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Topic of the Month

"As repositories of the rights of the people, courts rest on the bedrock of public confidence and faith. Judges, therefore, must make all efforts to maintain this confidence. A Judge who is arrogant would soon lose his credibility. Sobriety in behaviour is the hallmark of a Judge. I refer to courteous demeanour as a gift because often, it is difficult for those reposed with great responsibility and power to refrain from 'wielding the sword' of that power in places where it would be better to sheath it. The demeanour of a Judge includes patience, decency, decorum and other like traits. The conduct of the Bench towards society in general, towards the Bar, and towards litigants and court staff is significant. All must be treated with courtesy and respect. The Bench should command respect from others, and not demand it. Since no human is alike, it is difficult to gauge the framework of courtesy, because for one, consideration for the feelings of others may be an inherent part of his personality, and for another, it may have to be imbued and practised until it is firmly welded into routine behaviour. An offensive demeanour often leaves the receiver with a sourness that greatly affects his faith in the person, as well as the system at large. All who approach the doors of the court must feel relaxed and at ease at once, and Judges in particular have a great role to play in advancing this, for with a superciliousness of manner, a Judge can easily destroy the serenity of the court room."

(Excerpts from the lecture delivered by Hon'ble Shri Justice K.G. Balakrishnan, Chief Justice of India on 15-12-2007 at Jopdhpur, (2008)3 SCC J-13.)

Lok Adalat

In the month of March 2008, 1184 cases were settled in the Lot Adalat held in the different parts of the J&K State. Out of these, 187 cases were settled at pre-litigation stage. Compensation to the tune of Rs 36.30 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.

No leniency towards those involved in brutal murders : SC

Showing leniency towards a convict involved in brutal murders may undermine public confidence in the efficacy of law, the Supreme Court has said while confirming the death sentence on a man who raped and murdered two minor girls almost a decade ago. "Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine public confidence in the efficacy of law and society could not long endure such serious threats", a bench of Justice Arijit Pasayat and P. Sathasivam observed in its recent judgment.

"If for extremely heinous crime of murder, perpetrated in a very brutal manner without any provocation, the most deterrent punishment is not given then the case of deterrent punishment will lose its relevance", the apex court said. The court passed the observation while dismissing the appeal filed by Mohan Anna Chavan who had challenged the death penalty imposed on him by a session court for raping two minor girls.

The Bombay High Court had earlier confirmed the death sentence on him following which he appealed in the apex court. The apex court noted that Chavan did not deserve any leniency as he had a notorious track record of raping minor girls and was convicted twice for such heinous offences.

Chavan, was earlier sentenced to two years imprisonment on June 12, 1989 for kidnaping and raping a minor girl and on July 28, 1989 for nine years in connection with the rape of another minor girl.

In the present case, Chavan lured the two victims with sweets to nearby hills and raped them. The offence was committed on December 13, 1999 soon after he returned to his village in Satara district from Mumbai after serving the two earlier sentences. After raping and killing the two, Chavan dumped the body of one of the victim into a well and concealed the body of the other in bushes.

Rejecting the accused's plea that he should not be given a death sentence on conviction based solely on circumstantial evidence, the apex court said, in criminal law, the punishment is fixed according to the culpability of each kind of criminal conduct.

(PTI/20.05.2008)

SC says public faith utmost important for banks, flays BOI'S'S's conduct

The Supreme Court has held that banks, particularly nationalized banks, should not dishonour commitments or else the entire commercial and business transactions would come to a grinding halt.

Banks should know that their conduct would adversely affect the faith of the public in banking institutions, a bench comprising Justices Tarun Chatterjee and Dalveer Bhandari while dismissing Bank of India's (BOI's) appeal against a construction company observed.

"It is unfortunate that a nationalized bank (BOI's) is finding excuse for refusing to make the payment on totally untenable and frivolous grounds", it said in a case relating to BOI's refusal to honour a bank guarantee issued to a construction company.

While saying that the Delhi High Court was fully justified in making observations regarding BOI's conduct, it said: "The entire trust, faith and confidence of people depend on the conduct and credibility of the nationalized bank. In the present day world, the national and international commercial transactions largely depend on bank guarantees".

In the present appeal, a beneficiary of the bank guarantee had moved the court seeking a direction to BOI's to extend the bank guarantee till the disputes were finally adjudicated upon by arbitration between the parties.

However, BOI's had refused to renew the bank guarantee and pay the amount guaranteed by it on the ground that the charges for renewal of the bank guarantees were not paid.

While imposing costs on BOI's in a matter of Nangia Constructions & Others, the court said that the bank gurantee had been invoked during the validity period of the demand bank guarantee and BOI's was bound to honour its commitment and pay the amount of guarantee.

(PTI/19.05.2008)

Woman can't be prosecuted for gangrape, says H.C.

A woman cannot be made a co-accused in a gang-rape case and prosecuted for the offence, Justice V.R. Kingaonkar of Aurangabad bench of Bombay High Court has ruled. The case was registered against eight people in October 2006 by Rahuri police station in Ahmednagar district. According to petitioner's lawyer R.P. Phatke, eight people including two women were accused of raping a 14-year-old girl. The police had charged the accused with gang-rape, abduction, unlawful detention, threatening to kill and conspiracy. One of the women approached session court seeking here release from the case.

(TOI/25.05.2008)

Court frowns on arbitrary denial of Mediclaim policy renewal - Two member Bench asks IRDA to lay down clear guidelines.

Held - All dealings of Insurance firms must be fair and reasonable - Wrongful refusal is an act of mischief resorted to cause harm.

Renewal of a Mediclaim policy, particularly by senior citizens, could not ordinarily be refused on the ground that the insured contracted a disease during the period of the existing policy and that they made claims for that ailment, the Supreme Court has held.

A bench consisting of Justices S.B. Sinha and V.S. Sirpurkar said a policy should ordinarily be renewed subject to just exceptions, though it was not automatic process. It pulled up the United India Insurance Company and the New India Assurance Company for arbitrary denial of renewal (in the present petitions) on the only ground that claims were made in the existing policy.

The Bench dismissed appeals by the two companies challenging the judgments of the Delhi and Gujarat High Courts, which quashed orders refusing renewal of Mediclaim policies. It awarded Rs 25,000 each to the two respondents.

"Each of the (present) cases (in which renewal was refused) clearly shows that the action on the part of the authorities was highly arbitrary. When a policy is cancelled, the conditions precedent must therefore be fulfilled. Some reasons must be assigned. When an exclusion clause is resorted to the terms thereof must be given effect to".

The Bench said : "What was necessary is a pre-existing disease when the cover was inspected for the first time. Only because the insured had started suffering from a disease, the same would not mean the disease shall be excluded. If the insured had made some claim in each year, the insurance company should not refuse to renew insurance policies only for that reason".

The Bench said : "The appellants are bound to act fairly and reasonably in the matter of renewal of policies and wrongful refusal on their part must be an act of mischief resorted to cause harm which must be remedied".

Assuring that insurance companies must address their business concern vis-a-vis competition from other firms, "the same does not mean that, despite being the 'State' within the meaning of Article 12 of the Constitution, they would refuse to carry out their constitutional and statutory obligations, particularly in view of the fact that the insurance business was acquired (in 1972) to sub-serve a public purpose."

Writing the judgment, Mr. Justice Sinha said, "We have despite the new economic policy of the Centre, no option but to proceed on the assumption that the public sector insurance companies being a state have a different rule to play. It is not to say that as a matter of policy, statutory or otherwise, the companies are bound to regulate all contracts of insurance having the statement of Directive Principles (as enshrined in the Constitution) in mind but there cannot be any doubt whatsoever that fairness or reasonableness on the part of the companies must appear in all of their dealings".

The Bench said, "There should not be any hidden agenda and the insurance companies should not take recourse to "ticketing contract".

It asked the Insurance Regulatory and Development Authority (IRDA) to lay down clear guidelines on renewal of policies which would be applicable to all players.

The Bench asked the IRDA to consider the matter in depth and undertake a scrutiny of such claims so that if it was found that the companies were taking recourse to arbitrary methodologies in entering into contract of insurance or renewal, appropriate steps might be taken.

(Hindu/25.05.2008)

Can PIOs approach Indian court against verdict given in U.S. ? SLP filed against ruling declining to interfere with U.S. court order

The Supreme Court examined an important question, whether Persons of Indian Origin (PIOs) who had dual citizenship could approach Indian courts against an order passed by a family court in the U.S.

A Bench comprising Justice C.K. Thakker and Justice L.S. Panta issued notice to Rana Roy, a U.S. Citizen on a special leave petition from his divorced wife Nandini Chowdhuri against an order passed by the Calcutta High Court declining to interfere with the U.S. Court order.

According to Ms. Chowdhuri, she was married to Mr. Roy and they have a seven year old daughter. All of them are PIOs and U.S. Citizens. The U.S. Court granted divorce to the couple and the daughter stayed with the mother.

Ms. Chowdhuri remarried and in the new wedlock a child was born to her. She visited India to see her ailing father in Kolkota, where she admitted the daughter in school. As per the directions of the U.S. Court, she was to send her daughter to Mr. Roy during vacation. Ms. Chowdhuri filed a petition in a court in Kolkata to restrain Mr. Roy from enforcing his visiting rights and from taking the child to the U.S. After the trial court refused to pass an interim order, she filed an appeal in the High Court.

Initially the High Court restrained the father from enforcing his rights. However, a Division Bench of the High Court by its order dated April 30 said, "We do not propose to enter into the question whether an Indian court can interfere with the order passed by a competent American court in the facts of the present case. It is not a case where the appellant or the child will suffer irreparable loss and injury if the ad interim injunction is not granted nor is it a case, where the child's interest will be jeopardized".

"It is apparent that the appellant suppressed the fact that a competent American court had passed orders for the betterment of the child and also for sending the child to America during vacation. We vacate the interim order passed by another Bench of this court", the Bench said and directed the trial court to dispose of the matter as early as possible. The SLP is directed against this order.

Ms. Chowdhuri contended that since she was a PIO, the Indian court was competent to pass a restraint order against Mr. Roy.

(Hindu/28.05.2008)

Ex-director not liable for cheque dishonour : Supreme Court - He has no say in seeing that the cheque is honoured

A former director is not liable under Section 138 of the Negotiable Instruments Act for the dishonouring of a post dated cheque issued during his tenure in a company, the Supreme Court has held.

He would not be liable even u/s 141, "which provides for constructive liability of those who are in charge of the affairs of the company", said a Bench consisting of Justices S.B. Sinha and Mukundakam Sharma.

Writing the Judgment, Justice Sinha said, "It is only those persons who were in charge of and responsible for the conduct of the business of the company at the time of commission of an offence who will be liable for criminal action. It follows from this that a director, who was not in charge of and was not responsible for the conduct of business at the relevant point of time, will not be liable."

The Bench quoting earlier judgements said, "to launch a prosecution against the Director there must be a specific allegation in the complaint as to the part played by him in the transaction. There should be a clear and unambiguous allegation as to how the Director was in charge and responsible for the conduct of business of the company."

A person who had resigned as Director could not be one in-charge of the company when the cheque was dishonoured. The Bench said, "when post-dated cheques are issued and the same are accepted, it may be presumed that the money will be made available in the bank when the same are presented for encashment, but for that purpose, the harsh provision of constructive liability may not be available except when an appropriate case in that behalf is made out".

In the instant case, Mr. J.N. Sareen was Director of International Agro Allied Products, where as part of a business transaction some post-dated cheques were issued in favour of DCM Financial Services in April 1995. He resigned in May 1996. The appellant presented one of the cheques in January 1998 and it was dishonoured. A complaint under Section 138 of the Negotiable Instrument Act was registered against the company and its Directors. The trial court discharged Mr. Sareen as he was no longer a Director. The Delhi High Court dismissing the appeal said, "The mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract constructive liability under Section 141 of the Negotiable Instrument Act".

(Hindu/28.05.2008)

LEGAL JOTTINGS

(Case No. Criminal Appeal No. 925 of 2008)

V.R. Dalal & Ors. Versus Yougendra Naranji Thakkar & anr. - Date of Decision : 16/5/2008.

Judge(s) Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Harjit Singh Bedi

Subject Index : Indian Penal Code, 1860 - Section 420 -offence under - constitution of India - Article 142 - ingredients of Section 420 of Indian Penal Code are also absent in the instance case - when a proceeding is found to be an abuse of the process of court, this Court in exercise of its jurisdiction under Article 142 of the Constitution of India may not allow it to continue. For the said purpose, the fact of the matter can be looked into.

(Case No. Cr. Appeal No. 1167 of 2006 with Cr. A.No. 1168 of 2006) - S. Panneerselvam Versus State of Tamil Nadu - Date of Decision: 15/5/2008.

Judge(s) Hon'ble Dr. Justice Arijit Pasayat and Hon'ble Mr. Justice P. Sathasivam and Hon'ble Dr. Justice Mukundakam Sharma

Subject Index : Indian Penal Code, 1860 - section 302 read with section 34 - conviction under - this is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on his deathbed, being exceedingly solemn, serene and grave, is the reason that the requirements of oath and cross-examination are dispensed with - though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be - the conclusions have been arrived at by misreading the evidence. Therefore, the impugned judgment of the High Court cannot be maintained and is set aside. The appellant in each case is acquitted of the charges.

(Case No. Criminal Appeal No. 179 of 2007)
Sidhartha Vashisht @ Manu Sharma Versus State (NCT of Delhi) - Date of Decision : 12/5/2008.

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

Subject Index : Criminal Procedure Code, 1973 - section 389 - application under for suspension of sentence and release on bail - this is not a fit case to exercise power under Section 389 of the Code. Though the trial Court has acquitted the applicant-accused for the offences with which he was charged, the High Court reversed the order of acquittal and convicted him under Section 302, IPC and ordered him to undergo rigorous imprisonment for life - keeping in view the seriousness of offence, the manner in which the crime is said to have been committed and the gravity of offence, Court is of the view that no case has been made out by the applicant-appellant for suspension of sentence and grant of bail.

(Case No. Civil Appeal No. 3326 of 2008) Lachhman Singh (Deceased) through LR's & Ors. Versus Hazara Singh (Deceased) th. LR's & Ors. - Date of Decision : 6/5/2008.

Judge(s) Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Lokeshwar Singh Panta

Subject Index : Suit for redemption of mortgage in the factual matrix - what would be factual matrix - a transaction of mortgage in respect of the suit property measuring 58 kanals 11 marlas was entered into by and between the predecessors in the interest of the parties herein. The actual date of execution of the deed of mortgage was not known to the plaintiffs-respondents. However, the said mortgaged properties were mutated in the name of the mortgagee on or about 19.3.1913 - a suit for redemption of the said mortgage was filed by the respondents on or about 30.12.1970. The learned trial court, as also the First Appellate Court, dismissed the said suit as being barred by limitation opining that the actual date of mortgage being not known, a decree for redemption of mortgage could not be passed.

CASE COMMENTS

Prem Kumari & Ors. V. Prahlad Dev & Ors.
AIR 2008 SC 1073

Liability of Insurer where the Driver had a fake license - An Insurer, saddled with the liability to satisfy an Award passed under Section 166 or Section 163-A of the Motor Vehicles Act, 1988 can wriggle out of the liability only on grounds set out in Section 149 of Motor Vehicles Act which limits the grounds of defense available to an Insurer. Proviso to sub-section 4 of Section 149 of the Act clearly mandates that the Insurer has to pay compensation to 3rd parties but where the Insurance Company is entitled to escape liability on account of breach of terms and conditions of policy of insurance it may recover the same from Insured. The insurance company can avoid liability under this provision if it is able to establish that there is a breach of terms and conditions of policy of insurance. The ground of defense available to Insurance Company contemplated under this provision is breach on the part of insured. It will not suffice to show that the driver plying the offending vehicle was not duly licensed. The driver may be the employee of the insured and not a party to the contract of insurance. Breach of terms and conditions of insurance policy must be on the part of insured. Where breach of terms and conditions of insurance policy is raised as defense by insurer in claim filed by the 3rd party, the insured/owner has to demonstrate

that he had satisfied himself as regards holding of a valid and effective DL by the driver. The insurance company would not be absolved of liability unless it proves that the insured/owner was conscious of the DL being fake and despite such knowledge he authorized the driver to drive vehicle involved in the accident. Where the owner has satisfied himself that the driver was holding valid and effective DL, violation of provision engrafted in Sec 149 (2) of the Act is not involved.

Law on the subject witnessed further development when the Hon'ble Apex Court introduced concept of purposive, interpretation. The dictum of Hon'ble Apex Court in National Insurance Co. Ltd. v. Swarn Singh and Ors., (2004)3 SCC 297 is that compulsory coverage of all vehicles against third party risks was aimed at extending relief to victims of Motor Vehicular accidents and the provisions of the Act have to be interpreted to advance the said object. The Insurer is entitled to raise the defense in terms of Sec 149(2)(a)(ii) of the Act but must prove breach of conditions of the policy with regard to use of vehicle by a duly licensed driver. The Insurer would not be allowed to avoid its liability unless the breach in the conditions of Driving License is so fundamental which contributed to the cause of accident.

However, in the latest judicial pronouncement titled 'Prem Kumari and Ors. v/s Prahlad Dev and Ors, reported in AIR 2008 SC 1073 the Hon'ble Apex Court reiterated the principle enunciated in NIC Ltd v/s Laxmi Narayan Dhut reported in 2007(3) SCC 700 that renewal of a fake DL cannot cure the inherent fatality. Restricting application of decision in Swarn Singh's case (supra) only to cases involving 3rd party risks the Hon'ble Apex Court did not support the concept of purposive interpretation in cases of 3rd party risk the insurance company has to indemnify the owner. The insurer shall be entitled to recover the award money from the insured/owner, if so advised. The Hon'ble Apex Court reiterated the view taken in OIC v/s Meena Variyal and Ors. (2007)5 SCC 428 that in cases where a person is not a 3rd party the insurer cannot be made liable merely by resorting to the reasoning adopted in Swarn Singh's case. The insurer would be liable unless breach of terms and conditions of the insurance policy on the part of insured is established. In case of 3rd party risk the insurance company shall have to indemnify the owner and it may recover the award money from the insurer, if breach of terms and conditions of insurance policy is established.

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

Manager ICICI Bank v. Prakash Kour & Ors.
AIR 2007 SC 1349

As the commercial activity of the society sky rocketed since the last decade, it also saw an increased inclination towards unruly and illegal means to achieve it and banks are no exception. Banking in modern days has changed phenomenally from traditional cash lending and interest motive to more technical savvy multi dimensional customer service. The growth of the banking system also saw de-generative trends being born. One of the aspects of this contemporary system is the debt recovery means of the banking institutions. The case under comment had been filed by the appellants against the order of the Allahabad High Court. The respondent had taken a loan from ICICI Bank Allahabad branch for purchase of a truck but subsequently defaulted in payment of installments and in terms of the agreement entered into between the bank and the respondent, her truck was taken possession of by the bank authorities by use of force. It also appeared that the respondent had requested the Chief Manager (Loans), Sardar Patel Marg branch, for the release of truck which was alleged to have been taken forcibly by M/s Kartik Associates acting as the recovery agents of the bank. The respondent also appeared to have approached M/s Kartik Associates with a request and then with a legal notice which was returned unserved. The respondent accordingly wrote to the police authorities contending that the appellants and its officials has conspired to cheat her and prayed for the registration of an FIR under various sections of IPC but it yielded no results and as such respondent leveled charges against the state and police authorities under Prevention of Corruption Act section 13 and sections 166, 167, 212, 217, 218, 221, 120-B of IPC. On the basis of the above allegations the respondent moved to the High Court and prayed for a direction against the State for lodging of FIR and for saving her of losses by recovering the truck along with the documents and hand it over back to the respondent as also cancellation of the license of ICICI. The petition was disposed of with the direction of the SSP Allahabad for ensuring the registration of the case. By the time the appellant bank approached the Apex Court against the order, they had already assessed that their defence was somewhat punctured as was apparent from the pleading that was blended with a tone of negotiations and a possible compromise. The senior advocate appearing for the applicants, advanced that the dispute was clearly of civil nature relating to the instalment and conveyed bank's willingness to compromise the matter by foregoing the interest which was payable on outstanding dues and also having the respondent to sit across the

negotiation table with the bank. Surprisingly the counsel also held that if the respondent paid an initial amount of Rs 50,000/- the truck would be handed over. The suggestions of the appellants were accepted by the Apex Court in the best interest of the justice delivery and the circumstances of the case. But the concluding paragraph of the Apex Court is worth mentioning here. It laid down that "we wish to make it clear that we do not appreciate the procedure adopted by the bank in removing the vehicle from the possession of the respondent. The practice of hiring recovery agents who are musclemen, is deprecated and needs to be discouraged. The banks should resort to the procedure as recognized by the law".

(Mohd. Shafi Khan)
Pr. District & Sessions Judge
Anantnag

Kanhaiyalal v. Union of India
AIR 2008 SC 1044

The Apex Court has held that a statement made by accused under Section 67 of Narcotic Drugs and Psychotropic Substances Act is not the same as statement made under Section 161 of the Code of Criminal Procedure. Relying on an earlier decision in Raj Kumar Karwals case (AIR 1991 SC 45) Apex Court has held that an officer posted with powers of Officer-in-charge of a Police Station under Section 53 of NDPS Act is not a 'Police Officer' within the meaning of Section 25 of the Evidence Act. It is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161 of the Code, unless made under threat or coercion. It is this vital difference, which allows a statement made under Section 67 of NDPS Act to be used as a confession against a person making it and excludes it from the operation of Sections 24 to 27 of the Evidence Act and that the conviction can be based more so when it is corroborated by evidence.

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

State of A.P. v. A. S. Peter
AIR 2008 SC 1052

Whether prior permission for further investigation by police is required or not under Sections 173 of the Code of Criminal Procedure, the Apex Court has authoritatively laid down that law does not mandate taking of prior permission for further investigation even after filing of the charge sheet. Making further investigation is a statutory right of police. It has been held by the Apex Court in the above mentioned case that indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the charge sheet is a statutory right of the police. A distinction also exists between further investigation and re-investigation. Whereas re-investigation without prior permission is necessarily forbidden, further investigation is not.

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

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

The concept of Lok Adalat has materialized to bring the two warring parties, to the lis, to an amicable settlement without a trace of rancor, with economy of time and costs. Sections 19 to 22 of National Legal Service Authorities Act and Sections 18-21 of J&K State Legal Services Authorities Act have provided for establishment of Lok Adalat, its jurisdiction to settle the disputes both civil and criminal (Not-non compoundable one) and have made an award binding on the parties with immunity from a challenge in appeal or revision.

The institution of Lok Adalat works with emphasis on 'conciliation and amicable settlement' of the dispute. Consent of both the parties to a settlement is a sine qua non for Lok Adalat make an award. Lack of consent on the part of one of the parties, thus deprives Lok Adalat of jurisdiction to settle the dispute. The jurisidiction that Lok Adalat derives under Cl. 5 of Sec. 19 of the Central Act is "hedged with the expression to determine and arrive at a compromised settlement", (Refer Commissioner Kps Instruction v/s Nirupadi Vir Bhaderapa - AIR 2001 Kant 504 at 508). The Hon'ble Apex Court endorsed the view in State of Punjab v/s Pholan Rani (2004)7 SCC 555 and held, "If a case does not involve compromise or a settlement Lok Adalat cannot dispose of the same".

In AIR 2008 SC 1209 , the Hon'ble Apex Court has re-affirmed the above view in the following words, "Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. When the Act refers to the 'determination by Lok Adalat' it does not contemplate not require adjudicatory judicial determination: but a non adjudicatory determination based on a compromise or settlement arrived at by the parties....." (Para 8)

Had the matter rested their, certainly, would be

no need for the discussion. The Act has undergone a change vide Legal Services Authorities (Amendment) Act, 2002 with insertion of Sec. 22-A to E to the Act, providing for the establishment of Permanent Lok Adalat to exercise jurisdiction in respect of some public utility services. Sec. 22 C sub-section 8, however, has sown the seeds of discord and changed the character of a Lok Adalat - in as much as a Permanent Lok Adalat has been empowered to decided a dispute in absence of an agreed settlement, as well.

Sub-sec. 8 of Sec. 22 C says, "where the parties fail to reach an agreement under sub-Sec. 7 the Permanent Lok Adalat shall, if dispute does not relate to any offence, decide the dispute" This sub-section has been interpreted by Jharkhand High Court in Ajay Sinha's case (AIR 2006 Jhar 113 DB) to mean that Permanent Lok Adalat can decide a dispute on merits even if any party refused to agree. Therefore Permanent Lok Adalat could well jettison the endeavour of conciliation and decide the matter unilaterally. This position surely goes against the spirit of Lok Adalat and violates its grain. It may be remembered that materially, legally and conceptually there is no difference between Lok Adalat and Permanent Lok Adalat, only that former works intermittently while as latter is supposed to be regular in sitting.

Sub-sec. 8 of Sec. 22 C becomes totally untenable in view of what the Hon'ble Supreme Court has said in the case under discussion, viz "Lok Adalat should resist temptation to play part of Judges and constantly strive to function as conciliator. The endeavour of Lok Adalat should be to guide parties to compromise the dispute.....".(Para 9).

(B. L. Saraf)
Pr. District & Sessions Judge (Retd.)

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 nor, came as a question of law, for consideration with Criminal Procedure Code and question as to what would amount to 'arrest' and 'custody' being question of 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 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, Anticorruption
Kashmir-Srinagar

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