 years and a girl who had not attained the age of 18 years. The Juvenile Justice Act, 1986 stands repealed by the Juvenile Justice (Care and

Protection of Children) Act, 2000, which defines Juvenile to mean a person who has not completed eighteen years of age. Thus, the Parliament has removed gender discrimination with regard to age for determining whether the delinquent or neglected person is a juvenile.

2. Protection granted to a Juvenile under 1986 Act has been extended by virtue of the provisions of Act of 2000 but such extension is a limited one. Adopting rule of purposive construction the Hon'ble Apex Court held that the act of 2000 intended to extend protection only to a Juvenile and not an adult. Thus, the act of 2000 applies to a person, who has not attained the age of eighteen years. It did not apply to a person, who had attained the age of eighteen years on the date of enforcement of Act or who had not attained the age of eighteen years on the date of commission of the offence but has since ceased to be a Juvenile.

3. Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 enforced on 23-8-2006 defines "Juvenile in conflict with law" as a Juvenile alleged to have committed an offence, who has not completed 18th year of age as on the date of *commission of offence*. The Amending Act has given retrospective meaning to the definition of Juvenile.

4. Where proceedings initiated before any court under the 1986 Act were pending when the 2000 Act was enforced, the 2000 Act would be applicable if the person had not completed eighteen years of age as on 1-4-2001.

5. Where the accused had ceased to be a Juvenile under the 1986 Act but had not crossed the age of eighteen years on the date of enforcement of 2000 Act, then the pending case shall continue in that court and if the trial results in conviction of accused, such court shall, instead of passing sentence, forward the Juvenile to the Board for passing appropriate orders under the Act.

6. Where the accused claims benefit of the socially oriented legislation by raising plea of being a Juvenile, the court has an obligation to examine such plea with great care. Finding on age dependes upon the facts and circumstances of each case. Date of birth has to be determined on appreciation of evidence brought on record by the parties. Different standards for arriving at finding with regard to the age of the accused cannot be applied in civil and criminal cases. A uniform standard of proof must be adopted unless the statute lays down a particular standard.

(Bansi Lal Bhat)
Presiding Officer
Motor Accident Claims Tribunal
Jammu

State of Punjab v. Jalour Singh & Ors.
AIR 2008 SC 1209

A confusion was prevailing as to whether Lok Adalat as per the provisions of Legal Services Authorities Act, 1987 (Central Act) has adjudicatory or judicial function or Lok Adalat is required to play a role to guide and persuade parties to reach at a compromise or settlement.

In the aforesaid case, the Hon'ble Apex Court has held that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. When the Act refers to 'determination' by the Lok Adalat and 'award' by the Lok Adalat, the said Act does not contemplate nor require an adjudicatory judicial determination, but a non-adjudicatory determination based on a compromise or settlement, arrived at by the parties, with guidance and assistance from the Lok Adalat. The 'award' of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. Conducting Lok Adalat like Courts, by hearing parties, and imposing their views as to what is just and equitable, on the parties, instead of fostering alternative dispute resolution through Lok Adalats, will drive the litigants away from Lok Adalats. Lok Adalats should, therefore, resist their temptation to play the part of Judges and constantly strive to function as conciliators.

(Gh. Mohi-ud-Din Dar)
Director
J&K State Judicial Academy

Kailash v. State of Rajasthan & Anr.
AIR 2008 SC 1564

Supreme Court in this judgment has interpreted Section 319 Cr.P.C. Central (corresponding S. 351 of the State Cr.P.C) and has laid down the law that the provision under this section concludes that during the trial, it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this Section are *"it appears from the evidence"* any person has committed any offence. It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under this section would be used by the Court. It does not mean that such person against

whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This power has to be exercised only on the basis of the evidence connecting the person to the facts of committing offence.

Explaining the principle laid down by the Apex Court, it can be said that strength of material must be at least to the extent of charging the person before issuing notice to him for arraying accused. While relying upon this judgment, it can also be said that before exercising its discretion by the court under this section, the court must arrive at the satisfaction that there exists a possibility that the person so summoned in all likelihood would be convicted. Such satisfaction can be arrived at either on the material furnished by the investigating agency or from the material received during trial of the case.

*(*Jaffer Hussain Beg*)*
Sub-Judge
Deputy Registrar (Judicial)
High Court of J&K at Jammu

Hari Prasad Bhuyan v. Durga Prasad Bhuyan
AIR 2008 SC 1202

Through the above referred judgment, the Hon'ble Supreme Court has laid down the law that defendants can not take advantage of non-disclosure of the fact of death of a defendant if they had knowledge of the same. In the said case, the order declaring a decree to be nullity on the ground of non-substitution of parties by the plaintiff, was set aside. And it was held that the case involved was a clear case where the prayers for condonation of delay in seeking substitution by setting aside abatement and condonation of delay should have been accepted. By the impugned order the decree had been declared to be nullity on account of death of respondents No. 13 and 24 and the belated approach for bringing their legal heirs on record. This way consequences of non-performance of duty by a pleader to communicate death of a party to the court and naturally to the other side under Order 22 Rule 10 A stand highlighted, and law laid down.

This judgment also points out the importance of wording the prayer part of the judgment properly, and consequently the drawing of decree, and lays down the law. It is held therein that the trial court merely observing in the operative part of the judgment that the suit is decreed or an appellate court disposing of an appeal against dismissal of suit observing that the appeal is allowed, and then staying short at that without specifying the reliefs to which the successful party has been found entitled tantamount to a failure on the part of the author of the judgment to discharge obligation cast on the judge by the provisions of Code of Civil Procedure.

So the above referred judgment makes legal professionals wiser, by pointing out clearly the importance of the words of judgment with respect to the grant of prayer in the suit or appeal as well as the importance of Order 22 Rule 10 A with respect to the duty of a pleader to communicate the death of a party to the court.

(Ritesh Kumar Dubey)
Sub-Judge
Chief Judicial Magistrate
Kargil

Chaturbhuj v. Sita Bai
AIR 2008 SC 530

Entitlement to maintenance despite having source of income : Right to maintenance as per provisions of Section 125 of the Code of Criminal Procedure (central) which corresponds to Section 488 of the State Code of Criminal Procedure entitles a person to claim maintenance provided he or she is unable to maintain himself or herself from a person who is under law obliged to maintain him or her. The word "*unable to maintain herself*" does not mean that wife of *a* person claiming maintenance should be destitute, beggar or wear tottered clothes. Different High Courts have laid down law regarding this aspect of the subject.

The Apex Court in AIR 2008 SC 530 titled 'Chaturbhuj v. Sita Bai' held that, "where personal income of the wife is in-sufficient, she can claim maintenance under Section 125 Cr.P.C. and test is whether the wife is in position to maintain herself in the way she was used to in the place of her husband". The Apex Court has further held that the expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

In the present case the respondent placed material to show that the wife claiming maintenance was earning some income out of rent from a house purchased by him for her and she had also received some money from sale of the agricultural land. The Apex Court held that where personal income of wife is in-sufficient, she can claim maintenance under Section 125 Cr.P.C.

(Rajesh Sekhri)
Special Judge TADA/POTA,
Srinagar

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