# SJA NEWSLETTER

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## Topic of the Month

"It is trite that the individual response to a situation or the choice of an available option amongst possible solutions depends on the attitudinal reaction of the human mind. That, in turn depends on the material which led to the formation of the attitude. It is for this reason, the response of different persons may vary, particularly in intricate situations. The need, therefore, is to so train the mind that its response to a given situation is in accord with the highest norms of a civilized society. The task of a judge is so varied that it encompasses all kind of situations, human problems, to many of which no clear cut answer is provided by the literal existing law; and the need may be to tailor the ostensible solutions to fit the body of the problem. The manner in which the judge's mind works to tailor the available material to provide the solution depends on the way he looks at the problem and the manner in which he visualizes a just solution thereof. The judge's perception or his philosophy determines that course and is the vehicle on which he treads that path. A satisfactory solution, therefore, depends on a perceptive mind which is sensitive to all relevant factors and has a healthy response to each of them. This is the significance of a judge's perception in the quality of the justice delivery system. The need for every Judge to develop a proper perception need hardly be emphasized".

"The nature of a judge's task is well known and so also the traits needed in a good judge to discharge his duty properly. The needed traits have been enumerated so often, beginning with the ancient texts. Basically, the need is to be a good human being so that all responses to human problems are triggered by positive impulses. Then only the true purpose of justice can be served. 'The Rule of Law' in the words of Jeffery Jowell 'is seen as a principle of institutional morality'. As a part of the machinery for upholding and implementing the Rule of Law, every judge must perceive Law as an instrument of enforcing societal morality. The perception needed is of this kind, for Law to become truly an instrument of justice. Lifetime effort and continuing education is the only means to achieve this result." *(Taken from Article for the Golden Jubilee Commemoration Volume of Rajasthan High Court by Hon'ble Mr. Justice J.S. Verma, former Chief Justice of India.)*

# SOME RECENT SUPREME COURT JUDGMENTS OF PUBLIC IMPORTANCE

## (Delivered from January 2009 to March 2009)

**1.** On 20th January, 2009, a two Judges Bench in Jai Singh and Ors. v. Gurmej Singh [Civil Appeal No. 321 of 2009] summarized principles relating to inter-se rights and liabilities of co-sharers as follows:- (1) A co-owner has an interest in the whole property and also in every parcel of it; (2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession; (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all; (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other, as when a co-owner openly asserts his own title and denies that of the other; (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment; (6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners and (7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.

The Bench held that "when a co-sharer is in exclusive possession of some portion of the joint holding he is in possession thereof as a co-sharer and is entitled to continue in its possession if it is not more than his share till the joint holding is partitioned. Vendor cannot sell any property with better rights than himself. As a necessary corollary when a co-sharer sells his share in the joint holding or any portion thereof and puts the vendee into possession of the land in his possession what he transfers is his right as a co-sharer in the said land and the right to remain in its exclusive possession till the joint holding is partitioned amongst all co-sharers."

**2.** On 21st January, 2009, a two Judges Bench in Ranveer Singh v. State of M.P [Criminal Appeal NO.115 of 2009] observed that "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 defence, 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 a mechanism whereby an attack may be a pretence for killing."

"A right to defend does not include right to launch an offensive, particularly when the need to defend no longer survived", the Bench said.

**3.** On 2nd February, 2009, a two Judges Bench in State of M.P. v. Kashiram & Ors. [Criminal Appeal No. 191 of 2009] held that "the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong ."

"The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal", the Bench said.

**4.** On 17th February, 2009, a two Judges Bench in Martin F. D'Souza v. Mohd. Ishfaq [Civil Appeal NO.3541 of 2002] held that "the Courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists". Observing that the "medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money", the Bench however held that "the entire medical fraternity cannot be blamed or branded as lacking integrity or competence just because of some bad apples."

"Sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is", the Bench said.

**5.** On 24th February, 2009, a two Judges Bench in Vadiraj Naggappa Vernekar (D) Through Lrs. v. Sharad Chand Prabhakar Gogate [Civil Appeal No.

1172 of 2009] held that "the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination."

"If the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter", the Bench said.

**6.** On 3rd March, 2009, a two Judges Bench in Dilip Kumar Garg and another v. State of U.P. and others [Civil Appeal NO.5122 of 2007] observed that "Article 14 of the Constitution should not be stretched too far, otherwise it will make the functioning of the administration impossible." The Bench held that the "administrative authorities have experience in administration, and the Court must respect this, and should not interfere readily with administrative decisions."

**7.** On 3rd March, 2009, a three Judges Bench in V. Laxminarasamma v. A. Yadaiah (Dead) & Ors. [Civil Appeal No. 1849 of 2002] held that the Special Tribunal/Special Court constituted under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 has the requisite jurisdiction to go into the question of adverse possession.

**8.** On 6th March, 2009, a two Judges Bench in Yumnam Ongbi Tampha Ibemma Devi v. Yumnam Joykumar Singh & Ors [Criminal Appeal No. 1600 of 2009] held that "having regards to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will."

"The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator", the Bench said.

**9.** On 6th March, 2009, a two Judges Bench in M.J. Jacob v. A. Narayanan and Ors. [Civil Appeal NO.3611 of 2008] held that "election results should not be lightly set aside and the will of the electorate should ordinarily be respected."

**10.** On 20th March, 2009, a two Judges Bench in C. Elumalai & Ors. v. A. G.L. Irudayaraj & Anr. [Contempt Petition No. 118 of 2007] held that "punishing a person for contempt of Court is indeed a drastic step and normally such action should not be taken. At the same time, however, it is not only the power but the duty of the Court to uphold and maintain the dignity of Courts and majesty of law which may call for such extreme step."

"If for proper administration of justice and to ensure due compliance with the orders passed by a Court, it is required to take strict view, it should not hesitate in wielding the potent weapon of contempt", the Bench said.

**11.** On 25th March, 2009, a two Judges Bench in Commissioner of Income-tax, New Delhi v. M/s Eli Lilly & Company (India) Pvt. Ltd. [Civil Appeal No. 5114 of 2007] held that "the TDS provisions in Chapter XVII-B relating to payment of income chargeable under the head "Salaries", which are in the nature of machinery provisions to enable collection and recovery of tax, forms an integrated Code with the charging and computation provisions under the Income Tax 1961 Act, which determines the assessability/taxability of "salaries" in the hands of the employee-assessee. Consequently, Section 192(1) has to be read with Section 9(1)(ii) read with the Explanation thereto. Therefore, if any payment of income chargeable under the head "Salaries" falls within Section 9(1 )(ii) then TDS provisions would stand attracted."

## ACADEMY NEWS

A refresher course on the topic of "Importance of Preliminary examination of parties and Framing of Issues in the disposal of Civil Suits" was held by the State Judicial Academy on 16th of May, 2009 at Conference Hall of District Court Complex, Srinagar. Judicial officers of the Rank of Sub-Judges and Munsiffs of Group A of Kashmir province participated in the programme. It may be recalled that similar programme was organized by the State Judicial Academy for the Judicial Officers of Jammu province at Jammu, in the Month of April 2009.

Proceedings of the Refresher Course

Shri Hassnain Masoodi, Principal District and Session Judge Srinagar was the Resource Person. Shri Masoodi told the officers that framing of Issues is the back bone of civil cases and recording of preliminary examination is the stage which is a step in aid to framing of Issues. Most often the pleadings of parties are not clear and there are some ambiguities which can

Proceedings of the Refresher Course

which can be cleared by recording the statements of parties in terms of Order X of the Code of Civil Procedure. It was told by the speaker that Order X of the Code of Civil Procedure has to be followed invariably and so far as Rule 1 is concerned it is mandatory in nature. Rule 2 has applicability at the later stage as well, that is to say whenever during the trial, Court feels that there are certain points of facts which need to be explained by any of the parties, it can call that party for recording statement in terms of Rule 2 of Order X of the Code of Civil Procedure.

On framing of issues it was stressed by Shri Masoodi that framing of proper issues can expedite the proceedings by letting the parties to know precisely as to what evidence is to be produced. It was further told that not only the framing of issues but also placing the burden of proof rightly, is of utmost importance. If these procedures are followed properly it helps the Court in effective disposal of cases. A Judicial officer should be extra careful while conducting both these proceedings.

On the same topic, another course for Judicial Officers of Group B was held on 23-05-2009. Syed Javed Ahmed, Principal District and Session Judge Budgam was the Resource Person. While addressing the participants, Shri Syed told them that in fact the provisions of Order X serve the same purpose which is served by pre-trial conference of the Advocates of the parties in U.S.A. And it helps in narrowing down the differences and striking of Issues not only becomes easier but also purposeful. While dealing with the framing of Issues, Shri Syed told the participants that prevalent practice in the courts is that draft issues are sought from the counsel of the parties which is not in the spirit of law and justice because it is duty of the Presiding Officers of the court to strike the Issues, of course, with the assistance of counsel for the parties and framing of Issues is as important as framing of charge in criminal cases.

Participating judicial officers interacted with the resource persons and clarified their doubts pertaining to the subject of discussion. Officers felt satisfied and resolved to apply what they had learnt in the programme.

## LEGAL JOTTINGS

**(Case No: Criminal Appeal No. 733-734 of 2009)**
**K. Ashoka versus N.L. Chandrashekhar & ors.**
**Date of Decision: 15/04/2009.**
**Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.**

Subject Index: Karnataka Co-operative Societies, Act N.G.E.F. Employees House Building Cooperative Society Limited is a society incorporated and registered under the Karnataka Cooperative Societies Act, 1959 - complaint filed under section 200 Cr.P.C - appellant herein was a Director of the society. He filed a complaint petition alleging *inter alia* that the respondents herein who were the office-bearers of the society, earned a huge amount for themselves by alloting a site bearing No. 509 measuring 30' × 40' for a sum of Rs. 2,40,000/- to one Gopal, a name lender who in turn, sold the said site for a sum of Rs. 28,00,000/- to one Hanumanthegowda by a deed of sale dated 3.7.2006. However, in the sale deed, the consideration amount was shown as Rs.10,20,000/-. Complaint filed under section 200 Cr.P.C. in respect of commission of an offence under Section 420 read with Section 34 of the Indian Penal Code the primary allegation against the respondents in the complaint petition does not make out an offence only under the provisions of Section 109 of the Act as contended by Mr. Bhat but also other offences. A legal embargo in filing a complaint is contained in Section 109(6) of the act whether the allegations made in the complaint petition are correct or not have to be considered during trial. Section 109 of the Act provides for commission of offences under the said Act. Therein, no statutory embargo has been placed for a court to take cognizance of an offence under the provisions of IPC. If the allegations made in the complaint petition or in the first information report make out a case under the IPC, Section 111 of the Act, would constitute no bar for maintenance thereof being applicable only in respect of offences committed under the said Act. The said statutory interdict

therefore cannot be extended in regard to commission of an offence under any other Act.

**(Case No: Civil Appeal No. 4259 of 2002 with Civil Appeal Nos. 4266, 4262, 4260-4261, 4263, 4264-4265 of 2002)**
**Avinash Dhavaji Naik versus State of Maharashtra**
**Date of Decision: 15/4/2009.**
**Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Mr. Justice Cyriac Joseph.**

Subject Index: Land acquisition for Bombay Project notification issued - a declaration in terms of Section 6 of the Land Acquisition Act was made on 21.05.1971 - a notice under Section 9 of the Act was issued pursuant whereto the claimants - appellants filed their applications for payment of enhanced compensation. The Land Acquisition Collector made its award. Aggrieved by and dissatisfied therewith, the appellants filed applications before the Collector for reference in terms of Section 18 of the Act pursuant whereto reference was made to the Court of District Judge in the year 1986. The purpose for acquisition of land was building a new city. A vast tract of land was sought to be acquired. Indisputably, in terms of Section 23 of the Act, the market value of the land was required to be determined as was obtaining in the year 1970 when the notification under Section 4 of the Act was issued. It is unfortunate that despite the fact that notification was issued under Section 4 of the Act as far back as on 3.02.1970 and a declaration under Section 6 of the Act was issued on 21.05.1971, the award came to be passed only on 30.06.1986 and that too probably, only having regard to the consequences ensuing in terms of Section 11A of the act. If the belting system is taken recourse to, compensation at the rate of Rs. 10/- per sq. m. would sub-serve the ends of justice. The judgment rendered by the High Court in Civil Appeal No. 4264-65 of 2002 may be a safe guide, particularly when the Reference Court itself opined that the valuation of the land should be determined at Rs. 10 per sq. M.

**(Case No: Criminal Appeal Nos. 32-33 of 2004)**
**State of Kerala v. Anilachandran @ Madhu**
**Date of Decision : 15/4/2009.**
**Judge(s): Hon'ble Dr. Justice Arijit Pasayat, Mr. Justice Lokeshwar Singh Panta and Hon'ble Mr. Justice P. Sathasivam.**

Subject Index: Indian Penal Code, 1860 sections 143, 147, 148, 323, 324 and 302 - trial under challenge in this appeal is to the judgment of the Division Bench of Kerala High Court allowing the appeal filed by the respondent. Five accused persons faced trial for alleged commission of offence. All the accused persons denied their involvement in the crime. Learned First Additional Sessions Judge, Thiruvananthapuram found A1 to A4 guilty, while A5 was acquitted. Where an explanation is offered by the prosecution for the delay, that has to be tested. The unexplained delay by itself may not be fatal, but is certainly relevant aspect which can be taken note of while considering the role of the accused persons for the offence. In the instant case the High Court found that not only the document appeared to be suspicious but in addition there was considerable delay in sending it to *Illaka* Magistrate. It is certainly the duty of the persons who plead alibi to prove it beyond reasonable doubt. Merely because the accused was not able to prove his defence, it cannot be presumed that the prosecution case is proved against him.

**(Case No: Criminal Appeal No. 730 of 2009)**
**V.V.S. Rama Sharma & ors. versus State of U.P.**
**Date of Decision : 15/4/2009.**
**Judge(s): Hon'ble Mr. Justice S.B. Sinha and Hon'ble Dr. Justice Mukundakam Sharma.**

Subject Index: Indian Penal Code, 1860 sections 420 and 409 and Indian Stamp Act, 1899 sections 64 and 69 FIR under challenged by writ petitions - writ petitions dismissed. The registration of FIR shows complete non-application of mind as the said FIR also brings within its ambit purchase of insurance stamps done within the State of U.P. There cannot be any dispute with regard to the insurance stamps which has been duly purchased from the State of U.P. Itself. The State of U.P. has sought to invoke Section 64 (c) of the Stamp Act to contend that the action of appellants was 'calculated to deprive the Government of any duty or penalty', but there is no denial of the fact that appellants were indeed paying the duties, and by no means `depriving the government of any duty or penalty'. So, the act of the respondent is nothing but clearly a case of its *mala fide* intention to harass the appellants herein. It is wholly immaterial whether appellants are purchasing the insurance stamps from the State of U.P. or from any other State, the decision of the High Court is liable to be set aside.

**(Case No: Criminal Appeal Nos. 723-724 of 2009)**
**Thahira Haris etc. versus Government of Karnataka & Ors.**
**Date of Decision :15/4/2009.**
**Judge(s): Hon'ble Mr. Justice Dalveer Bhandari and Hon'ble Mr. Justice Asok Kumar Ganguly.**

Subject Index: Habeas corpus writ petition challenging the order of detention the main allegation against the detenu is abetting in smuggling

of red sanders out of the country. According to the appellants, the High Court did not consider the case in proper perspective and dismissed both the writ petitions filed by the *detenu* on proper construction of clause (5) of Article 22 read with section 3(3) of COFEPOSA Act, it is imperative for valid continuance of detention that the *detenu* must be supplied all documents, statements and other materials relied upon in the grounds of detention. In the instant case, admittedly, the relied upon document, the detention order of Anil Kumar was not supplied to the detenu and the detenu was prevented from making effective representation which has violated his constitutional right under clause (5) of Article 22 of the Constitution. The impugned detention order is quashed and the detenu is directed to be released forthwith, if not required in any other case.

## NEWS & VIEWS

### Wife's suspicion about hubby's affair is not cruelty, says court

Interpreting cruelty in divorce cases, the Bombay high court has delivered a significant ruling that if a woman, who has been asked to sleep in a separate room by her husband, suspects about him having an extramarital affair and inquires about the same, it cannot be termed as mental cruelty.

"...When a wife contends that the husband had abandoned physical relationship, it was natural for her to inquire whether he had any other woman in life. We are therefore inclined to accept that the inquiry made by the wife would not amount to mental cruelty," Justice B. H. Marlapalle and Justice S J Vajifdar observed recently.

The court was hearing an appeal filed by Suyog Dahiwadkar, a 35-year-old Pune-based jeweller, challenging an order passed by a family court rejecting his divorce petition on the grounds of cruelty.

The couple had an arranged marriage in December 1997. The husband had sought divorce in July 2001, after the wife left the matrimonial home in April 2001, following a quarrel. In April 2004, the family court rejected Suyog's divorce petition which alleged that respondent (wife) Mohini, 33, did not tell her correct age at the time of wedding.

"She was born in 1969, but we were told she is 1970-born," the petitioner alleged. The petitioner claimed his wife had also not given her horoscope before the wedding and that she was into black magic.

The divorce was sought on grounds of cruelty under Section 13(i) (ia) of the Hindu Marriage Act. "My wife has a quarrelsome nature. She used to misbehave with my family members. She had ill motives against my elder brother and she had also inquired from my cousin, whether I was carrying on with another woman," his petition stated.

The wife, on the other hand, had replied that her husband was an alcoholic and used to beat her mercilessly under the influence of liquor.

"On January 31, 2001, my husband came home late night and beat me up mercilessly under the influence of liquor. On March 23, 2001, I was suddenly told by him not to sleep with him in our bedroom. I was told to sleep separately in the hall," she told the court. As the wife had shown willingness to go back to her husband, the High Court refused to accept Suyog's argument that their marriage has been irretrievably broken. The court also enhanced the maintenance granted to his wife from Rs 3,000 to Rs 10,000 a month, considering that Suyog was into a 145-year-old family business earning jointly with other members an annual income of Rs 40 lakh to Rs 50 lakh.

(TOI/4.05. 2009)

### SC awards techie Rs 1cr damages for medical negligence

In the highest compensation ordered by an Indian court in a medical negligence case, a techie who found himself paralyzed waist down after a surgeon damaged his spinal chord during an operation to remove a tumour in the chest, was awarded Rs 1 crore in damages by the Supreme Court.

The victim, Prashant S. Dhananka, 39, who spiritedly argued his case from a wheelchair he has been confined to since the operation 19 years ago, had sought a compensation of Rs 7 crore. The court, however, settled for an almost seven-fold increase in the Rs 15 lakh amount awarded by the Andhra Pradesh High Court.

Though it is a pittance compared to the 5 million pounds (a little over Rs 37 crore) awarded to British TV actress Leslie Ash in a similar case last year, this Supreme Court ruling could be a trendsetter for judicial re-evaluation of compensation for victims of medical negligence.

Dhananka, a senior manager with Infosys earning Rs 1.5 lakh a month and residing in Bangalore, gave vivid details of the gross negligence he suffered at Nizam's Institute of Medical Sciences (NIMS), Hyderabad, and demonstrated the inadequacy of the compensation awarded by the high court. NIMS, a semi-government set up, is rated as one of the premier hospitals in the country.

While increasing the compensation to Rs 1 crore, the bench comprising Justices B N Agrawal, H S Bedi and G.S. Singhvi showed both its disgust at blatant attempts by NIMS to wriggle out of its responsibility for the victim's condition and acknowledged the need to provide for the huge medical expenses that Dhananka has had to incur every month since 1990.

Dhananka's nightmarish experience is similar to the case of national table tennis player V. Chandrasekhar, who fought a legal battle against Apollo Hospital, Chennai, for over a decade before being awarded Rs 19 lakh by the Supreme Court in February 1995 -- the highest compensation in a medical negligence case in India before the Dhananka verdict. Chandrasekhar too had been left partially paralyzed due to medical negligence. For Dhananka, it all began on September 19, 1990, when he got himself examined at NIMS for frequently recurring fever. Dhananka was studying mechanical engineering at the time. The hospital diagnosed a benign tumour in the chest. He underwent thoracotomy for removal of the tumour but due to negligence during the operation, his spinal chord was damaged. He developed paralysis in the lower part of his body and since then has been confined to a wheelchair. The apex court agreed with Dhananka's plea that his bright future was cut short due to the mistake of doctors.

Dr P. V. Satyanarayana, who had performed the operation was then a professor of cardiac surgery at NIMS. He took voluntary retirement in 1996 and now works for a corporate hospital in Vizag. "The complication occurred in spite of taking all the precautions. It is not a case of medical negligence. Similar cases are mentioned in medical literature," he said.

(TOI/15.05.2009)

## CASE COMMENTS

### State of Goa v. Pandurang G. Mohite AIR 2009 SC 1066

It is the basic principle of criminal jurisprudence that guilt of accused needs to be proved by prosecution beyond reasonable doubts. It has to be proved by prosecution that it is only the accused facing trial who committed the offence and none else. There may be very strong case set up by the prosecution; however some reasonable doubts may be available on the file when Court is considering the evidence. Only reasonable doubts are to be taken into consideration by the Court. Doubts which are not reasonable are to be outrightly rejected. The important question however arises as to what are the reasonable doubts. The Hon'ble Supreme Court in judgment rendered in case reported as "AIR 2009 Supreme Court 1066 State of Goa v. Pandurang Mohite.", has made observations as to what are the reasonable doubts.

"Doubts would be called reasonable if they are free from a zest of abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a mere possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."

*(Sushil Singh)*
*Munsiff, Bishnah*

### Gourav Nagpal v. Sumeda Nagpal AIR 2009 SC 557

The trial court is confronted with conflicting claims of spouses and faces difficulty while deciding the matter of handing over the custody of the child to the spouse and oftenly plunges into dilemma that who is the best claimant and entitled to the custody. Number of courts are being travelled by spouses for achieving this objective. Keeping aside the legal claim of the parents, the moral and ethical upliftment and welfare of the child has also to be considered in its widest term. The cases relating to divorce are increasing at the alarming rate and matrimonial ties are looking fragile. The sanctity of the institution of marriages is eroding. This leads to disintegration of the families and ultimately the society. According to the import of the Hon'ble Supreme Court Judgment as mentioned below, the moral & ethical welfare of the child is of utmost importance rather than the rights of the parents under some statute.

The Hon'ble Supreme Court has held in a case reported as AIR 2009 SC 557 titled Gourav Nagpal v. Sumeda Nagpal, at paras Nos. 35, 42 and 43 as under;

The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the 'welfare of the child' and not rights of the parents under a statute

for the time being in force. When the Court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis. In such matters human angles are relevant for deciding those issues. The Court then does not given emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. The word 'welfare' used in S. 13 of the 1956 Act has to be construed liberally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parents patriae jurisdiction arising in such cases."

It has been now well settled by the Apex Court that custody of the child has to be given to the spouses keeping in view the moral, ethical, welfare and well being of the child and moreover taking into consideration the consent of the child wherever the child is competent to give his consent. Because it is the child who bears the brunt of dissolution of Marriage and ultimately suffers in life socially morally and ethically.

*(Rajesh Kumar Abrol )*
*Sub-Judge, Leave Reserve*
*Jammu*

**Rukmani Narvekar v. Vijaya Satardekar & Ors.**
**AIR 2009 SC 1013**

Sec. 227 Code of Criminal Procedure - Scope of Accused's rights of being heard - What are the rights of an accused at the time of framing of the charges - is a subject, which has been under consideration by the Courts for quite a time now. After going through the latest pronouncement of the Hon'ble Apex Court in the referred case, one can safely say that the last word is yet to be heard on the matter.

The legal position obtaining as of now, on the matter, has been made clear by the Hon'ble Supreme Court in State of Orissa v. Debendra Nath Padhi - 2004(8) Supreme 568, that is the accused cannot be permitted to produce evidence or file any material in support of his defence at the stage of framing of the charge. According to the Hon'ble Court expressions "the record of the case" used in Section 227 Cr.P.C has reference to the material produced by the prosecution alone which is to be considered and not the one produced by the accused. Hearing the submissions of accused, under 227 Cr. P.C have to be confined to the material produced by the police. According to this case (supra) "right of accused to seek discharge by filing unimpeachable and unassailable material of sterling quality and invocation of Article 14 and 21 of Constitution is misplaced, at the stage of framing of charge defence of the accused could not be put forth". This is the view of the three Judge Bench, the reference to which had necessitated on account of a different view expressed by the two Judge Bench judgment of the Hon'ble Apex Court in Satish Mehra v. Delhi Administration [(1996)9 SCC 766]. It was observed there that if the accused were able to produce any reliable material at the stage of taking cognizance or framing of charge, which might fatally affect the very sustainablity of the case, it is unjust to suggest that no such material should be looked into by the court at that stage. It held the trial court would be within its powers to consider even material which the accused may produce at the stage of contemplated in Sec. 237 Cr.P.C.

However, as noticed at the out set the view taken in Satish Mehra's case was not accepted by the three Judge Bench of the Hon'ble Apex Court in State of Orissa v. Debender Nath Padhi case.

The issue cropped up again before the Hon'ble Supreme Court in the Rukmini Narvekar's case-captioned above. In this two Judge Bench case while there is an agreement, on the outcome of the matter before it, however, the Hon'ble Judges seem to differ on the legal import of the Sec. 227 Cr.P.C and the scope of the accused to produce his defence at the stage of framing of charge. One of the Hon'ble Judges has completely endorsed and followed the view of Debinder Nath padha's case that under Section 227 Cr.P.C there is no scope for the accused to produce any evidence in support of the submission at the charge framing stage. But the other Hon'ble Judges seems to be influenced by the view taken in Satish Mehra's case. He says. "It cannot be said as an absolute proposition that under no circumstances can the court look into the material produced by the defence at the time of framing of charge....though it should be done in very rare cases....." Words are almost identical with those used in Satish Mehra's case which may, thus, tend to open the doors for rediscussion on the matter; and surely, would not make Debendar Nath Padhi's Judgment a last word on the subject.

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