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Topic of the Month

The greatest quality of a judge is to have patience which is sister virtue of calmness. Calmness is as essential as fearlessness and honesty to the exercise of good judgment in times of aroused feelings and excited passion.

Patience implies the quietness or self-possession of one's own spirit under sufferance and provocation. Since it has a tranquillizing effect, patience is the best remedy for every affliction. The Bible says that if patience or silence be good for the wise, how much the better for others-unwise or not so wise. Sometimes we turn our anger upon the person responsible for hurting us; we are also likely to blame someone for any kind of mishap. By learning to be patient, one can cultivate the art of reigning in bad temper and hasty decision - making. Patience yields many good things. It is also a necessary ingredient of genius. Patience can solve problems, avert wars and disasters, and lead us to the path of truth.

The power of patience leads us to self-inspection, to the admission of errors and the capacity for forgiveness. A learned man tells us that misfortune can be turned into fortune through wisdom. The acquisition of wisdom needs five steps. The first is patience, the second is listening, the third is understanding, the fourth is pondering and the fifth is practice - all qualities needed in a judge. To be patient one has to be humble. To cultivate patience, anger management plays a crucial role. "He who is slow to anger is better than the mighty and he that rules his spirit than he who takes a city". The world exists only because of self-restraint exercised by the mighty. Power coupled with impatience can be very dangerous. Leaders and judges who are impulsive are greatly feared and are considered impractical. Anger begets violence and cannot be easily repressed. At times anger is provoked by misunderstanding and may actually have no basis in reason. Anger can be subverted with forgiveness.

One of the ways to be patient is through tolerance. Tolerance recognizes individuality and diversity; it removes divisiveness and diffuses tension created by ignorance. Tolerance is an inner strength, which enables the individual to face and overcome misunderstandings and difficulties. A tolerant person is like a tree with an abundance of fruits; even when pelted with sticks and stones, the tree gives its fruit in return. Without tolerance, patience is not possible. Tolerance is integral and essential to the realization of patience."

(Quoted from M.C. Setalvad Memorial Lecture 'Canons of Judicial Ethics' delivered by Hon'ble Shri Justice R.C. Lahoti, Chief Justice of India on 22.02.2005)

SOME RECENT SUPREME COURT JUDGMENTS OF PUBLIC IMPORTANCE

(Delivered from October 2008 to December 2008)

1. On 13th October, 2008, a two Judges Bench in Siddhapal Kamala Yadav v. State of Maharashtra [Crl. A. No. 1602 of 2008] held that "under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is , however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately after wards, also evidence of his mental condition and other relevant factors".

"The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section", the Bench said.

2. On 16th October, 2008, a two Judges Bench in Maganlal son of Kishanlal Godha vs Nanasaheb son of Udhaorao Gadewar [C.A. 6125 of 2008] while examining the order recorded by the Rent Controller granting permission to the landlord under Clause 13(3)(iv) and (vi) of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949, held that "the notice issued by the Advocate on behalf of the appellant-landlord prior to filing of the application for eviction of the respondent-tenant under clause 13(3)(vi) was not a mandatory requirement postulated under the provisions of the Rent Control Order".

The Bench observed that "as there was no statutory requirement that the landlord should issue a notice of eviction to the tenant before initiating proceedings under clause 13(3) of the Rent Control Order, the Division Bench of the High Court was not right in drawing an interference against the appellant-landlord for not stating the ground of bona fide requirement of the premises in the notice dated 12.07.1982 issued to the respondent-tenant before the institution of eviction proceedings which commenced on 30.09.1982."

3. On 7th November, 2008, a two Judges Bench is Paschimanchal Vidyut Vitran Nigam Ltd. & Ors. Vs. M/s DVS Steels & Alloys Pvt. Ltd. & Ors. [C.A. No. 6565 of 2008] held that "when the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occpant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity, the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them."

The Bench observed that "a stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is

given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment , may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Having regard to the very large number of consumers of electricity and the frequent moving or translocating of industrial, commercial and residential establishments, provisions simlar to clause 4.3(g) and (h) of Electricity Supply Code are necessary to safeguard the intrestes of the distributor".

The Bench did not "find anything unreasonable in a provision enabling the distribtor / supplier to disconnect electricity supply if dues are not paid or where the electricity supply has already been disconnected for non-payment, insist upon clearance of arrears before a fresh electricity connection is given to the premises".

It is the "duty of the purchasers/occupants of premises to satisfy themseleves that there are no electricity dues before purchasing / occupying a premises. They can also incorporate in the deed of sale or lease, appropriation clauses making the vendor/lessor responsible for clearing the electricity dues up to the date of sale/lease and for indemnify in the event they are made liable", said the Bench.

4. On 12th November, 2008, a two Judges Bench in Deepak Bajaj vs State of Maharashtra & Anr. [Writ Petition (Crl.) No. 77 of 2008] held that the "reputation of a person is a facet of his right to life under Article 21 of the Constitution." "If a person is sent to jail then even if he is subsequently released, his reputation may be irreparably tarnished", the Bench observed.

5. On 12th December, 2008, a two Judges Bench in U.P. Pollution Control Board vs Dr. Bhupendra Kumar Modi & Anr. [Crl. A. No. 2019 of 2008] held that since escalating pollution level of environment" affects on the life and health of human beings as well as animals, the courts should not deal with the prosecution for offences under the pollution and environmental Acts in a casual or routine manner." The Bench observed that the Courts "cannot afford to deal lightly with cases involving pollution of air and water."

6. On 16th December, 2008 a two Judges Bench in M/s Kumar Exports vs M/s Sharma Carpets [Criminal Appeal No. 2045 of 2008] held that "the accused in a trial under Section 138 of the Negotiable Instruments Act, 1881 has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-exstence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant."

7. On 12th December, 2008 a two Judges Bench in M/s Harman Electronics (P) Ltd. & Anr. Vs M/s National Panasonic India Ltd. [Crl. A. No. 2021 of 2008] while examining the territorial jurisdiction of a court to try an offence under Section 138 of the Negotiable Instruments Act, 1881 observed that "a banking institution several cheques sighted by the same borrower can not only present the cheque for its enchashment at four different places but also may serve notices from four different places so as to enable it to file four complaint cases at four different places. This only causes grave harassment to the accused. It is, therefore, necessary in a case of this nature to strike a balance between the right of the complainant and the right of an accused vis-a-vis the provisions of the Code of Criminal Procedure".

ACADEMY NEWS

Refresher course on the topic of "Importance of Preliminary Examination of the Parties and the

Settlement of Issues in the decision of Civil Suits" was organized by the State Judicial Academy for Sub-Judges and Munsiffs of Jammu province in three groups on 9th, 12th and 14th of March, 2009. Groups A and C were addressed by Shri Bushan Lal Saraf, former District and Sessions Judge presently Member, J&K State Consumer Forum on 9th and 14th of March, 2009. While interacting with the participants, Shri Saraf told that the concept of recording preliminary statement has been in fact borrowed from American Judicial System where it is known as pre-trial conference of the advocates of the parties. Shri Saraf told the participants that this process of recording of preliminary statements gives a clear picture about the points on which parties are at variance and the Issues are accordingly framed on these points alone. Some time it so happens that good sense prevails upon the parties and the matter is compromised at the instance of the concerned court.

Judicial Officers of Group B were addressed by Shri D.K. Kapoor, Addl. District and Sessions Judge, Jammu. Shri Kapoor while interacting with the participants in the Refresher course told them that the

Resource Person while delivering lecture

Presiding Officers of the courts dealing with civil suits get clear picture about the dispute between the parties and many times with a bit of persuasion, the matters are compromised at this stage alone and otherwise also this process of preliminary examination of the parties helps a lot in the settlement of Issues. He also impressed upon the participants that the settlement of Issues should not be resorted to on the basis of draft Issues being filed by the contesting parties. He told them that in fact it is the duty of the court to frame Issues, of course with the assistance of the concerned litigants. Learned District Judge also told them that after framing of Issues the placing of burden of proof is of utmost important and he emphasized that Presiding Officers have to do so in the light of different provision of the Evidence Act.

2. Refresher courses on the topics of "Application of Law in the Process of Judging" and "Art of Writing Judgment" were held by the State Judicial Academy for Sub-Judges and Munsiffs of Jammu province in three groups on 20th, 23th and 25th of March, 2009. Shri Bansi Lal Bhat, Spl. Judge Anti-corruption, Jammu was nominated as Resource person to address the officers on the topic of

Resource Person while delivering lecture

"Application of Law in the Process of Judging". Shri Bhat while dealing with the subject gave an over view of the topic from the angle of Rule of Law while dispensing justice. Shri Bhat after stating the importance of rule of law told the participants about the application of the principles of law in dispensation of justice. The participants were told that it is not only important to follow the letter of law but more important is to follow the spirit of law. Shri Bhat shared his experience when he had come across certain peculiar situations where he found difficulties in the application of law and how he overcame them by applying the spirit of law. While delivering his scholarly lecture, Shri Bhat emphasised the need for the Judicial Officers to be sensitive to the needs of the society and also for sensitizing themselves to the latest developments in the social structure. The participants interacted with the Resource person and put their queries and were made wise by the Resource person by satisfactorily responding to their queries.

Shri Harbans Lal, former District and Sessions Judge addressed the participants on the topic of "Art of Writing Judgment". Shri Harbans Lal while dealing with the topic told the participants that art of writing judgment is not taught anywhere while studying law or even after joining the profession as Judicial Officer. This art can be mastered through study, experience and by remaining attentive to the requirements of procedural law. Every Judge has his own style of writing judgments and there can not be any specific or model style. It was emphasized by the Resource person that writing judgment is truly an art which comes to the Judicial Officers through experience and also through careful reading of judicial pronouncements of the seniors Judicial

Officers, High Courts and the Supreme Court reported in law journals. Learned Resource Person shared his personal experience having served as Judicial officer for more than three decades and narrated some of anecdotes which he came across while writing judgments. It was also emphasized by the Resource person that a judgment needs to be brief, lucid, to the point and complete in all respects. There should be no ambiguity and use of words difficult to understand should be avoided as far as practicable. No superfluous words and sentences should be used as it makes it very difficult to understand what the import of judgment is, said the Resource person.

At the conclusion of course, participating Judicial Officers were satisfied with the nature of treatment given by the Resource persons to the topics and also gained immensely.

LEGAL JOTTINGS

(Case No: Criminal Appeal No. 1490 of 2007)
Arun versus State of Maharashtra
Date of Decision : 16/3/2009.
Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Indian Penal Code, 1860 - sections 302 and 324 - conviction under - upheld by Division Bench of the Bombay High Court - challenged in appeal - the right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for a vindictive, aggressive or retributive purpose of offence. It is a right of defense, not of retribution, expected to repel unlawful aggression and not as retaliatory measure. While providing for exercise of the right, care has been taken in IPC not to provide and has not devised a mechanism whereby an attack may be pretence for killing. A right to defend does not include a right to launch an offensive, particularly when the need to defend no longer survived - when the factual scenario is examined in the background of the principles set out above, the inevitable conclusion is that the appeal is without merit, deserves dismissal.

(Case No: Criminal Appeal No. 468 of 2009)
M/s V.G. Saraf & Sons versus H. Ranjith & anr.
Date of Decision : 16/3/2009.
Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Negotiable Instruments Act, 1881 - section 138 - conviction under - High Court held that the conviction and sentence not sustainable - challenged in this appeal - the High Court has not examined the matter in proper perspective. The probative value of the documents produced and the acceptability of the evidence of PW-1 has not been examined - impugned order of the High Court set aside and the matter remitted to the High Court for fresh consideration.

(Case No: Criminal Appeal No. 444 of 2009)
Jagjit Singh versus State of Punjab
Date of Decision : 6/3/2009.
Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Dr. Justice Mukundakam Sharma.

Subject Index: Indian Penal Code, 1860 - sections 304-B and 498-A trial under - acquittal by Additional Sessions Judge - appeal filed by the prosecution allowed by DB of High Court - challenged in appeal - the High Court has analysed the evidence of the witnesses clearly keeping in view the parameters relating to the scope of interference with the judgment of acquittal. The analysis does not suffer from any infirmity to warrant interference - no scope to interfere in this appeal.

(Case No: Criminal Appeal No. 78 of 2007)
Mohd. Asif versus State of Uttaranchal
Date of Decision : 6/3/2009.
Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Indian Penal Code, 1860 - section 302/34 - trial under - principle of causa causan - applicability of - the question which now arises for consideration is as to whether a case for converting the sentence from Section 300 IPC to Section 304 IPC has been made out - it is not a case where the intervening ailment was wholly unconnected with the injury. On the other hand, in Manubhai Atabhai vs. State of Gujarat [(2007) 10 SCC 358], this court clearly held: "Merely because a single blow was given that does not automatically bring in application of Section 304 Part I IPC." - the appellant has rightly been found guilty of commission of an offence under Section 302 of the IPC.

(Case No: Criminal Appeal No. 435 of 2009)
Satish Ambanna Bansode versus State of Maharashtra
Date of Decision : 5/3/2009.
Judge(s): Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Indian Penal Code, 1860 - section 302

- conviction under - appeal - this is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded, it will result in the miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

(Case No: Criminal Appeal No. 679 of 2006)
Jitu @ Jitender versus State of M.P.
Date of Decision : 5/3/2009.
Judge(s): Hon'ble Mr. Justice Arijit Pasayat and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Indian Penal Code,1860 - section 302 - conviction under - upheld by the Division Bench of the Madhya Pradesh High Court - challenged in this appeal - considering the nature of injuries, the conviction of the present appellant is altered to one under Section 326 IPC and custodial sentence of seven years is imposed upon him. It is stated that the appellant has already undergone the sentence of more than seven years. If that be so, he shall be released from custody forthwith unless required to be in custody in connection with any other case.

(Case No: Civil Appeal No. 1849 of 2002 with C.A. No. 1850 of 2002)
V. Laxminarasamma versus A. Yadaiah (Dead)
Date of Decision : 3/3/2009.
Judge(s): Hon'ble Mr. Justice S.B. Sinha, Mr. Justice Asok Kumar Ganguly and Hon'ble Mr. Justice R.M. Lodha.

Subject Index: Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 - adverse possession - determination of a question of adverse possession whether would come within the purview of the jurisdiction of Special Tribunal and/or Special Court constituted under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 - has been referred to this Bench of the Supreme Court noticing purported conflict in the decisions of two Division Benches of this Court in Konda Lakshmana Bapuji v. Government of Andhra Pradesh & Ors. [(2002) 3 SCC 258] and N. Srinivasa Rao v. Special Court under the A.P. Land Grabbing (Prohibition) Act & Ors. [(2006) 4 SCC 214] - Konda Lakshmana Bapuji (supra) lays down the correct law and N. Srinivasa Rao (supra) does not. The reference is answered accordingly.

(Case No: Criminal Appeal No. 405 of 2009)
Lunaram versus Bhupat Singh and Ors.
Date of Decision : 27/2/2009.
Judge(s): Hon'ble Mr. Justice Arijit Pasayat and Hon'ble Mr. Justice Asok Kumar Ganguly.

Subject Index: Indian Penal Code, 1860 - sections 302, 307, 323 read with section 34 and Schedule Cast and Schedule Tribe Section 3(2)(5) - charge under - the learned trial Court convicted accused Bhupat Singh, Ral Singh and Amiya under Section 302/34 of IPC and Section 3(2)(5) of SC/ST Act - the High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus - considering the parameters of appeal against the judgment of acquittal, Court is not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence.

NEWS AND VIEWS

Lok Adalat

In the month of January 2009, 367 cases were settled in the Lot Adalats held in different parts of the State of Jammu & Kashmir. Out of these, 22 cases were settled at pre-litigation stage. Compensation to the tune of Rs 40.07 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, 40 eligible persons were given free legal aid during the month.

Irretrievable breakdown is no ground for divorce

A marriage cannot be dissolved on the ground of "irretrievable breakdown" as the law does not recognise it as a valid ground for divorce.

Dismissing a Hindu husband's plea for divorce on the ground of "irretrievable breakdown" of marriage, a Supreme Court bench headed by Justice Markandey Katju said the Hindu Marriage Act, 1955 does not recognize it as a ground for dissolution of marriage.

The legal position on the grounds on which a Hindu marriage can be dissolved had been getting blurred with courts saying if there was an irretrievable breakdown, courts should not force a couple to live

together.

The apex court's ruling has now clarified the legal position regarding grounds for dissolution of a Hindu marriage.

The court noted that Section 13 of the Act provided for several grounds for divorce — cruelty, adultery, desertion, conversion, etc, but irretrievable breakdown of the marriage was not there.

"This court cannot add such a ground to …the Act as that would be amending the Act, which is a function of the legislature… It is for Parliament to enact or amend the law and not for the courts," the bench said. The husband's counsel had argued that the court in some cases had dissolved a marriage on the ground of irretrievable breakdown.

But the bench rejected the argument. "In our opinion, those cases have not taken into consideration the legal position…and hence they're not precedents. A mere direction of the court without considering the legal position is not a precedent."

The ruling came on an appeal filed by a Delhi man, whose plea for divorce from his wife on the grounds of cruel behaviour was turned down. The Delhi High Court, too, did not find any merit in his case. It concluded that it was the husband who was being cruel to the wife.

The man urged the SC to grant him divorce on the ground of irretrievable breakdown, contending that the marriage was over for all practical purposes as his wife didn't stay with him for more than 25 days.

(HT/ 4.03.2009)

Costs for vandalizing properties to be imposed on offenders : SC

Angry over growing incidents of damage being caused to properties by politicians and hooligans, the Supreme Court said that it would frame suitable guidelines to recover the cost from offenders and pay it to the victims.

"Why should the poor taxpayer pay for the fault of these elements ? There are instances where public properties worth crores of rupees are damaged and at best the offenders may be in jail for six months," the apex court said.

A bench of Justices Arijit Pasayat and Asok Kumar Ganguly said, the guidelines would be in force until Parliament makes suitable amendment to the Public Safety Act, 1984.

The guidelines would be framed after the Solicitor General G. E. Vahanvati and amicus curaie Rajeev Dhawan submit their suggestions on the issue.

The apex court's decision assumes significance as at present under the Prevention of Damage to Public Safety Act, a maximum of six months imprisonment is imposed on arsonists damaging public and private properties, but there is no civil liability in the form of compensation to the victims.

Incidentally, counsel of various states present in the court said they have no objection to such a step and assured that they would abide by the directions of the court.

(HT/17.03.2009)

CASE COMMENTS

P. Venugopal v. Madan P. Sarthi
AIR 2009 SC 568

The Hon'ble Supreme Court, in its recent decision reported as "P. Venugopal v. Madan P. Sarthi", AIR 2009 SC 568, has reiterated the principle of law propounded in its earlier judgment reported as "Krishna Janardhan Bhat v. Dattatraya G. Hegde", AIR 2008 SC 1325, on the presumption in favour of the holder of Cheque.

Section 139 of Negotiable Instruments Act, provides "It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability".

The principle of law laid down in the "Krishna Janardhan Bhat's case" and reiterated in the judgment under discussion, is "The presumption raised in favour of the cheque must be confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant".

A distinction has been made regarding 'issuing' and 'receiving' of cheque. The presumption so raised in terms of Section 139 of Negotiable Instruments Act, pertains only to the 'receiving' of cheque and not to the 'issuing or drawing'. The distinction so made stands to the well reasoned application of law. So far as the 'issuing or drawing' of cheque is concerned, it has to be proved by the complainant. The initial burden of proof is required to be discharged by the complainant in order to raise a presumption as provided in Section 139. If the initial burden has been discharged by the complainant, it falls on the accused to rebut the presumption by giving

some plausible explanation. Here also accused is fortified by the presumption of 'innocence', being general principle of criminal jurisprudence. Such burden to be discharged by accused can at the most be equated with what in Civil law is called the 'preponderance of probability'.

Therefore it cannot be said that in presence of presumption as stated in Section 139, complainant has to act as mere spectator and accused should dispel the presumption without the complainant having done enough to discharge the initial burden of proof.

(Jatinder Singh Jamwal)
City Judge, Srinagar

Suman Kapur v. Sudhir Kapur
AIR 2009 SC 589

In one of its Judgment reported as Suman Kapur v. Sudhir Kapur, AIR 2009 SC 589, the Hon'ble Supreme Court of India has laid down two principles of law. First principle is that in the cases where divorce is sought under Section 13(1)(ia) of Hindu Marriage Act, on the ground of cruelty, Mens-rea is not a necessary element. Another principle laid down is that where a career oriented lady pursues her professional career to achieve success, in total neglect of her matrimonial relations, is one of the elements of 'cruelty' and coupled with other similar factors, be ground to grant divorce.

It has been observed by the Hon'ble Supreme Court that there may be certain circumstances where the conduct of one of the spouse is bad enough and per se unlawful or illegal, then it is not required to enquire into the impact or injurious effect of such conduct on the other spouse. It cannot be a defense that the party whose conduct is in question had no intentional or deliberate ill-treatment on its part, if in the ordinary sense of human affairs the conduct could be otherwise regarded as cruelty. In those cases Mens-rea is not a necessary element.

It has been further observed by the Hon'ble Court that every spouse has to strike a balance between the career and matrimonial duties. Matrimonial affairs cannot be sacrificed for the sake of being highly career oriented and striving to achieve high success in the field of career. The Hon'ble Court has referred to various judicial pronouncements rendered by it from time to time, to define what is called the 'mental cruelty'. The approach of the trial court that where the career was most important factor for the spouse and not matrimonial obligations, amounted to one of the elements of cruelty, has been approved in this Judgment.

(Sunit Gupta)
Excise Magistrate
Jammu.

Komalam Amma
v.
Kumara Pillai Raghavan Pillai & Ors.
AIR 2009 SC 636

The Hon'ble Supreme Court of India, in case titled "Komalam Amma v. Kumara Pillai Raghavan Pillai and ors.", reported as AIR 2009 SC 636, has laid down the law that the scope of 'Maintenance' includes within its ambit, the provision for 'residence' apart from monetary allowance under the Hindu Marriage Act (1955). In para 9 of the said Judgment, it has been held as under :

"Maintenance, as we see it, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the lady's life a residence and money for other necessary expenditure. Where provision is made in this manner by giving a life interest in property for the purposes of residence, that provision is made in lieu of a pre-existing right to maintenance and the Hindu lady acquires far more than the vestige of title which is deemed sufficient to attract Section 14(1).

This principle of law laid down by the Hon'ble Supreme Court will go a long way in alleviating the miseries of deserted wives and destitute ladies. This may also prevent the unrelenting husbands from resorting to throwing their wives away from matrimonial homes and neglecting to maintain them thereafter. Even if they resort to such acts, the wife will not have to worry, at least, for the necessities of life including the roof where she could take shelter. This may help the defaulting husbands in particular and the society in general, to maintain the sanctity of marriage, and to ensure the welfare of the wives and the children.

(Ritesh K. Dubey)
Sub-Judge (LRP)
High Court of J&K
Jammu

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