SJA e-NEWSLETTER

Official Newsletter of Jammu & Kashmir Judicial Academy
(For internal circulation only)

Volume 4 | Monthly | January 2021

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Editor
Rajeev Gupta
Director

Composed by:
Vishali Razdan
Computer Operator

From the Editor's Desk

The Supreme Court recently in *Subedar v. State of Uttar Pradesh,* has reminded us of the Constitutional and statutory obligation of providing effective legal assistance to the accused in a Criminal trial. This Right of the accused is traced to the Fundamental Rights under Article 21 and Article 22 read with directive principle under Article 39-A of the Constitution of India and Section 304 of CrPC. The Supreme Court has also recognized this Right in *Ajmal Kasab's Case,* in which it was held that every accused unrepresented by a lawyer must be provided a lawyer at the commencement of the trial, to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. The accused has to voluntarily make an informed decision and inform the court in clear and unambiguous terms that he does not want the assistance of any lawyer and would rather defend himself personally. The obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial. Any failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequences. Nonetheless, right of effective legal remedy commences with the initiation of investigation of a case, more particularly when accused is produced before a magistrate. Failure to apprise the accused of such Right makes the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation from the State for failing to provide him Legal Aid. This, however, would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial.

The requirement of providing counsel to the accused at the State's expense is not an innocuous formality. When the law enjoins appointing a counsel to defend an accused, it mean a competent counsel who in real sense can safeguard the interest of accused in a best possible manner as permissible under law. At a trial, the accused may make a request for availing of the services of a particular lawyer at the State's expenses as envisaged under Section 304 CrPC, but the State is under no obligation to provide to the accused a lawyer of his choice.

LEGAL JOTTINGS

"A criminal trial of an accused is conducted in accordance with procedure as prescribed by the Criminal Procedure Code. It is the obligation of the State and the prosecution to ensure that all criminal trials are conducted expeditiously so that justice can be delivered to the accused if found guilty."

Ashok Bhushan, J. ***In Sanjai Tiwari v. The State of Uttar Pradesh & Anr., Criminal Appeal No.869 of 2020, Decided on December 16, 2020.***

CRIMINAL

Supreme Court Judgments

Criminal Appeal Nos. 872-873 of 2020
Dr. Naresh Kumar Mangla v. Smt. Anita Agarwal & Ors.
Decided on: December 17, 2020

In this case an anticipatory bail was granted to 4 out of 5 persons who were named as accused of offences under Sec 313, 498-A, 304-B, 323 of IPC and sec. 3 and 4 of Dowry Prohibition Act 1961 by High Court. The same was rejected by Session Judge. The single Judge of High Court held that —

- FIR prima facie appears to be engineered to implicate applicants;
- There is no correlation between various allegations levelled in FIR;
- The allegations are general in nature with no specific role being assigned to the accused.

Aggrieved by the order, the father of the deceased filed the appeal. The Supreme Court held the judgment of single Judge of the High Court as unsustainable. The Supreme Court dismissed the application of anticipatory bail of the respondents (accused) and cancelled the bail granted to them.

The Supreme Court took note of the fact that investigating officer has a duty to investigate when information about commission of cognizable offence is brought to their attention. Unfortunately, this role is being compromised by manner in which selective leaks take place in public realm. This is not fair to an accused because it pulls the rug below presumption of innocence. It is not fair to the victims of crime, if not them to their families. Neither the victims nor their families have a platform to respond to the publication of lurid details about their lives and circumstances. The Court also held that the selective disclosures to media during investigation of crime affects the rights of both accused and victims.

The Supreme Court also observed that setting aside of an unjustified, illegal or perverse order granting bail is distinct from cancellation of bail on the ground of supervening misconduct of accused or because some new facts have emerged, requiring cancellation. Where an order granting bail ignores material on record or if a perverse order granting bail is passed in a heinous crime without furnishing reasons, interests of justice may require that order be set aside and bail be cancelled.

The Court transferred the investigation to the CBI after submission of the charge-sheet, indicating that there is no embargo in it.

Criminal Appeal No. 869 of 2020
Sanjai Tiwari v. State of Uttar Pradesh & Anr.
Decided on: December 16, 2020

The Supreme Court in this case laid down that it is for the parties in the criminal case to raise all the questions and challenge the proceedings initiated against them at appropriate time before the proper forum and not for third parties under the garb of Public Interest Litigation. Any person unconnected with the criminal trial has no right to bring the matter to the superior court in the guise of public interest.

Special Leave Petition (Crl.) No.6951 of 2018
Amar Nath Chaubey v. Union of India & Ors.
Decided On: December 14, 2020

The Supreme Court in this case held that the police has the primary duty to investigate a case on receiving the report of the commission of a cognizable offence. This is a statutory duty under the Code of Criminal Procedure, apart from being a constitutional obligation to ensure that peace is maintained in the society and the rule of law is upheld and applied to say that further investigation was not possible as the informant had not supplied adequate materials to investigate, is a

preposterous statement, coming from the police. The police has a statutory duty to investigate into any crime in accordance with law as provided in the Code of Criminal Procedure. Investigation is the exclusive privilege and prerogative of the police which cannot be interfered with. But if the police does not perform its statutory duty in accordance with law or is remiss in the performance of its duty, the court cannot abdicate its duties on the precocious plea that investigation is the exclusive prerogative of the police. Once the conscience of the court is satisfied, from the materials on record, that the police has not investigated properly or apparently is remiss in the investigation, the court has a bounden constitutional obligation to ensure that the investigation is conducted in accordance with law. If the court gives any directions for that purpose within the contours of the law, it cannot amount to interference with investigation. A fair investigation is, but a necessary concomitant of Articles 14 and 21 of the Constitution of India and this Court has the bounden obligation to ensure adherence by the police.

Criminal Appeal No. 38 of 2011
Rohtas & Anr. v. State of Haryana
Decided On: December 10, 2020

The Court held that it is the duty of the prosecution not just to seek conviction but to ensure that justice is done. The prosecution must, therefore, put forth the best evidence collected in the course of investigation. Although it is always ideal that independent witnesses come forward to substantiate the prosecution case but it would be unfair to expect the presence of third parties in every case at the time of incident, for most violent crimes are seldom anticipated. Any adverse inference against the non-examination of an independent witnesses thus needs to be assessed upon the facts and circumstances of each case. In fact, it must first be determined whether the best evidence though available, has actually been withheld by the prosecution for oblique or unexplained reasons.

The Court also discussed on Sections 34 and 149 IPC. The Court held that although both Sections 34 and 149 of the IPC are modes for apportioning vicarious liability on the individual members of a group, there exist a few important differences between these two provisions. Whereas Section 34 requires active participation and a prior meeting of minds, Section 149 IPC assigns liability merely by membership of the unlawful assembly. In reality, such 'common intention' is usually indirectly inferred from conduct of the individuals and seldom it is done through direct evidence.

The Court also considered issue relating to framing of charges in terms of Sections 211 to 224 of CrPC which give significant flexibility to the courts to alter and rectify the charges. The only controlling objective while deciding on alteration is whether the new charge would cause prejudice to the accused, say if he were to be taken by surprise or if the belated change would affect his defence strategy. The emphasis of Chapter XVII of the CrPC is to give a full and proper opportunity to the defence, but at the same time to ensure that justice is not defeated by mere technicalities. Similarly, Section 386 of CrPC bestows even upon the appellate court such wide powers to make amendments to the charges which may have been erroneously framed earlier. Furthermore, improper or non framing of charge by itself is not a ground for acquittal under Section 464 of the CrPC. It must necessarily be shown that failure of justice has been caused, in which case a retrial may be ordered.

Writ Petition (Criminal) No. 160 of 2020
Amish Devgan v. Union of India & Ors.
Decided On: December 07, 2020

The Supreme Court discussed import of Sections 179 and 186 of CrPC. It was observed that Section 179 of the Criminal Code permits prosecution of cases in the court within whose local jurisdiction the offence has been committed or consequences have ensued. Section 186 of the Criminal Code relates to cases where two separate charge-sheets have been filed on the basis of separate FIRs and postulates that the prosecution would proceed where the first charge-sheet has been filed on the basis of the FIR that is first in point of time. Principle underlying section 186 can be applied at the pre-charge sheet stage, i.e. post registration of FIR but before charge-sheet is submitted to the Magistrate. In such cases ordinarily the first FIR, i.e. the FIR registered first in point of time should be treated as the main FIR and others as statements under Section 162 of the Criminal Code. However, in exceptional cases and for good reasons, it will be open to the High Court or Supreme Court, as the case may be, to treat the subsequently registered FIR as the principal FIR. However, this should not cause any prejudice, inconvenience or harassment to either the victims, witnesses or to the accused.

It was reiterated by the Supreme Court that the FIR is not an encyclopedia disclosing all facts and details relating to the offence. The informant who lodges the report of the offence may not even know the name of the victim or the assailant or how the offence took place. He need not necessarily be an eye-witness. What is essential is that the information must disclose the commission of a cognizable offence and the information must provide basis for the police officer to suspect commission of the offence. Thus, at this stage, it is enough if the police officer on the information given suspects though he may not be convinced or satisfied that a cognizable offence has been committed. Truthfulness of the information would be a matter of investigation and only thereupon the police will be able to report on the truthfulness or otherwise. Thus, the information disclosing commission of a cognizable offence only sets in motion the investigating machinery with a view to collect necessary evidence, and thereafter, taking action in accordance with law.

The Court also interpreted the 'hate speech'. It was held that loss of dignity and self-worth of the targeted group members contributes to disharmony amongst groups, erodes tolerance and open-mindedness which are a must for multi-cultural society committed to the idea of equality. It affects an individual as a member of a group. It is however necessary that at least two groups or communities must be involved; merely referring to feelings of one community or group without any reference to any other community or group does not attract the 'hate speech' definition.

Freedom and rights cannot extend to create public disorder or armour those who challenge integrity and unity of the country or promote and incite violence. Without acceptable public order, freedom to speak and express is challenged and would get restricted for the common masses and law-abiding citizens. This invariably leads to State response and, therefore, those who indulge in promotion and incitement of violence to challenge unity and integrity of the nation or public disorder tend to trample upon liberty and freedom of others.

Further, the law of 'hate speech' recognises that all speakers are entitled to 'good faith' and '(no)-legitimate purpose' protection. 'Good faith' means that the conduct should display fidelity as well as a conscientious approach in honouring the values that tend to minimise insult, humiliation or intimidation. The important requirement of 'good faith' is that the person must exercise prudence, caution and diligence. 'Good faith' or 'no-legitimate purpose' exceptions would apply with greater rigour to protect any genuine academic, artistic, religious or scientific purpose, or for that matter any purpose that is in public interest, or publication of a fair and accurate report of any event or matter of public interest and would get protection when they were not undertaken with a specific intent to cause harm. 'Hate speech' has no redeeming or legitimate purpose other than hatred towards a particular group. A publication which contains unnecessary asides which appear to have no real purpose other than to disparage will tend to evidence that the publications were written with a mala fide intention. However, opinions may not reflect mala fide intention.

Criminal Appeal Nos. 824-825 of 2020
Jayant Etc. v. The State of Madhya Pradesh
Decided on: December 03, 2020

The present appeal was moved against the judgment of High Court which dismissed the applications filed under Section 482 CrPC. to quash the respective FIRs for the offences under Sections 379 and 414, IPC, Section 4/21 of the Mines & Minerals (Development & Regulation) Act, 1957 ('MMDR Act') and under Rule 18 of the M.P. Minerals (Prevention of illegal Mining, Transportation and Storage) Rules, 2006 ('2006 Rules').

The Supreme Court reiterated that the order passed by the Magistrate ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, cannot be said to have taken cognizance of the offence.

The Supreme Court drew the following conclusions in this case:-

i) that the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the concerned Incharge/SHO of the police station to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted;

ii) the bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/ summons for the offences under the MMDR Act and Rules made thereunder;

iii) for commission of the offence under the IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without

awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and Rules made thereunder; and

iv) that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3) of the Code and directs the concerned In-charge/SHO of the police station to register/lodge the crime case/ FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned In-charge of the police station/ investigating officer submits a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

v) in a case where the violator is permitted to compound the offences on payment of penalty as per sub-section1 of Section 23A, considering sub-section 2 of Section 23A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rule made thereunder so compounded. However, the bar under sub-section 2 of Section 23A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further.

J&K High Court Judgments

SLA No. 38 of 2018
State of J&K v. Mohd. Imran Khan
Decided on: December 24, 2020

While hearing leave to appeal against the judgment and order of acquittal passed by the Sessions Judge in offences under Sections 363 and 376 RPC, the High Court made some observations on two important aspects of common concern i.e. regarding disclosure of name of the victim of sexual offence and employing 'two fingers test' to ascertain the probable sexual intercourse. It would be useful to reproduce the observations of the High Court as under;

"11. Section 228A of IPC prohibits disclosure of identity of the victim of certain offences, which includes offence under Section 376 IPC. In *pari-materia* to the aforesaid provision is Section 228A of the J&K Ranbir Penal Code, which was applicable to the case at hand at the relevant time.

12. Although, prohibition contained in Section 228A may not strictly apply to the judgment of a Court, yet the Courts must avoid disclosing the name(s) of prosecutrix in their orders and judgments, so as to avoid embarrassment and humiliation to a victim of rape. Rape is not merely a physical assault but it is destruction of the personality of the victim. Therefore, Courts have to act responsibly and with sensitivity while dealing with the cases of rape, particularly, while referring to the prosecutrix.

13. This issue has been a matter of discussion before the Supreme Court and various High Courts of the country in a number of cases. In State of Punjab v. Gurmeet Singh, (1996) 2 SCC 384, the Supreme Court, while emphasizing that victims of sexual abuse or assault need to be treated with sensitivity during investigation and trial and that trial of rape cases should be generally held in camera, made the following observations:

"It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. .....The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of

Sections 327 (2) and (3) CrPC liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception."

14. In Bhupinder Sharma v. State of Himachal Pardesh (2003) 8 SCC 551, the Supreme Court while referring to Section 228A IPC, held as under:

"We do not propose to mention the name of the victim. Section 228A of the Indian Penal Code, 1860 (in short "IPC") makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376A, 376B, 376C or 376D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment."

15. The afore-noted judgments of the Supreme Court were noted with the approval by the Supreme Court in the case of Nipun Saxena v. Union of India & Ors. (2019) 2 SCC 703, and it was held that though, the bar imposed under Section 228A IPC did not in term apply to the printing or publication of judgments of the High Courts and the Supreme Court because of the explanation to the said provisions, yet keeping in view the social object of preventing the victims or ostracizing of victims, it would be appropriate that in judgments of all the Courts i.e. trial Courts, High Courts and the Supreme Court the name of the victim should not be indicated.

16. From afore-noted judgments of the Supreme Court, it is clear that all Courts are bound to avoid disclosure of name of rape victim(s) in the court proceedings as well as in their judgments. This dictum of law, it seems, has been ignored by the learned trial Court in the instant case. We, therefore, feel a need to reiterate and remind the trial Courts of the Union Territories of Jammu & Kashmir, and Ladakh to follow the aforesaid dictum in letter and spirit while dealing with cases of rape and crime against women.

17. Another issue that has come to our notice from the reading of the trial Court record and the impugned judgment is that the prosecutrix in this case has been subjected to "two finger test". The International Covenants on Economic, Social and Cultural Rights, 1966, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 provide that rape survivors are entitled to medical procedures conducted in a manner that respects their right to consent. As per these Covenants, State is under an obligation to make such services available to survivors of sexual violence and that proper measure should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy.

18. On the basis of aforesaid Covenants, the Supreme Court in the case of Lillu and others v. State of Haryana, (2013) 14 SCC 643, came to the conclusion that "two finger test" and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, "two finger test" has been declared as unconstitutional.

19. Apart from the above, Ministry of Health and Family Welfare, Govt. of India has issued guidelines and protocols for health professionals for dealing with survivors of sexual violence. Guideline 18-B is relevant to the context and the same is reproduced as under:

"18. Local examination of genital parts/other orifices

A……

B. In case of female survivors, the vulva is inspected systematically for any signs of recent injury such as bleeding, tears, bruises, abrasions, swelling, or discharge and infection involving urethral meatus & vestibule, labia majora and minora, fourchette, introitus and hymen.

•Examination of the vagina of an adult female is done with the help of a sterile speculum lubricated with warm saline/ sterile water. Gentle retraction allows for inspection of the vaginal canal. Look for bruises, redness, bleeding and tears, which may even extend onto the perineum, especially in the case of very young girls. In case injuries are not visible but suspected; look for micro injuries using good light and a magnifying glass/ colposcope whatever is available. If 1% Toluidine blue is available it is sprayed and excess is wiped out. Micro injuries will stand out in blue. Care should be taken that all these tests are done only after swabs for trace evidence are collected.

•Per speculum examination is not a must in the case of children/young girls when there is no history of penetration and no visible injuries. The examination and treatment as needed may have to be performed under general anesthesia in case of minors and when injuries inflicted are severe. If there is vaginal discharge, note its texture, colour, odour.

•Per-Vaginum examination commonly referred to by lay persons as 'two-finger test', must not be conducted for establishing rape/ sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated.

•The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.

• Genital findings must also be marked on body charts and numbered accordingly."

20. From a perusal of the aforesaid guidelines, it is clear that "two finger test", which, as per the medical term is called per-vaginum examination, has been strictly prohibited under the guidelines and protocols issued by the Ministry of Health and Family Welfare, Government of India. It is pertinent to mention here that these guidelines stand adopted by the Government of Union Territory of J&K and are applicable to the health professionals of the Union Territory with full force.

21. Inspite of all this, in the instant case, it appears that the prosecutrix, who was minor at the relevant time, has been subjected to two finger test, which must have violated her privacy, physical and mental integrity and dignity.

22. It is the need of the hour to implement the ban on "two finger test" on rape survivors with full force and in this regard a direction is required to be extended to all the health professionals of Union Territories of Jammu and Kashmir, and Ladakh, so that the judgment of the Supreme Court and guidelines and protocols issued by the Ministry of Health and Family Welfare, Govt. of India, on the subject are taken seriously.

23. In view of what has been discussed hereinbefore, we direct that all the Courts in the Union Territories of Jammu & Kashmir, and Ladakh to avoid disclosing identity of rape survivors in their proceedings and judgments. A further direction is issued to all the health professionals of Union Territory of Jammu & Kashmir, and Union Territory of Ladakh to strictly desist from undertaking "two finger test" known as "per-vaginum examination" on the rape survivors."

CRMC 560 of 2018
Karnail Chand & Ors. v. State of J&K
Decided on: December 23, 2020

In this case the petitioners (accused) sought quashment of FIR registered against them for offence under section 498-A RPC. It was contended on behalf of the petitioners that there was no matrimonial relationship between the complainant and the main accused. The main accused, who was serving in the Army, was already married, and was having grown up children.

The High Court relying upon the case law in Reema Aggarwal v. Anupam & Ors, (2004) 3 SCC 199, and A. Subash Babu v. State of A.P & Anr, (2011) 7 SCC 616, rejected the contention of the petitioners. The Court observed as under:

"13 From what has been discussed and held by the Apex Court in the aforesaid judgments, it can be safely stated that when a person enters into a marital arrangement with a woman, he is covered by the definition of 'husband' as contained in Section 498-A RPC irrespective of the legitimacy of the marriage."

"18 From the aforesaid discussion, this Court has no hesitation in holding that even if respondent No.2 is not the legally wedded wife of accused Kuldeep Kumar, still then, petitioner Nos. 1 to 3, who happen to be the relatives of the accused Kuldeep Kumar as also accused Kuldeep Kumar can be prosecuted for an offence under Section 498-A RPC on the basis of allegations made by respondent No.2 in the subject FIR. The allegations made in the subject FIR prima facie constitute an offence under Section 498-A RPC against the accused Kuldeep Kumar and petitioner Nos. 1 to 3, as such, the investigation, which is still at its infancy, cannot be throttled by quashing the subject FIR."

SLA 89 of 2017
State of J&K v. Kirpal Singh & Ors.
Decided on: December 21, 2020

Accused in this case were tried for commission of offences under section 302, 201

and 34 RPC, and were acquitted by the trial court. The High Court dismissed application for leave to appeal. It observed as under:

"7. There is no direct evidence in the instant case and the whole case of the prosecution is based upon circumstantial evidence. It is settled law that in a case based solely upon circumstantial evidence, it is incumbent upon the prosecution to establish, beyond reasonable doubt, all the circumstances from which the conclusion of guilt is drawn and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of events.

8. In the instant case, the prosecution has based its case on the following circumstances: (i) Motive for the crime--previous enmity between the deceased and the accused. (ii) Disclosure statement (Ext-PW-5) of accused Sudesh Kumari and recovery of ornaments vide memo ExtPW-5/1, pursuant thereto. (iii) Disclosurement (Ext-PW-5/2) of the accused Kirpal Singh and recovery of pair of plastic shoes vide memo ExtPW- 5/3 pursuant thereto. (iv) Cause of death of the deceased--strangulation.

9. In a case based upon circumstantial evidence, motive for the crime assumes great significance. In the instant case, the prosecution has alleged that there was enmity between the deceased and the accused because they had deprived the deceased and her husband of the share in the family property and the ornaments. The witnesses to prove this circumstance PWs Sagar Singh, Des Raj, Rattan Singh and Vaishno Devi have not supported the version of the prosecution. Thus it has miserably failed to prove the motive for the crime."

The Court also found that the prosecution had failed to establish that death had been caused by strangulation, as was alleged in the prosecution case, and the alleged disclosures made by the accused and consequent recovery of ornaments and footwear at the behest of the accused were also not proved beyond reasonable doubt.

Leave to appeal accordingly refused.

CRMC No. 585 of 2017
Farooq Ahmad Dar v. State of J &K & Ors.
Decided on: December 22, 2020

The High Court held that there cannot be different yardsticks in respect of registration of a case on basis of a complaint made by common man and complaint lodged by high ranking police officers. The High Court referred to *Lalita Kumari case* where in it was stressed upon the need for holding a preliminary enquiry in certain categories of cases including the cases where there is delay/ laches in initiating criminal proceedings e.g. 3 months delay in reporting the matter without satisfactorily explaining the reason for delay.

In this case, the FIR was delayed by about 3 years which showed that launching of criminal prosecution against petitioner was motivated with malice.

CRMC No. 292 of 2015
Sher Noble Manav & ors v. State & ors.
Decided on: December 22, 2020

The High Court reiterated that the offences arising out of matrimony relating to dowry or family disputes where the wrong is basically private or personal in nature and parties have resolved their entire dispute, if it is known that due to compromise between the parties, there is remote possibility of securing the conviction of the accused, the High Court is within jurisdiction to quash criminal proceedings. It would amount to extreme injustice if despite settlement arrived at between parties; the criminal proceedings are allowed to continue.

It was again reiterated by the Court after referring to guidelines given by Supreme Court in Narinder Singh & Ors. v/s State of Punjab & anr. that under section 482 CrPC , the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable but exception be taken under offences which are heinous and serious in nature, offences like murder, rape, dacoity etc. offences under prevention of corruption Act or offences committed by public servants.

WP (Crl.) No. 524 of 2019
Khalid Hussain Malik v. State of J&K
Decided on: December 17, 2020

The Court observed that when there is undue and long delay between the prejudicial activities and the passing of detention order, it is incumbent on the part of the Court to scrutinize whether the Detaining Authority has satisfactorily examined such a delay and afforded a reasonable and acceptable explanation as to why such a delay has occasioned. It is also the duty of the court to investigate whether casual connection has been broken in the circumstance of each case

WP(Crl.) No.607 of 2019
Farooq Ahmed Malik v. Govt. of J&K & Ors

Decided on: December 17, 2020

The court held that a person can be taken into a preventive custody notwithstanding the fact that the said person was already in custody in some substantive offence. Only condition is that the detaining authority must show his awareness about the detention of that person in substantive offence and the detaining authority is also required to record its satisfaction that there is likelihood of said person being released on bail.

CRM(M) 289of 2019
Mohd Azad Khan v. State of J&K
Decided on: December 17, 2020

The Court held that a criminal prosecution for an offence under Section 188 RPC cannot be initiated against a person, who is alleged to have violated an order of a civil Court. The remedy in this regard lies in approaching the civil court by initiation of contempt of court proceedings.

CRM(M) 259 of 2019
Satpal Sharma v. Pawan Singh Rathore, Ex Vice Chairman, JDA
Decided on: December 17, 2020

The Court held that the power conferred on the Magistrate under Section 156(3) of CrPC is of the same nature as the power under Section 156(1) of CrPC which is a power conferred on a Police Officer, In-charge of a Police Station to investigate any cognizable case without the orders of the Magistrate. A Police Officer records FIR in accordance with the procedure mentioned in Section 154(1) of CrPC. In the event of failure of a Police Officer to record the information, the aggrieved informant is given a right to approach the Superintendent of Police under Section 154 (3) of CrPC for a direction for investigation and in case even the Superintendent of Police fails to exercise his jurisdiction under Section 154(3) of CrPC the power has been vested upon a Magistrate to issue directions under Section 156 (3) to remind the Police Officers to exercise their powers under Section 154(1) and 154(3) of CrPC. The orders for investigation issued by a Magistrate under Section 156(3) are only ancillary steps in aid of the investigation. The same, therefore, do not finally or even provisionally terminate the proceedings. A person, whose application for registration of FIR under Section 156(3) even if rejected by the Magistrate, has an option of either approaching the police directly for registration of FIR or file a criminal complaint before the Magistrate under Section 190 of CrPC. So far as a suspect named in an application under Section 156 (3) is concerned, he does not have a right to be heard at the time of registration of FIR, either on the basis of an information directly lodged before the police or at the time of consideration of an application under Section 156(3) of CrPC filed before the Magistrate. Having regard to the nature of proceedings under Section 156(3) of CrPC it can safely be stated that an order passed by a Magistrate under the aforesaid provision, is interlocutory in nature. it is clear that orders for investigation are only ancillary steps in aid of investigation and are clearly interlocutory in nature. Such orders do not infringe upon the valuable rights of the prospective accused and, as such, are not amenable to challenge in criminal revision in view of the bar contained in Section 435 of J&K CrPC which is in *pari-materia* with Section 397 of Central CrPC. The order under Sec 156(3) CrPC is an interlocutory order and a revision against the same does not lie.

It was further held that the order of the Magistrate made in exercise of powers under Section 156(3) of CrPC directing the police to register and investigate a criminal offence is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued, and that such an order is an interlocutory order and remedy of revision against such order is barred under Section 397 (2) of CrPC (Central).

Bail App. No. 139 of 2020
Badri Nath v. Union Territory of J&K
Decided on: December 11, 2020

The Court held that if an earlier bail application was rejected by an inferior court, the superior court can always entertain the successive bail application. The rejection of a bail application by Sessions Court does not operate as a bar for the High Court in entertaining a similar application under Section 439 CrPC on the same facts and for the same offence.

The court reiterated the settled legal position about the matters to be considered for deciding the application for bail. These are as under:

(i) Whether there is any prima facie or reasonable ground to believe that the accused has committed offence;

(ii) Nature and gravity of the charge;

(iii) Severity of punishment in the event of conviction;

(iv) Danger of the accused absconding or fleeing after release on bail;

(v) character, behaviour, means, position

and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being tampered with and

(viii) danger of justice being thwarted by grant of bail.

When it comes to offences punishable under a special enactment, such as, POCSO Act, something more is required to be kept in mind in view of the special provisions contained in the said enactment. Section 31 of the said Act makes the provisions of the Code of Criminal Procedure applicable to the proceedings before a Special Court and it provides that the provisions of the aforesaid Code including the provisions as to bail and bonds shall apply to the proceedings before a Special Court. It further provides that the Special Court shall be deemed to be a Court of Sessions.

Thus, it is clear that the provisions of CrPC including the provisions as to grant of bail are applicable to the proceedings in respect of offences under the POSCO Act. The present application is, therefore, required to be dealt with by this Court in accordance with the provisions contained in Section 439 CrPC. The other provisions of the POCSO Act, which are also required to be kept in mind, are Sections 29 and 30……..

Section 29 quoted above raises a presumption of commission of an offence under Sections 3,5,7 and 9 of the POCSO Act against a person who is prosecuted for commission of the said offence, unless contrary is proved. Similarly, Section 30 quoted above raises a presumption with regard to existence of culpable mental state against an accused in prosecution of any offence under the Act which requires a culpable mental state on the part of the accused. Again, the accused in such a case has been given a right to prove the fact that he had no such mental state.

In the said case, the Court, while dealing with an application for grant of bail in a case involving, inter alia, the offences under Sections 6/21 of the POCSO Act, when the trial of the case was undergoing, framed five questions for considerations which are quoted herein below:

"i. Since Section 29 says 'where a person is prosecuted' for committing an offence inter alia under Sections 3, 5, 7 and 9, the special court 'shall presume' an accused to be guilty, when can a person be said to be prosecuted ?

ii. Since Section 29 says 'unless the contrary is proved', when does a person get the chance to disprove his presumptive guilt ?

iii. When and at what stage does the 'presumption of guilt' as engrafted in Section 29 get triggered? And

iv. Does the presumption apply only at the stage of trial or does it also apply when a bail plea is being considered ?

v. Does the applicability or rigor of Section 29 depend on whether a bail plea is being considered before or after charges have been framed?"

……

In the opinion of this Court therefore, at the stage of considering a bail plea after charges have been framed, the impact of Section 29 would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex- facie appears that the evidence will not sustain the weight of guilt.

If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

……The prosecution of an accused begins with the presentation of challan before a Court. The Legislature has used the word "prosecuted" in Section 29 of the POCSO Act. If the Legislature intended to bring the presumption contained in Section 29 of the POCSO Act into operation at the commencement of trial of the case, it would have certainly used the word "tried" instead of word "prosecuted", as has been done in the case of Section 54 of the NDPS Act, which creates presumption in trial of certain offences under the said Act.

In the bail proceedings, even at pre-trial stage, it would open to an accused to highlight the circumstances/material or lack of it to show that foundational facts are not established and in this manner, the right available to an accused under the later part of the provision contained in Section 29 of the POCSO Act would get safeguarded. For the foregoing reasons, I am of the considered opinion that at the time of considering the bail application of an accused, who has been booked for the offences under Sections 3, 5, 7

& 9 of the POCSO Act, the presumption under Section 29 of the said Act would come into play even at the pre-trial stage. The accused, of course, would have a right to bring to the notice of the Court the material or lack of it to show that the foundational facts giving rise to the presumption are prima facie not established in the case.

The Court held that the victims are entitled to receive most appropriate information of the proceedings which would include the status of the accused including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death.

In order to give a mandatory colour to the aforesaid guidelines, the Court held that it is necessary to issue a Circular to all the Special Courts constituted under the POCSO Act within the Union Territories of Jammu and Kashmir and Ladakh, directing them to ensure that the victim/ Child Welfare Committee is informed about the proceedings in bail petitions of the persons accused of having committed offences under the aforesaid Act by issuing prior notice to them.

CRM(M) No. 200 of 2020
Majid Jehangir & ors v. Munavir Bashir & Ors
Decided on: December 04, 2020

So, even if, for the sake of arguments it is accepted that the petitioner (husband) has divorced respondent (wife), still the petitioner cannot wriggle out of his liability to provide benefits/reliefs to the wife, to which she is entitled under the Domestic Violence Act 2005 as they were in domestic relationship and respondent was allegedly turned out prior to the alleged date of dissolution of marriage. When the aggrieved person is deprived of necessities of life, such as, food shelter and also of her articles, it would give rise to continuing cause of action. Till the filing of the application before the trial court, the status of the respondent is that of an aggrieved person, as such, the application of the respondent cannot be dismissed being time barred.

CRMC No. 105 of 2018
Syed Zubair Shah & ors v. Farhat Rashid Sheikh
Decided on: December 04, 2020

The High Court in this petition held that once the cause of action for a particular relief is continuing, the application under Domestic Violence Act cannot be dismissed being time barred. It was further observed that the Court cannot dismiss the petition at the threshold only on the issue of maintainability when there are disputed questions of facts, which require adjudication.

Crl LP (D) 02/2020
Union of India, National Control Bureau v. Rafi Ahmad
Decided on: December 15, 2020

The court in this application held that the statement recorded under Section 67 of NDPS Act without corroboration is sufficient to convict an accused, but for that, the court has to be satisfied about its voluntary nature. confessional statement recorded under Section 67 of NDPS Act cannot be used as being barred under the provision of Section 25 of the Evidence Act.

CRMC No. 252 of 2014
Neelam Choudhary & Ors v. State & ors.
Decided on: December 03, 2020

The Court held that the offences arising out of matrimony relating to dowry or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, the High Court will be within its jurisdiction to quash the criminal proceedings if it is known that because of the compromise arrived at between the parties, there is remote possibility of securing conviction of the accused. In fact, in such cases, the Supreme Court has clearly observed that it would amount to extreme injustice if despite settlement having been arrived at by the parties; the criminal proceedings are allowed to continue.

WP(Crl) 347 of 2019
Waseem Ahmad Sheikh v. Govt. of J&K
Decided on: December 02, 2020

The Court held in this petition that the only precious and valuable right guaranteed to a *detenu* is of making an effective representation against the order of detention. Such an effective representation can only be made by a *detenu* when he is supplied the relevant grounds of detention, including the materials considered by the detaining authority for arriving at the requisite subjective satisfaction to pass the detention order. In this case, the *detenu* was provided material in the shape of grounds of detention with no other material/documents, as referred to in the order of detention, the right of the *detenu* to file such representation is impinged upon and the detention order is resultantly vitiated.

"It is well accepted that right of being represented through a counsel is part of due process clause and is referable to the right guaranteed under Art 21 of the Constitution of India. In case the Advocate representing the cause of the accused, for one reason or the other was not available, it was open to the Court to appoint an Amicus Curiae to assist the Court but the cause in any case ought not to be allowed to go unrepresented."

Uday Umesh Lalit, Vineet Saran, S. Ravindra Bhat JJ. ***in Subedar v. State of Uttar Pradesh, Criminal Appeal No.886 of 2020, Decided on December 18, 2020.***

CIVIL

Supreme Court Judgments

Arbitration Petition (Civil) No. 08 of 2020
Suresh Shah v. Hipad Technology India Private Ltd .
Decided on: December 18, 2020

The Supreme Court in this case held that eviction or tenancy relating to matters governed by special statutes where the tenant enjoys statutory protection against eviction, whereunder the Court/ Forum is specified and conferred jurisdiction under the statute alone can adjudicate such matters. Hence, in such cases the dispute is non-arbitrable. If the special statutes do not apply to the premises/property and the lease/tenancy created thereunder as on the date when the cause of action arises to seek for eviction or such other relief and in such transaction if the parties are governed by an Arbitration Clause; the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the Arbitration Clause. This view is fortified by the opinion expressed by the Coordinate Bench while answering the reference made in the case of "Vidya Drolia" wherein the view taken in 'Himangni Enterprises' was overruled.

Civil Appeal No. 611 of 2020
Pradeep Kumar Sonthalia v. Dhiraj Prasad Sahu @ Dhiraj Sahu & Anr.
Decided on: December 18, 2020

The Supreme Court in this case held that there is a vast difference between (i) the interpretation to be given to the expression "date", while calculating the period of imprisonment suffered by a person and (ii) the interpretation to be given to the very same expression while computing the period of limitation for filing an appeal/revision. Say for instance, a person is convicted and sentenced to imprisonment and also taken into custody pursuant thereto, on 23.03.2018, the whole of the day of March 23 will be included in the total period of incarceration. But in contrast, the day of March 23 will be excluded for computing the period of limitation for filing an appeal. Though one contrasts the other, both interpretations are intended to benefit the individual.

Civil Appeal No. 4083 of 2020
Anglo American Metallurgical Coal Pvt Ltd. v. MMTC Ltd.
Decided on: December 17, 2020

In this case the Supreme Court discussed about the arbitral award, when it can be challenged in a court . The court held that an arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts.

As far as Section 34 of Arbitration and Conciliation Act is concerned, the position is well settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of Supreme Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award.

Additionally, the concept of the fundamental policy of Indian law would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and reasonableness. It is only if one of these conditions is met that the court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute and is limited to situations where the findings

of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the court is shocked, or when the illegality is not trivial but goes to the root of the matter.

After the 2015 Amendment to Section 34, insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality.

Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, the Court must be extremely cautious and slow to disturb such concurrent findings.

The Court further held that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is within the arbitrator's jurisdiction to consider the same.

The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

Two fundamental principles which form part of the fundamental policy of Indian law that the arbitrator must have a judicial approach and that he must not act perversely are to be understood.

A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.

It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award.

Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.

Civil Appeal No. 3822 of 2020
Smt. S Vanitha v. The Deputy Commissioner, Bengaluru
Decided on: December 15, 2020

The Supreme Court held that the provisions under Senior Citizens Act, 2007 cannot be deployed to nullify other protections in law, particularly that of a woman's right to a "shared household" under Domestic Violence Act, 2005. In this case, the Court was hearing the plea of S Vanitha, residing at her in-law's residence, challenging the order of eviction passed against her by the Deputy Commissioner. The in-laws filed an application under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act 2007, and inter alia, sought the appellant and her daughter's eviction (i.e. their daughter-in-law and grand-

daughter) from a residential house in North Bengaluru. The Division Bench of the High Court by its judgment dated 17 September 2019 held that since the house belonged to the mother -in-law and the daughter-in-law's right to maintenance and shelter lies only against her estranged husband. The Division Bench upheld the Order of the Deputy Commissioner and directed the appellant to vacate the suit premises. The appellant, aggrieved by the judgment of the Division Bench, submitted that she is residing in her matrimonial home as the lawfully wedded spouse and she cannot be evicted from her shared household in view of the protection offered by Section 17 of the Protection of Women from Domestic Violence Act (PWDV) 2005. The Supreme Court outlined that the Tribunal under the Senior Citizens Act, 2007 may have the authority to order an eviction, if it is necessary and expedient to ensure the maintenance and protection of the senior citizen or parent. However, this remedy can be granted only after adverting to the competing claims in the dispute. In the present case, eviction was sought of the daughter-in-law. Although the High Courts have upheld the power of eviction as being implicit in the Senior Citizens Act, that is in the case of sons refusing to maintain their parents. The apex court observed that such facts do not arise in this case. The judgement observes that in the event of a conflict between Special Acts, the dominant purpose of both statutes would have to be analysed to ascertain which one should prevail over the other. The primary effort of the interpreter must be to harmonize. The Court firmly held that Section 3 of the Senior Citizens Act, 2007 cannot be deployed to over-ride and nullify other protections in law particularly that of a woman's right to a "shared household" under Section 17 of the PWDV Act 2005.

The judgement broadens the understanding of "shared household" for married women. A "shared household" would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. Merely because the ownership of the property has been subsequently transferred to her in-laws or that her estranged spouse is now residing separately, is no ground to deprive the appellant of the protection that was envisaged under the PWDV Act 2005. The fact that specific proceedings under the PWDV Act 2005 had not been instituted when the application under the Senior Citizens Act, 2007 was filed, should not lead to a situation where the enforcement of an order of eviction deprives her from pursuing her claim of entitlement under the law. The inability of a woman to access judicial remedies may, as this case exemplifies, be a consequence of destitution, ignorance or lack of resources can not come in her way to seek her right. Even otherwise, recourse to the summary procedure contemplated by the Senior Citizen Act, 2007 was not available for the purpose of facilitating strategies that are designed to defeat the claim of the appellant in respect of a shared household. A shared household would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. The Court concluded that the claim of the appellant that the premises constitute a shared household within the meaning of the PWDV Act, 2005 would have to be determined by the appropriate forum. The claim cannot simply be obviated by evicting the appellant in exercise of the summary powers entrusted by the Senior Citizens Act, 2007. The apex court held that "Section 3 of the Senior Citizens Act, 2007 cannot be deployed to over-ride and nullify other protections in law particularly that of a woman's right to a "shared household" under Section 17 of the PWDV Act, 2005. A shared household would have to be interpreted to include the residence where the appellant had been jointly residing with her husband. Merely because the ownership of the property has been subsequently transferred to her in-laws or that her estranged spouse is now residing separately is no ground to deprive the appellant of the protection that was envisaged under the PWDV Act, 2005."

Civil Appeal No. 1725 of 2010
Iqbal Basith Ors. v. N. Subbalakshmi & Ors.
Decided on: December 14, 2020

In this case, the Supreme Court held that the adverse inference can be drawn against a party under Section 114 Indian Evidence Act who did not appear to depose in person and be cross examined. In this case younger brother deposed on basis of Power of Attorney and no explanation was furnished by him that why original defendant did not appear in person to

depose. Moreover, the rejection of documents which were more than 30 (thirty) years old with an explanation of not producing it in original by trial court and the High Court without any valid reason was held to be erroneous. The Supreme Court held that it is clearly perverse in view of Sec. 114(e) of IEA, which provides that there will be a presumption that all official acts have been regularly performed.

Civil Appeal No. 2402 Of 2019
Vidya Drolia & Ors v. Durga Trading Corporation
Decided On: December 14, 2020

The Supreme Court held that where a dispute arises between landlord and tenant in a contract of lease under Transfer of Property Act (TPA), the landlord in order to obtain possession can institute a suit in the court having jurisdiction. If the parties to the contract of lease agree to resolve the matter through alternate mode of dispute settlement through arbitration, the landlord would be entitled to invoke arbitration clause and make claim before arbitrator. Hence the matter under TPA is arbitrable. But if the eviction or tenancy is related to some special statutory act and the tenant enjoys statutory protection where under court/forum is specified and conferred jurisdiction to adjudicate the matter, the same cannot be given in arbitration. Hence such dispute is non arbitrable. When parties decide to enter into an arbitration agreement, they agree to take all their disputes before arbitration. This presumption is a rebuttable presumption. Therefore, Section 8 and 11 has to be interpreted with sufficient strictness, wherein the jurisdiction of the court to decide issues should be limited to those expressly provided by the law.

Since Sections 8 and 11 are complementary provisions, the Court said that it can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, 'existence of an arbitration agreement'. The Court further held that "Accordingly, we hold that the expression 'existence of an arbitration agreement' in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including question of jurisdiction and non arbitrability".

a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.
b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.
c. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
d. The court should refer a matter if the validity of arbitration agreement cannot be determine on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.

The scope of the Court to examine the prima facie validity of an arbitration agreement include only:

a. Whether the arbitration agreement was in writing? or
b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
d. On rare occasions, whether the subject¬ matter of dispute is arbitrable?

The Supreme Court further held that power of reference under Section 11 is a judicial function. It was further observed that the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act.

The Court also held that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute.

Civil Appeal No. 5650 of 2010

Daulat Singh (D) Thr. Lrs. v. The State of Rajasthan & Ors.
Decided On: December 08, 2020

The Supreme Court held that Section 122 of the Transfer of Property Act, 1882 neither defines acceptance, nor does it prescribe any particular mode for accepting the gift. The word acceptance is defined as "is the receipt of a thing offered by another with an intention to retain it, as acceptance of a gift." The aforesaid fact can be ascertained from the surrounding circumstances such as taking into possession the property by the donee or by being in the possession of the gift deed itself. The only requirement stipulated is that, the acceptance of the gift must be effectuated within the lifetime of the donor itself. Being an act of receiving willingly, acceptance can be inferred by the implied conduct of the donee.

Thus, the implied conduct of a done can be deduced as valid acceptance of a gift made by the donor.

Civil Appeal Nos. 3860-3862 of 2020
The State of Jharkhand & Ors v. Brahmputra Metallics Ltd., Ranchi & Anr.
Decided on: December 01, 2020

The Supreme Court discussed difference between the doctrines of promissory estoppel and legitimate expectation under English Law. It was observed that the latter can constitute a cause of action. The scope of the doctrine of legitimate expectation is wider than promissory estoppel because it not only takes into consideration a promise made by a public body but also official practice, as well. Further, under the doctrine of promissory estoppel, there may be a requirement to show a detriment suffered by a party due to the reliance placed on the promise. Although typically it is sufficient to show that the promisee has altered its position by placing reliance on the promise, the fact that no prejudice has been caused to the promisee may be relevant to hold that it would not be "inequitable" for the promisor to go back on their promise. However, no such requirement is present under the doctrine of legitimate expectation.

The Court also observed that the doctrine of promissory estoppel cannot be used as a 'sword', to give rise to a cause of action for the enforcement of a promise lacking any consideration. Its use in those decisions has been limited as a 'shield', where the promisor is estopped from claiming enforcement of its strict legal rights, when presentation by words or conduct has been made to suspend such rights.

The doctrine of legitimate expectation was initially developed in the context of public law as an analogy to the doctrine of promissory estoppel found in private law. However, since then, English Law has distinguished between the doctrines of promissory estoppel and legitimate expectation as distinct remedies under private law and public law, respectively.

Under Indian Law, there is often a conflation between the doctrines of promissory estoppel and legitimate expectation.

"At times, the expressions 'legitimate expectation' and 'promissory estoppel' are used interchangeably, but that is not a correct usage because 'legitimate expectation' is a concept much broader in scope than 'promissory estoppel.' While this doctrinal confusion has the unfortunate consequence of making the law unclear, citizens have been the victims. Representations by public authorities need to be held to scrupulous standards, since citizens continue to live their lives based on the trust they repose in the State. In the commercial world also, certainty and consistency are essential to planning the affairs of business. When public authorities fail to adhere to their representations without providing an adequate reason to the citizens for this failure, it violates the trust reposed by citizens in the State. The generation of a business friendly climate for investment and trade is conditioned by the faith which can be reposed in government to fulfil the expectations which it generates concept much broader in scope than 'promissory estoppel'.

For the application of the doctrine of 'promissory estoppel', there has to be a promise, based on which the promise has acted to its prejudice. In contrast, while applying the 'doctrine of legitimate expectation', the primary considerations are reasonableness and fairness of the State action.

Thus, the Court held that the 'doctrine of legitimate expectation' cannot be claimed as a right in itself, but can be used only when the denial of a legitimate expectation leads to the violation of Article 14 of the Constitution. The doctrine of substantive legitimate expectation is

one of the ways in which the guarantee of non-arbitrariness enshrined under this Article finds concrete expression.

J&K High Court Judgments

Mac App No.41 of 2020
United India Insurance Co. Ltd. v. Mst. Gulshana & Ors.
Decided on: December 24, 2020

Claim petition filed by the respondents on account of death of one Mukhtar Ahmad Wagay, aged 23 years, died in an accident, which took place on 10th April 2011 at Sopat National Highway, due to rash and negligent driving of driver of offending vehicle, decided by the Motor Accident Claims Tribunal, and award passed against the appellant. Challenged in appeal before the High Court. Held that –

"12. It may not be out of place to mention here that the Supreme Court in the case of Sarla Verma (supra) has laid down the principles governing determination of quantum of compensation in the case of death in a motor accident. The Supreme Court held that compensation awarded does not become 'just compensation' merely because the Tribunal considers it to be just. Just compensation is adequate compensation, which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit. To have uniformity and consistency, Tribunals should determine compensation in cases of death, by following well settled steps, namely, ascertaining multiplicand (annual contribution to the family), multiplier and calculation of loss of dependency by multiplying the multiplicand by such multiplier.

13. In Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Company, (2011) 13 SCC 236, the Supreme Court reckoned monthly income of a coolie (manual labourer), who met with a road accident in the year 2004, at the age of 35 years, notionally as Rs.4,500/-. The Supreme Court held that claimant, who was working as a coolie, cannot be expected to produce any documentary evidence to substaniate his claim. In absence of any other evidence contrary to claim made by claimant, in the facts of the said case, the Tribunal should have accepted the claim of claimant. The Supreme Court has made it clear that in all cases and in all circumstances, the Tribunal need not to accept claim of claimant, in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guess work, which may include the ground realities prevailing at the relevant point of time.

14. Again, the Supreme Court in Syed Sadiq v. Divisional Manager, United India Insurance Co. Ltd., (2014) 2 SCC 735, while taking note of earlier decision in Ramachandrappa's case (supra), reckoned monthly income of a vegetable vendor, who met with a road accident in the year 2008, at the age of 24 years, notionally as Rs.6,500/-. In the said decision, the Supreme Court held that a labourer in an unorganized sector doing his own business could not be expected to produce documents to prove his monthly income. Therefore, there was no reason for Tribunal and the High Court to ask for evidence to prove his monthly income. Going by the state of economy, prevailing at that time and rising prices in agricultural products, the Supreme Court accepted his case that a vegetable vendor was reasonably capable of earning 6,500/- per month.

15. A Constitution Bench of the Supreme Court in National Insurance Company Ltd v. Pranay Sethi, (2017) 16 SCC 680, has held that Section 168 of Motor Vehicles Act, 1988, deals with concept of 'just compensation' and same has to be determined on foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of 'just compensation' has to be viewed through the prism of fairness, reasonableness and non-violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation

granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the Tribunal is quite wide, yet it is obligatory on the part of the Tribunal to be guided by the expression, i.e., just compensation."
Appeal dismissed.

CR No.18 of 2020
Maheen Azhar Kakroo v. Sadaf Niyaz Shah & Anr.
Decided on: December 24, 2020

In this case the appellant had purchased the suit property during the suit proceedings. The appellant feeling aggrieved by the order passed by the trial court in the application for grant of interim injunction filed appeal. The appellate court dismissed the appeal on the ground that not being a party to the suit, the appellant was not an aggrieved party so as to file appeal. Application seeking leave to appeal was, thus, declined. Order declining application for grant of leave to appeal challenged before the High Court. Held that -

"9. The Supreme Court in Adi Pherozshah Gandhi v. H. M. Seervai, Advocate General of Maharashtra, Bombay, A.I.R. 1971 SC 385, has observed that a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. It has been held in a number of cases that a person, who is not a party to suit, may prefer an appeal with leave of appellate court and such leave would not be refused where judgment or order would be binding on him under Explanation 6 to Section 11 of the Code of Civil Code of Procedure. It is no more res integra that right to file an appeal is not restricted to parties to the suit/action or to legal representative of parties; a person, who is aggrieved by an order or judgment sought to be appealed against, may be allowed to appeal against an order or judgement if he is adversely affected by such an order or judgement.

10. Section 96 and 100 of the Code of Civil Procedure provide for preferring an Appeal from any original decree or from decree in appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. However, it is a settled legal proposition that a stranger cannot be permitted to file an appeal in any proceeding unless he satisfies the Court that he falls within the category of aggrieved persons. It is only where a judgment and decree prejudicially affect a person who is not party to the proceedings, he can prefer an appeal with the leave of the Appellate Court."

"15. It is a well settled law that any transaction that takes place during pendency of a suit in respect of a property, is affected by doctrine of Lis Pendens, which principle is enshrined in Section 52 of the Transfer of Property Act. Whether a person is a bona fide purchaser or otherwise, would not strip off doctrine of Lis Pendens or its impact on such transaction. A party, gaining interest in an immoveable property, which is subject matter of the suit, is always bound by the judgment or order of the Court, notwithstanding the fact that he is not party to the Suit. This principle of law is based on the principle of equity. The immoveable property, which is subject matter of Suit, is nucleus, around which are woven interests of beneficiaries of suit property. It is the interest, which flows from the property, which is germane to the issues, which are to be settled by the Court of competent jurisdiction. The rights and interests flow from the property, which is subject matter of the Suit and it is those rights and interests, which are to be adjudicated upon by the Court of competent jurisdiction. When the Court of competent jurisdiction returns its findings in respect of suit property, then all those persons, who have secured interest in such property, are bound by the judgment and decree of the Court notwithstanding the fact that such a person may not be party to the Suit.

If case on hand is analysed on the touchstone of above settled legal position, petitioner is bound by order(s) and judgment(s), which have been passed by Trial Court and/or which may/would come up during pendency/ trial before the Trial Court qua suit property, notwithstanding the fact that she is not party to the suit before the Trial Court. However, Appellate Court, unmindful of the fact that any order or judgement emanating from the proceedings pending before Trial Court relating to suit property is to be ultimately implemented by petitioner, given the right she has accrued in suit property, has passed impugned order, which, therefore, is liable to be set-aside. Order

VII Rule 11 CPC on the ground of subsequent event having taken place."

Accordingly, the Court dismissed the revision petition.

CMAM No.171 of 2009
New India Assurance Co. Ltd. v. Gh. Mohammad Bhat & Ors.
Decided on: December 24, 2020

Motor Accident Claims Tribunal decided a claim petition filed 28 years after the accident in which the petitioner had suffered injuries and consequent amputation of leg. The Tribunal awarded compensation in favour of the petitioner and directed the Insurer to pay the award amount and recover from the owner of the vehicle. Appeal against the award by the Insurer. The High Court relying upon the case law in M/s Purohit and Company v. Khatoon bee and another, 2017 AIR (SC) 1612, allowed appeal and dismissed the claim petition holding the claim to be stale. The Court observed as under:

"16. It is relevant to mention here that in above extracted judgement, the Supreme Court, inter alia, discussed the laid down by it in Haryana State Coop. Land Development Bank v. Neelam (2005) 5 SCC 91. The Supreme Court in the said referred to case had arrived at a conclusion that a claim after a period of seven years was not a surviving claim and the claim was held to be not maintainable. The Supreme Court said that it is not as if it can be open to all and sundry to approach a Motor Accident Claims Tribunal to raise a claim for compensation, at any juncture, after the accident had taken place and that the individual concerned must approach the Tribunal within a reasonable time. After saying so, the Supreme Court held that any explanation, given by claimant for approaching the Tribunal after a delay of 28 years, cannot be accepted as such claim is stale and is to be treated as a dead claim.

17. In the above backdrop and having regard to case set up, judgment rendered by the Supreme Court in the case of M/s Purohit and Company (supra) squarely covers the case in hand as well."

CR No.29 of 2018
Mehtabi v. Ghulam Mohammad Sheikh
Decided on: December 24, 2020

The trial court in this case dismissed the application moved by the defendant (petitioner herein) seeking rejection of plaint in terms of Order VII rule 11 CPC, on the ground that the plaintiff had sold the suit land during the course of proceedings in the suit and was no more in possession. Against the order of dismissal of application, the defendant filed revision petition.

The Court observed as under:

"7. It may not be out of place to mention here term cause of action refers to a set of facts or allegations that make up the grounds for filing a suit. A cause of action is, therefore, by its very nature essential to a civil suit as without a cause of action a civil suit cannot arise. The question now arises how important exactly is a cause of action? The term cause of action is mentioned in the Civil Procedure Code, in various places. The first such instance is in Order I Rule 8 CPC, where in the explanation it is written that the parties being represented in the suit need not have the same cause of action as the person they are being represented by. The fact that a cause of action is essential to a suit is represented in Order II Rule 2 of the Code wherein it is stated that a plaint must mention the cause of action if it is to be instituted as a suit. Order VII Rule 1 reaffirms the same. Thus, it can be seen from the beginning that not only is a cause of action, an important part of the civil suit but is in essence the reason that the civil suit exists in the first place. Any claim that is made in the suit flows from the cause of action, and as is stated by the above-mentioned part of the Code the claims made must be with respect to the cause of action from whence they arise.

8. To pursue a cause of action, a plaintiff pleads or alleges facts in a plaint, the pleading that initiates a lawsuit. A cause of action is said to consist of two parts, legal theory (the legal wrong the plaintiff claims to have suffered) and the remedy (the relief a court is asked to grant). Sometimes cases arise where the facts or circumstances create multiple causes of action. There are a number of specific causes of action, including: contract-based actions; statutory causes of action; torts such as assault, battery, invasion of privacy, fraud, slander, negligence, intentional infliction of emotional distress; and suits in equity such as unjust enrichment and

quantum meruit. To win a case, plaintiff must prove the major legal points of the case lie in his favour; these are called the "elements" of that cause of action. For example, for a claim of negligence, the elements are: the (existence of a) duty, breach (of that duty), proximate cause (by that breach), and damages. If a plaint does not allege facts sufficient to support every element of a claim, the court, upon motion by the opposing party, may dismiss the plaint for failure to state a claim for which relief can be granted. It may be mentioned here that the first Order containing the term cause of action is Order II Rule 2. The object of Order II Rule 2 is to prevent multiplicity of suits. The Rule applies not only to relief claimed in plaint but also to claims in the form of set off. The test for raising objection under the Rule is that whether the claim made in the subsequent suit could have been made in the earlier suit or not. The cause of action must be same for application of the rule. Cause of action means a bundle of material facts which it is necessary for the plaintiff to prove in order to get relief in the suit. But it does not comprise every piece of evidence which is necessary to produce in order to prove such material facts.

9. In the present case, perusal of impugned order reveals that Trial Court has rightly observed that a plaint can be rejected for non-disclosure of cause of action, but it cannot be rejected under Order VII Rule 11 CPC on the ground of subsequent event having taken place."

Accordingly, the Court dismissed the revision petition.

Mac App No.41 of 2020
United India Insurance Company Limited v. Mst. Gulshana & Ors.
Decided on: December 24, 2020

Claim petition filed by the respondents on account of death of one Mukhtar Ahmad Wagay, aged 23 years, died in an accident, which took place on 10th April 2011 at Sopat National Highway, due to rash and negligent driving of driver of offending vehicle, decided by the Motor Accident Claims Tribunal, and award passed against the appellant. Challenged in appeal before the High Court. Held that –

"12. It may not be out of place to mention here that the Supreme Court in the case of Sarla Verma (supra) has laid down the principles governing determination of quantum of compensation in the case of death in a motor accident. The Supreme Court held that compensation awarded does not become 'just compensation' merely because the Tribunal considers it to be just. Just compensation is adequate compensation, which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit. To have uniformity and consistency, Tribunals should determine compensation in cases of death, by following well settled steps, namely, ascertaining multiplicand (annual contribution to the family), multiplier and calculation of loss of dependency by multiplying the multiplicand by such multiplier.

13. In Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Company, (2011) 13 SCC 236, the Supreme Court reckoned monthly income of a coolie (manual labourer), who met with a road accident in the year 2004, at the age of 35 years, notionally as Rs.4,500/-. The Supreme Court held that claimant, who was working as a coolie, cannot be expected to produce any documentary evidence to substantiate his claim. In absence of any other evidence contrary to claim made by claimant, in the facts of the said case, the Tribunal should have accepted the claim of claimant. The Supreme Court has made it clear that in all cases and in all circumstances, the Tribunal need not to accept claim of claimant, in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guess work, which may include the ground realities prevailing at the relevant point of time.

14. Again, the Supreme Court in Syed Sadiq v. Divisional Manager, United India Insurance Co. Ltd., (2014) 2 SCC 735, while taking note of earlier decision in Ramachandrappa's case (supra), reckoned monthly income of a vegetable vendor, who met with a road accident in the year 2008, at the age

of 24 years, notionally as Rs.6,500/-. In the said decision, the Supreme Court held that a labourer in an unorganized sector doing his own business could not be expected to produce documents to prove his monthly income. Therefore, there was no reason for Tribunal and the High Court to ask for evidence to prove his monthly income. Going by the state of economy, prevailing at that time and rising prices in agricultural products, the Supreme Court accepted his case that a vegetable vendor was reasonably capable of earning 6,500/- per month.

15. A Constitution Bench of the Supreme Court in National Insurance Company Ltd v. Pranay Sethi, (2017) 16 SCC 680, has held that Section 168 of Motor Vehicles Act, 1988, deals with concept of 'just compensation' and same has to be determined on foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of 'just compensation' has to be viewed through the prism of fairness, reasonableness and non-violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the Tribunal is quite wide, yet it is obligatory on the part of the Tribunal to be guided by the expression, i.e., just compensation."

Appeal dismissed.

OPW No. 1258 of 2017
Masarat Nazir v. Zaffar Hussain Beigh
Decided on: December 10, 2020

The Court reiterated that the underlying object of Order 6 Rule 16 is to ensure that every party to a suit should present his pleadings in an intelligible form without causing embarrassment to his adversary.

The Court held that in a suit seeking declaration of a transaction as Benami, there is hardly any necessity to make allegations of immorality against the defendant nor is there any requirement to indulge in character assassination of the adversary. The plaintiff cannot be permitted to raise allegations of character assassination against his adversary only with a view to embarrass him/her and to prejudice the fair trial.

For seeking a declaration with regard to a transaction of sale as a Benami Transaction, there is no necessity to plead and prove a breach of trust. It is enough, if the plaintiff seeking declaration pleads and proves that the property, which stands in the name of defendant, was purchased by the plaintiff exclusively by spending his own money and that it was intended to be the property of the plaintiff for all practical purposes.

MA No.07 of 2019
United India Insurance Company Ltd v. M/S Star Dry Fruits & Anr.
Decided on: December 09, 2020

The Court observed that the endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court, while construing the terms of the policy, is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy.

CR No. 15 of 2020
Altaf Ahmad Bhat v. Vice Chairman SDA and others
Decided on: December 03, 2020

The Court held that there is a set procedure provided for allotment of State land and none is clothed with a right to be necessarily allotted a piece of State land merely one applying for it unless he/she satisfies the requirements of the applicable Rule. It was further held that the courts enjoy inherent powers under section 151 of the CPC but such powers cannot and must not be construed to be used for facilitating a wrong. The power of the court is required to be exercised well within the cannons of law to uphold the rule of the law and not vice versa.

CMAM No.153 of 2012
National Insurance Company Limited v. Sonam Choron & ors

Decided on: December 03, 2020

The Court held that there cannot be actual compensation for anguish of heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. The Court further held that Section 168 of the Motor Vehicles Act, 1988 stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance."

The same principle was settled in National Insurance Company Limited v/s Noora Bano & Ors., CMAM No. 65/2017 decided on 3-12-2020.

CONC No. 57 of 2016

National Insurance Company Limited v. Gulzar Ahmad Najar & Ors.

Decided on: December 01, 2020

The Court held that Section 140 of the Motor Vehicles Act, 1988 provides that while considering application for grant of interim compensation, the Tribunal has to take into consideration contents contained in the claim petition, FIR, postmortem report, death/ disability certificate and, thereafter, has to make an interim award. At that stage, the Tribunal has not to consider defence(s) available to the insurer in terms of other provisions contained in the Act.

ACTIVITIES OF THE ACADEMY

Academic activities of the High Court of J&K for the Law Interns

Webinar on "Career in Arbitration"

On 5th December, 2020, a webinar was organized in which Mr. Gourav Pachnanda, Senior Advocate, Mr Abhinav Bhushan, Mr. Mozzam Khan and Mr Shashank Garg, Advocates were the resource persons. The discussion was moderated by Mr. Ishan Sanghi, Advocate. The panelists in the discussion are renowned lawyers and prominent arbitrators and arbitration practitioners. They have vast experience of conducting programmes on Arbitration Law. Three of the panelists, Mr Pachnanda, Mr Bhushan and Mr Khan are members of the Governing Committee of J&K International Arbitration Centre.

The panelists in this programme deliberated upon various aspects of Indian and International Arbitration Law. They shared their personal experiences and their motivational factors in joining Arbitration Law practice. They aprized the participants of whole mechanism of Arbitration and highlighted the advantages of choosing Arbitration over the litigation in Court. They said that Arbitration is fast developing as an effective tool for settlement of disputes, especially in the commercial matters and contracts. The most important facet of Arbitration is the expeditious, effective and long-lasting settlement of the disputes, which is rare in the common litigation procedure.

The panelists discussed with the participants the possibilities of and opportunities in choosing Arbitration as career. They also discussed with the participants the course of journey to be adopted and ways and means for gathering information for adopting Arbitration as career.

The programme was very useful and gave a lot of insight to the law interns to make up their mind to consider Arbitration as career option.

Interaction of Director, Judicial Academy with Law Interns

On 19th December, 2020, an interaction was organized with the Law Interns in which Director, J&K Judicial Academy took feedback from the Law Interns and responded to the various issues roused by the Law Interns in the course of Internship Programme organized by the High Court.

The Law Interns conveyed their satisfaction on the overall scheduling of the Internship Programme being organized through Virtual Mode, which is first of its kind in the Judiciary across India. They also expressed their gratitude to the High Court for

organizing series of programmes on "Careers in Law" and on some domain subjects.

Some issues of the Law Interns regarding successful completion of their internship and issuance of certificates, were dealt by the Director. The Law Interns were apprised that they would get e-Certificates digitally signed by the Registrar General of the High Court, after completion of the period of Internship applied for by them. The Law Interns expressed their desire to participate in future internship programmes that may be organized by the High Court.

Interaction of Former Chief Justice, Ms. Justice Gita Mittal with Law Interns

On 20th December, 2020, interaction was organized by the High Court and J&K Judicial Academy in which former Chief Justice of High Court of J&K interacted with the Law Interns. Ms. Justice Gita Mittal, had retired as Chief Justice, High Court of J&K on 8th of December, 2020. The Law Interns were desirous of having interaction with the Former Chief Justice. Justice Mittal had taken all pains to organize series of webinars for the Law Interns and bringing in eminent resource persons to deliberate upon whole range of legal issues with the Law Interns.

The Law Interns gave their heartiest thanks to the Former Chief Justice for organizing such knowledgeable webinars for them. They also appreciated the resource persons for their valuable guidance. Former Chief Justice shared her experiences as a Judge and as a Lawyer with the Law Interns and enlightened them with her experience in the journey from being a lawyer to a judge. She stressed that the 'Hard-work' and 'Dedication' are the two pillars on which the foundation of the Judicial Careers lies. She exorted the law interns to follow three H's principle in their judicial career. She elaborated three H's principles as Hardwork, Humility and Honesty, which will pay them in the long run. She emphasized on the principle that there is no shortcut to hard work and urged the law interns to follow the same in letter and spirit. She wished the law interns for their successful career in any field of Law they would choose.

The Law Interns were enriched with the knowledge which they gained through the webinars which will help them in the long run in Judicial Career.

Webinar on "Nuances of Sports Law"

On 26th December, 2020 a Webinar on 'Nuances of Sports Law' was organized for the law interns. The programme was conducted by Mr. Shivam Singh, Advocate and the programme was moderated by Mr. Rahul Krishna Reddy (Law Intern).

Mr. Shivam Singh commenced the discussion by highlighting the interplay between sports and law. He said that laws, rules and regulations governing the sports, sporting community and promotion etc. of sports can be categorized as 'Sports Law'. Mostly, the persons who have some connection with sports, either as a fan or as a player and purses law as a career, somehow gets attracted to pursing litigation relating to the sports and sports persons. The resource person discussed various aspects of Sports Law in Indian context. The resource person said that the Sports Law is the amalgam of Laws that apply to athletes and the sports they play. He also discussed about data privacy of the athletes. He also discussed about the doping laws. He stressed upon the efforts to identify the doping related offenders becomes better and our ability to prosecute them becomes more robust. He appreciated the efforts of National Anti-Doping Agency for identifying the doping cheats. He referred to the Section 106 of the Evidence Act with reference to Anti-doping and it is the backbone of the world Anti-doping Rules. He stressed upon the peer learning that is the acquisition of knowledge and skill through active helping and support among peers who are equals in standing or matched companions. He said that government can initiate investment to uplift infrastructure at Primary Levels. He stated that before becoming a successful Sports lawyer, one should be a good lawyer.

The Law Interns were very much enriched with the views of the expert and broadened their vision about Sports Law.

"Insaaf Ki Dastak", a programme for ensuring access to justice at doorsteps of people

On 07.12.2020, High Court of Jammu & Kashmir launched an ambitious legal outreach programme "Insaaf Ki Dastak". The programme aims at providing access to justice at the door steps of people living in far-flung and inaccessible areas of the UTs of J&K and Ladakh who face severe hardships in reaching the courts for their legal issues.

The Project "Insaaf ki Dastak" (Access to Justice for inaccessible areas) was envisioned by Hon'ble Ms Justice Gita Mittal, the then Chief Justice, High Court of J&K and Hon'ble Mr. Justice Rajesh Bindal, Executive Chairman, J&K LSA to ensure that no person is deprived of the constitutional right enshrined in Article 39-A of the Constitution of India which provides that the State shall secure that the operation of legal system promotes justice, on the basis of equal opportunity and to ensure that the opportunities for securing justice are not denied to any citizen by reason of any disability.

The rules governing the filing of suits, appeals and petition by the persons residing in remote areas were framed and by virtue of notifications no. 1616 & 1617 dated: 07.03.2019, the High Court of J&K made necessary amendments to J&K General Rules (Criminal) of 1978 svt & J&K General Rules (Civil) of 1978 svt respectively. The High Court in Sch. A, Chapter 8 of the J&K General Rules (Civil) of 1978 Svt. has notified certain areas of U.T of J&K and U.T of Ladakh as remote areas.

For achieving the target of the Project, the assistance of department of posts and certain government approved agencies providing public services (Common Services Centres) were also taken. The Para Legal Volunteers who form an important area of Legal Services Authorities would bridge the gap between the people living in inaccessible areas with Court and other Legal Services Authorities by facilitating filing of cases as per rules through the CSC's /Post office located in their area.

The programme was launched by Ms Justice Gita Mittal, the then Chief Justice of the High Court in presence of Mr Justice Rajesh Bindal, Executive Chairman J&K Legal Services Authority, Mr Justice Ali Mohammad Magrey, Executive Chairman, Ladakh Legal Services Authority, Hon'ble Mr. Justice Dhiraj Singh Thakur, Chairman, High Court Legal Services Committee, Hon'ble Mr Justice Tashi Rabstan, Hon'ble Mr. Justice Sanjeev Kumar, Hon'ble Mrs. Justice Sindhu Sharma, Hon'ble Mr. Justice Rajnesh Oswal, Hon'ble Mr. Justice Vinod Chatterji Koul, Hon'ble Mr. Justice Sanjay Dhar, Hon'ble Mr. Justice Puneet Gupta and Hon'ble Mr. Justice Javed Iqbal Wani. Also present on the occasion were Mr D.C. Raina Advocate General J&K, Mr Achal Sethi Secretary Law, Justice & Parliamentary Affairs J&K Government, Mr Jawad Ahmed Registrar General, High Court of J&K, Mr Shalender Shora Chief Post Master General J&K, Mr Shahnawaz Rashid, General Manager Common Services Centre e-Governance Agency, Government of India and officers of the High Court Registry. The function was also live streamed on Youtube.

In her inaugural address, the Chief Justice emphasised that there are areas in both the U.T's which face severe vagaries of weather. Moreover, due to the topography of the region a large area remain cut-off and inaccessible for months together especially during the harsh winters. Resultantly, the inhabitants of these areas are deprived of their legal rights as they are unable to approach the courts for redressal of their grievances. This programme, the Chief Justice said is aimed at to reach out to these people so that they do not remain deprived of their legal rights. The Chief Justice hoped that by better coordination between the Courts, the Post Offices, Common Services Centres and the Legal Services Institutions, the programme shall play a major role in ensuring justice at doorstep.

For better operationalization of the scheme, the Para Legal Volunteers have been provided preliminary knowledge of laws and schemes provided by the Government especially in drafting petition, pleadings and applications. Besides, the Para Legal Volunteers, the post Masters, their subsidiary staff were also imparted training on how to maintain register of filed cases and applications with details of court fees and exemption if any.

Hon'ble Mr Justice Rajesh Bindal dwelt deep into the concept behind the programme and its purpose to serve the poor and marginalised people and the role of Legal Services Institutions in carrying forward the programme.

Speaking on the occasion, Mr Justice Ali Mohammad Magrey lauded the concept and thought behind the programme and thanked the Chief Justice for floating the idea for such a programme.

On this occasion, MoU was exchanged between JKLSA & LLSA, Department of Posts and Government approved Common Service Centres, Special Cover (Specially designed by Department of Posts) was also released. The Chief Justice also released a short film and a theme song on "Insaaf Ki Dastak". Videos showing filing of a case in Common Service Centres at Salamabad Uri and Sub-Post Office Nyoma Leh were also released. Messages of eminent personalities of UTs of J&K and Ladakh were also displayed during the function.

A Youtube Channel for the High Court was also launched on the occasion. The team involved in production of film and theme song was felicitated in the programme.

The operational framework for filling of cases through CSC's or Post Offices is as under:

i) The petition shall be received by CSC or Post Office on prescribed template along with document, if any, and transmitted in soft form to concerned court as per the instruction of the party/PLV/Panel lawyer.

ii) If no facility for e-receipt is available then hard copy of case file shall be received and forwarded to concerned court.

iii) The CSC or Post Office shall maintain a proper record pertaining to date and time of report/transmission of such cases to concerned court.

iv) Wherever possible the CSC/Post Office shall enable video conferencing facility to the Panel Lawyer and PLV's through manpower provided by CSC's & Postal department.

v) The functioning of post office pertaining to filing of cases and maintenance of record in relation thereto shall be supervised by the Presiding Officer of Court of lowest jurisdiction, the District Judge concerned and Secretary, District Legal Services Authority. However the administrative control over post office shall remain with Department of Posts, Ministry of communication, Govt. of India.

- Shri M. K. Sharma
(Member Secretary)
J&K Legal Services Authority
& Ladakh Legal Services Authority

Untouchability an unhealthy democracy

Untouchability is a social evil which creates social disorder. It is the practice of discriminating some individuals and groups based on their caste and the jobs done by them. The practice of untouchability is legally abolished by Indian Constitution (1950) and provided measures for positive discrimination in educational institutions and public services for all those who lie within the caste system. Despite attainment of political independence and expiry of about a century the poor and downtrodden masses of the country are still under the grip and clutches of social evils of which untouchability is the greatest dragon. Article 17 is aimed to end the inhuman practice of treated certain fellow human beings as dirty and untouchability by reason of their birth in certain caste the apex court held that fundamental rights enshrined in part IIIrd of constitution includes rights against untouchability granted under article 17 is available against private individuals and it's a

constitutional duty of the states to take necessary steps so that this right is not violated.

In the Preamble to the Constitution, Justice - Political, Economic and Social; and Equality aim at cutting the very roots of caste system. The framers of Constitution in their wisdom decided to secure the complete abolition of untouchability which was also one of the greatest ideal of 'Mahatma Gandhi' who openly said that untouchability is a sin of Hinduism'.

Untouchability Offences Act, 1955, came into force which makes practice of untouchability an offence which prescribes penalties for the enforcement of any disability that arises out of untouchability and subsequently after amendment in the year 1976, it was renamed as 'Protection of Civil Rights Act, 1955'. The practice of untouchability in any form is strictly forbidden.

The objective of Article 17 is to abolish some iniquitous social customs and disability which is prevalent in some parts of the Country. The practice of untouchability is strictly prohibited in India after passing of the Untouchability Offences Act 1955. It makes practice of untouchability an offence and prescribes penalties for violation of its provisions. Article 17, which is interlinked with Articles 14, 15 and 16 of the Constitution came to rescue of the people who were facing the trauma of untouchability.

Mahatma Gandhi openly advocated abolition of untouchability which according to him is a 'sin'. It was held that, in fact, life was a huge struggle for untouchables and now in terms of Article 243 (D) there is a reservation of seats for scheduled castes at Panchayat level to dispel the notion of untouchability and discrimination. Untouchability in India was a social problem and the social aloofness of untouchables was enjoined in every way due to various causes. With the social and economic advancement, the so called untouchables have emerged as brilliant Lawyers, Statesmen, Medical Professionals etc. Thus, the Constitutional makers resolved to declare that untouchability must be abolished in toto. For the enforcement of prohibition of untouchability, Article 35 calls for making provisions to prescribe punishment. Untouchability Offences Act, 1955, has been legislated as follow up of the Constitutional command. Under this Act, discrimination at all levels on the ground of untouchability is considered as an offence and prescribes punishment which may extend to imprisonment for six months and with fine which may extend to Rs. 500.

Untouchability in its literal sense is the practice of ostracising a minority group by segregating from the social and political mainstream. This term is mostly associated with treatment of the 'Dalit communities' in Indian sub-continent, who were considered as literally out castes. Article 15, 16 and 46 of the Indian constitution have taken care of scheduled castes and scheduled tribes, and have protected them from social injustice.

Despite numerous sincere efforts and endeavours to bring a strong legislation to curb the menace of untouchability, it has not been completely eliminated and still violators of law are finding ways to perpetuate the agony and mental torture of untouchability. In case of "Duni chand v. Srinivas & Ors., 1994 JKLR 270" Hon'ble Mr. Justice R.P Sethi has expressed his anguish and twinge of sadness as still violators of law are trying to divide the society on the basis of castes/customs. In case of Jai Singh v. Union of India, decided on 28-01 -1993 (Rajasthan) and in case of Smt. Siba Rani Devi & Anr. v. Ramendra Nath Mukherjee & Ors. (1963) Calcutta 46, it was held that Article 17 is a very significant provision from the point of view of equality before law as it guarantees social justice and dignity of man and privilege which was denied to a vast section of Indian society. Denying of women's entry into "Sabrimala Temple" amounts to untouchability apart from being a gender discrimination.

Role of judiciary towards abolition of untouchability is required to be appreciated, as the Apex Court of the country held in "Peoples Union for Democratic Right v. Union of India, AIR 1982 SC 1473, that it is the constitutional duty of the State to ensure the protection of basic human rights. Even Article 15 (2) deals

with an eradication of untouchability. Thus, on the ground of untouchability no person can be prohibited from the use of well, tanks, bath tub, roads and ponds are dedicated to the use of general public. (Refer State of Karnataka v. Appa Baluingale & ors., on 01-12-1992).

In another case it was held that conferment of titles 'Bharat Ratan', 'Padam Vibushan', 'Padma Shree' are not prohibited under Article 18, as they merely denote State recognition of good work done by the citizens in various fields of activity. (Refer 'Vichitra Banwari Lal Meena v. Union of India & ors' on 11-08-1982).

Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act enacted by the Parliament of India is meant to prevent atrocities against scheduled castes and scheduled tribes. The purpose of the Act was social inclusion of 'Dalits' into Indian society but the act has failed to live up its expectations. Untouchability is a hate-full expression of caste system, hence a crime. (Refer Devarajiah v. B. Padmana, AIR 1958 Karnatka 84).

The basic purpose of Indian constitution is to establish welfare state and the concept of rule of law not only aims at safeguarding and advancing the civil and political rights of the citizens of the country but also establishing social, economic, educational and cultural condition under which their legitimate activism and dignity may be relied. Whenever inequality exists and an economic injustice found, the aid of law endeavour is made to establish social equality and remove economic injustice. Section 15 (2) (1) of the Protection of Civil Rights Act, 1955 provides for adequate facilities including legal aid to the persons subjected to any disability arising out of untouchability to enable them to avail such rights.

There is no denial that untouchability is a malignant in nature which is slowly but steadily spreading its evils in the social fabric of Indian society and untouchability is a menace but our Constitution provides sufficient safeguards to prevent and eliminate the evil of untouchability. But now in the changing scenario things are improving and slowly changing the mindset of modern generation. Today's youth with modern education and globalized outlook are viewing the social order from different perspective of equality and impartiality and not from the religious or traditional point of view.

Law as a product of tradition and culture is an instrument of social change which can bring social transformation. Adjustment of law to the social needs is a continuing process and our alert judiciary is discharging a huge task of "Balancing the Right & Access to Justice to all".

- Ms. Bala Jyoti
(District & Sessions Judge)
Judicial Member,
J&K Special Tribunal Jammu

Concept of Blue-Pencil Rule

According to Oxford Dictionary of English, Blue Pencil means to censor or to make cuts in a manuscript, film, or other work. Blue Pencil was earlier used by the editors to make corrections in the copy. According to Black's Law Dictionary the Doctrine of Blue Pencil is a judicial standard for deciding whether to invalidate the whole contract or only the offending words. The Blue Pencil rule allows the courts only to strike down the offending provisions and enforce the rest of the agreement.

The doctrine was evolved by English and American courts. In a case 'Daymond v. South West Water Authority' Lord Bridge had observed that "appropriate test of substantial severability should be applied. Nonetheless on his approach there would be at least two forms of the substantial severability test - First, when textual severance is possible, the test takes this form, is the valid text unaffected by and independent of, the invalid text? Secondly, when textual severance is not possible so that the court must modify the text in order to achieve severance, the court may do this only if it is effecting no change in the substantial purpose and effect of the impugned legislation."

Looked at from the perspective of the Indian Law regime, Section 24 of the Indian Contract reads as under:

Agreements void, if considerations and objects unlawful in part-if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful the agreement is void.

However, this is not an absolute proposition and without exceptions. A class of cases which can be considered as truly severable and therefore capable of being blue-pencilled would be the cases covered under Section 57 & 58 of the Indian Contract Act.

Section 57 'Reciprocal promise to do things legal, and other things illegal where persons reciprocally promise, firstly to do certain things which are legal and secondly under specified circumstances to do certain other things which are illegal, the first set of the promises is a contract, but second is a void agreement.'

Section 58 'Alternative promise, one branch being illegal- in case of an alternative promise one branch of which is legal and the other illegal, the legal branch alone can be enforced.'

In the case of Babasaheb Rahimsaheb v. Rajaram Raghunath (1931 33 BOMLR 260), the court observed the application of 'blue pencil' in Indian contracts as well be holding that "in an agreement if different clauses are separable, the fact that one clause, is void does not necessarily cause the other clauses to fail". The court has applied this principle by holding that "the sub-clause making the award 'final and conclusive' was clearly separable from the main clause which referred to an arbitrator imperative. The existence of the sub-clause or the fact that the sub-clause appears to be void does not in any way affect the right of the parties to have recourse to arbitration and does not make a reference to an arbitrator any the less an alternative remedy."

In the case of 'D.S. Nakara v. Union of India' AIR 1983 SC 130, the doctrine of severability was applied so as to retain the beneficial part of the relevant memorandum and make the same applicable to the pensioners irrespective of date of their retirement.

The Supreme Court in the case 'Shin Satellite Public Co. Ltd. v. Jain Studios Limited' AIR 2006 SC 963, provides that "the proper test for deciding validity or otherwise of an agreement or order is 'substantial severability' and not 'textual divisibility'. It is the duty of the court to severe and separate trivial or technical part by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful, and otherwise enforceable. In such cases, the Court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms."

Thus, the Indian court affirms the views of Lord Bridge and held that for application of blue pencil rule, substantial severability is necessary In India, the blue pencil doctrine is not only applicable on covenants dealing with restraint of trade or the non-compete covenants but is also applicable to Arbitration clauses. In the case 'Sunil Kumar Singhal and another v. Vinod Kumar', 2007 Indlaw ALL 2702, It was held that the offending part in the arbitration clause can be severed or marked by the blue pencil.

The Courts have applied this doctrine to contract where some clause was redundant, unnecessary, and opposed to public policy. The court held that if contract for sale of property with eight flats is illegal and void being contrary to building regulations and master plan, the agreement for sale of property with lesser number of flats, if permitted under Section 12, is enforceable.

The blue pencil doctrine is a legal concept in common Law countries where a court finds that a portion is void or unenforceable, but the other part of the contract is enforceable. In that case, the court may order the parties to follow the enforceable part and can delete the voided portion. The courts have held that partial invalidity in contract will not ipso facto make the whole contract void & unenforceable.

Blue-pencil rule is most frequently invoked in cases of 'agreements dealing with restraints on trade, business and profession'; or in modern parlance 'non-compete agreements', where a restraint which is clearly illegal is suitably excised and remaining contract given effect to. In fact, the rule of blue pencil owes its very genesis to cases where employers tried to impose unreasonable restraints on employees/ex -employees/good-will sellers etc, and the Courts did a balancing act, and separated and salvaged the good from the ugly…. Arguably, the first reported case on blue-pencil is the oft quoted landmark case- 'Nordenfelt v Maxim, Nordenfelt Guns and Ammunition Co.' (House of Lords). The facts of the case are pretty straightforward: Nordenfelt, a manufacturer specialising in armaments, sold his business to Hiram Stevens Maxim. They had agreed that Nordenfelt 'would not make guns or ammunition anywhere in the world and would not compete with Maxim in any way for a period of 25 years.' The House of Lords, having regard to the fact Nordenfelt had received a handsome amount for the sale, did not find the whole restriction bad. Having said that, the Court found the latter part of the restriction unreasonable and severed it to read: "for the next 25 years, would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way". The latter part was considered too broad-brush/all-encompassing and, therefore, an unreasonable restriction. This is where the roots of this principle lie.

While doing this, the Court did recognise the limitations of this rule: A contract must be severed by caution (lest the courts be accused of re-writing bargains). Only if 'severability' is substantively possible and contract capable of surviving post the surgical operation, that this exercise of running a blue pencil down should be embarked upon.

- Shri Mohammad Ashraf Bhat
Chief Judicial Magistrate, Pulwama
And Ms. Poonam Gupta
Civil Judge (Jr. Div), 2020 Batch

(Guest Column)

Why 'victim' cannot appeal against inadequate sentence under Section 372 Of Code of Criminal Procedure, 1973?

Since 2009, the 'victim' has officially entered in the textbook of Criminal Law. For the first time, a victim is defined under Section 2 (wa) of the Code of Criminal Procedure, 1973 as a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.

The proviso to Section 372 of Code of Criminal Procedure, 1973 is an exception to the general law and same confers on a 'victim' a right to appeal against acquittal, which is subject to the grant of leave by the Court. The first part of the definition of 'victim' as given under Section 2 (wa) of Code of Criminal Procedure, 1973 is required to be construed in its literal sense and no liberal interpretation is required. Accordingly, only such person would be treated as 'victim' who is the subject matter of trial being direct sufferer of crime in terms of loss or injury caused to his own body, mind, reputation and property and such loss or injury is one of the ingredient of the offence for which the accused person has been charged and, therefore, any other person cannot be accepted as a 'victim' within the first part of Section 2 (wa) for the purpose of maintaining appeal.

Section 372 Chapter XXIX in of Code of Criminal Procedure, 1973 defines as under;

"372. No appeal to lie unless otherwise provided - No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or impose inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

Evolution of Right to Appeal:

The Code of Criminal Procedure when originally enacted in the year 1861 did not provide for any right to appeal against acquittal to anyone including the State. It was in the Code of Criminal Procedure of 1898 that Section 417 was inserted enabling the Government to direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. The Law Commission of India in its 41st Report given in September, 1969 as also in 48th Report pertaining to the Criminal Procedure Bill, 1970, however, recommended to restrict the right of appeal given to the State Government against an order of acquittal by introducing the concept of 'leave to appeal' and that all appeals against acquittal should come to the High Court though it rejected the right to appeal to "the victim of a crime or his relatives".

The Code of Criminal Procedure, 1973 came into being on January 25, 1974 repealing the Code of Criminal Procedure, 1898. The recommendations made by the Law Commission of India, referred to above, largely found favour with the Parliament when it inserted an embargo in sub-Section (3) to Section 378 against entertainment of an appeal against acquittal "except with the leave of the High Court". Sub-section (4) of Section retained the condition of maintainability of an appeal at the instance of a complainant against an order of acquittal passed in a complaint-case only if special leave to appeal was granted by the High Court. Save in the manner as permitted by Section 378, no appeal could lie against an order of acquittal in view of the express embargo created by Section 372 according to which "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force".

The Code of Criminal Procedure (Amendment) Act, 2005:

Hon'ble Supreme Court in a string of decisions recognized time and again one or the other right of the 'victim' including locus standi of his/her family members to appeal against acquittal in the broadest sense. Notwithstanding these decisions or the chorus of such like rights being heard in all civic societies, the Legislature in its wisdom did not deem it necessary to permit a 'victim' to appeal against the acquittal of his wrong-doer even while carrying out sweeping amendments in the Code in the year 2005. The only significant amendment brought into force was in Section 378, whereby, the appeals against acquittal in certain cases are now maintainable in the Court of Session without any leave to appeal. The afore-stated amendment has been brought to guard against arbitrary exercise of power and to curb reckless 'acquittals'. Section 377 was also suitably amended enabling an appeal on the ground of inadequacy of sentence to the Court of Session, if the sentence is passed by a Magistrate.

The Committee on reforms of Criminal Justice System was constituted by Government of India, Ministry of Home Affairs by its Order dated 24.11.2000 to consider measures for revamping the Criminal Justice System. In this connection, for providing Justice to victims of crime, Committee made its recommendation as follows:

"i) The 'victim', and if he is dead, his legal representative shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with 7 years imprisonment or more.

ii) In select cases notified by the

appropriate Government, with the permission of the Court an approved voluntary organization shall also have the right to implead in Court proceedings.

iii) The 'victim' has a right to be represented by an advocate of his choice; provided that an advocate shall be provided at the cost of the State if the 'victim' is not in a position to afford a lawyer.

iv) The victim's right to participate in criminal trials shall, inter alia, include:

a) To produce evidence, oral or documentary, with leave of the Court and/or to seek directions for production of such evidence

b) To ask questions to the witnesses or to suggest to the court questions which may be put to witnesses

c) To know the status of investigation and to move the Court to issue directions for further investigation on certain matters or to a supervisory officer to ensure effective and proper investigation to assist in the search for truth.

d) To be heard in respect of the grant or cancellation of bail

e) To be heard, whenever, prosecution seeks to withdraw or offer to withdraw and not continue the prosecution

f) To advance arguments after the prosecutor has submitted arguments

g) To participate in negotiations leading to settlement of compoundable offences.

v) The 'victim' shall have a right to prefer an appeal against any adverse order passed by the Court acquitting the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation. Such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

vi) Legal services to victims in select crimes may be extended to include psychiatric and medical help, interim compensation and protection against secondary victimization.

vii) Victim compensation is a State obligation in all serious crimes, whether the offender is apprehended or not, convicted or acquitted. This is to be organized in a separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration.

viii) The Victim Compensation law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. The law should provide for the scale of compensation in different offences for the guidance of the Court. It may specify offences in which compensation may not be granted and conditions under which it may be awarded or withdrawn."

In this long journey it was found that victim's right comprises of the following ingredients:

a) Access to Justice & fair treatment,

b) Restitution,

c) Compensation &

d) Assistance.

Based on said recommendations amendments were made in the Code showing sensitivity to the rights of a 'victim', by incorporating the following provisions:

"i) Section 2 (wa) was incorporated in the Code defining a victim and making it inclusive of his or her guardian or legal heir;

ii) Proviso to sub section (8) of Section 24 (8) of the Code which provided that the Court may permit the 'victim' to engage advocate of his choice to assist the Public Prosecutor.

iii) Proviso to clause (a) of Section 26 of the Code, which provided that offenses under Section 376 and 376 (A) to 376 (D) of the Indian Panel Code shall be tried as far as practicable by a Court presided over by a woman.

iv) Proviso 2nd to sub section (1) of Section 157 of the Code by which it was provided that the statement of a rape victim will be recorded at the residence of the 'victim' or in the place of her choice as far as practicable by a

woman Police Officer in the presence of her parent or guardian or near relative or a social worker of the locality.

v) Sub-section (1-A) of Section 173 (1-A) of the Code by which it was provided that in relation to rape of a child investigation would be completed within three months from the date of receipt of information.

vi) Section 357-A of the Code so as to provide for the "Victim Compensation Scheme" for the purpose of compensation to the 'victim' or his dependents who suffered loss or injury as a result of the crime.

vii) Proviso to Section 372 of the Code conferring right on a 'victim' to file appeal"

Prior to 31.12.2009, that is before the enforcement of amending Act No. 5 of 2009, Section 372 was as follows:

"No Appeal shall lie from any Judgment or Order of a Criminal Court except as provided for by this Code or any other law for the time being in force".

The aforesaid amendment is based upon the 154th report of Law Commission.

The Statement of Object & Reasons of Act 5 of 2009 mentioned, is as follows:

"..... 2. The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the Criminal Justice System.....".

Prior to insertion of the proviso, appeal against inadequacy of sentence lay under Section 377 of the Code and against acquittal lay under Section 378 of the Code but in neither case the 'victim' had a right to appeal though in a case instituted upon a Complaint, the Complainant had a right to present an appeal under sub- section (4) of Section 378 of the Code. Thus, by insertion of the proviso an exception to the general rule was carved out by providing 'victim' a right to prefer an appeal against an order of acquittal or of convicting for a lesser offence or imposing inadequate compensation.

Right to challenge conviction or acquittal or any sentence

Right to challenge a conviction or acquittal or any other sentence or order emanates only from a Statute. The Scheme of the Code after various amendments, confers right of appeal only on four categories of persons; (i) accused; (ii) State; (iii) victim; and (iv) complainant in complaint cases and none else. A 'victim' who happens to be the 'complainant' in the police cases, if files appeal against acquittal is not required to take 'leave' under Section 378 (4) of the Code of Criminal Procedure, 1973 nor such 'victim' is required to seek leave in cases where appeal is against inadequacy of compensation and punishment for lesser offence.

The 'victim' or a 'complainant' under Chapter XXIX of the Code of Criminal Procedure, 1973 are not inter se dependent and each right operates within its own sphere. For example, the State has got a right to appeal on the ground of inadequacy of sentence (Section 377 of the Code of Criminal Procedure, 1973) but a 'victim' (including 'complainant' who is also a 'victim' in police case) has got no such right though he/she can prefer appeal if the accused is convicted for a lesser offence. State has no right to appeal against conviction of an accused for a lesser offence. The legislative scheme thus does not permit an inter se comparison of the right or duties granted or assigned to a 'victim' or the State under the afore-stated Chapter of the Code. The cumulative effect is that the rights(s) of a 'victim' under the amended Code are substantive and not mere brutal flume, hence these are not accessory or auxiliary to those of the State and are totally incomparable as both the sets of rights or duties operate in different and their respective fields. Thus a 'victim' is not obligated to seek 'leave' or 'special leave' of the

High Court for presentation of Appeal under proviso to Section 372 of the Code of Criminal Procedure, 1973.

The right of the 'victim' to appeal gets limited here but the State still has powers in this regard. Under Section 377 of the Code of Criminal Procedure, 1973, the State can move an appeal on the ground of inadequacy of sentence but the 'victim' has not been accorded a similar right. This amendment was brought in, in 2009 after the famed Best Bakery case, fought by the Citizens for Justice and Peace, supporting star witness Zahir Shaikh.

Section 372 of the Code of Criminal Procedure, 1973 was amended in December 2009 stating that the 'victim' shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

Judicial Pronouncements

The meaning of conviction of lesser offence has been explained by the Supreme Court in 'Mallikarjun Kodagali v. The State of Karnataka' decided on October 12, 2018). The Court explained, thus, any order passed by a court where the accused is convicted of a lesser offence but the victim feels that he should have been convicted for a higher offence. Obviously, the appeal lies against the acquittal of the accused for a higher offence"

"Before the amendment to CrPC Section 372, the remedy of appeal was provided under Section 378 Cr. P. C and the same could be filed on a police report only at the instance of District Magistrate or State Government. The aggrieved victim of complainant had no right to appeal and he could only prefer a revision… the revision would be a cumbersome process as the Revision Court has no powers to convict an accused in case it finds that the latter has been wrongly acquitted. At the most it could remand the case back to the Trial Court. This involved wastage of time and money – as has been observed by the Law Commission on whose recommendation an exception was added to Section 372 Cr. P. C, providing right of appeal to the 'victim' against any order passed by the Court acquitting the accused or conviction for a lesser offence or an inadequate compensation".

In February 2020, Bombay High Court affirmed victim's right to appeal against an order of acquittal as being absolute and unfettered under section 372 of CrPC.

In "Mallikarjun Kodagali's case, the Supreme Court in 2:1 majority Judgment stated that Section 372 of CrPC has to be given "realistic, liberal, progressive" interpretation to benefit the 'victim' of an offence. It also held that "there is no doubt that the proviso to Section 372 of the CrPC must be given life, to benefit the 'victim' of an offence" and also referred to the United Nation's General Assembly's resolution to hold that besides the State, the victims are also entitled to appeal against the acquittal of the accused. Upholding the right of the 'victim' to prefer an appeal against acquittal, the Court held, "Access to mechanisms of Justice and redress through formal procedures as provided for in national legislation, must include the right to file an appeal against an order of acquittal".

Hence, when it comes to right of 'victim' to appeal, the Courts have so far held that the 'victim' need not seek leave to appeal to a Higher Court in cases of acquittal, conviction on lesser offence and inadequate compensation. The ambit of lesser offence has not been read into or expanded into including appeal against inadequate sentence and that right lies only with the State Government.

The Hon'ble Supreme Court of India, in recent case of 'Parvinder Kansal Vs The State of NCT of Delhi & Anr', held that "Appeal filed by Victim seeking enhancement of sentence is not maintainable." Though, while arriving at this principle, the Supreme Court has affirmed the view taken in 'National Commission for Women Vs State of Delhi & Anr.', (2010) 12 SCC 599, as these decisions are based upon strict interpretation of law and showed that the legislature has failed to take into account the plight of the victim in this regard.

The Delhi High Court, in a case of ["Ram Phal Vs. State & Others" (Decided on 28-05-2015) noted the legislative history of this newly inserted proviso that:

"… A victim-oriented approach to certain aspects of criminal procedure was advocated in the Law Commission of India's 154th Report, 1996, which noted that "increasingly, the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology, control of victimization and protection of the victims of crimes." (Chapter XV, Paragraph 1) While focused on issues of compensation, the Law Commission Report cited the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power for its definition of "victim": "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws." (Chapter XV, Paragraph 6.2).

".....The said report prompted the Code of Criminal Procedure (Amendment) Bill of 2006. Its Statement of Objects and Reasons noted that "the Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind …

It also noted that … "at present, the victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system."

In wake of the above, the proviso under Section 372 of the Cr. P. C added in 2009. However, due to legislative lapse or inadvertence (or unknown intention of legislature, as it is not found anywhere), it is restricted only to three eventualities:

i. acquittal of the accused;

ii. Conviction of the accused for lesser offence;

iii. for imposing inadequate compensation (as mentioned in the Judgement of Parvinder Kansal).

Hence, even if a Trial Court sentenced the accused only a token sentence e. g. Till the rising of the Court or only with fine for a particular offence … then also, the victim does not have any right to seek enhancement of sentence by way of an independent and/or separate appeal. This seems to frustrate the very statement of objects and reasons of the proviso of the section, for which it has specifically inserted or brought in for effective implementation of law on victim side, which intends to balance the rights of the accused vis-à-vis rights of the victim.

The Supreme Court has also reiterated the statement of Objects and reasons behind the proviso of Section 372 of the Cr. P. C in a case of ["Rekha Murarka Vs The State of West Bengal & Anr." [Decided on 20-11-2019] by stressing that …

'Furthermore, credence should be given to the overall emphasis on victimology underlying the 2009 Amendment Bill,: … "Statement of Objects and Reasons.– The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy justice and to tone up the criminal justice system has been felt for quite sometimes…(then, repetition of the same as mentioned above in a case before the Delhi High Court)"

Conclusion

In view of the above and by re-reading the proviso under Section 372 of the Cr. P. C, the 2nd eventuality, which the Supreme Court has categorized: 'convicting for a lesser offence' – this phrase, actually does not give any right to 'victim' for prefer an appeal for enhancement of sentence. The plain and simple reading of these

words suggest that: 'convicting for a lesser offence' means, conviction is imposed, but it is in respect of lesser offence. Meaning thereby, if a person is charged with an offence of Murder under Section 302 of the Indian Panel Code and if at the end of trial the Session Court found him guilty for culpable homicide not amounting to murder under Section 304, the 'victim' has a right to prefer an appeal against the same, because this is tantamount to 'convicting for a lesser offence'.

Criminal Law, no doubt, clearly differentiates between the conviction and sentence. In fact, Conviction is 'the act or process of judicially finding someone guilty of a crime; the state of having been proved guilty, whereas the Sentence is the (actual) punishment imposed on a criminal wrongdoer.'

- Shri Dinesh Singh Chauhan
Advocate, High Court of J&K

ADDING DIGNITY TO DEATH: PLEDGE ORGANS

The right to human dignity is an inherent right in every human being. Something what is inherent cannot be taken away. Nor denied. It is part of being a human being. Any practice which is derogatory to the dignity of a human being must be renounced. Practices which are 'inhuman' cause violence to the dignity of a human being. Article 21 guarantees the right to 'Life'. From birth to death. The right to dignity exists even beyond death. It is a constitutional right. Also, a human right. It is both Constitutional value and morality.

The biggest challenge is, how do we ensure this right? I wish to examine: how one human being can contribute towards to dignity of other human beings. This thought came to my mind when I addressed a meet of Rotarians on zoom on August 13, 2020. It happened to be : The World Organ Donation Day. We all are dependent upon humans for body spare parts: Organs, foetuses, embryos, eggs, wombs, tissues and blood. They are not available in market like the automobile spare parts. Article 23 prohibits 'Human Trafficking'. My body belongs to me. Can I sell parts of my body? Can body parts be commercialised? Human Trafficking would include Trafficking in Organs and Tissues of human body. Section 19 and Section 19A of the Transplantation of Human Organs and Tissues Act, 1994 render commercial dealings in human organs and tissues as criminal offences. Commercialisation, therefore, is constitutionally prohibited and is punishable under the Act of 1994. Commercialisation is a global challenge. Inspite of legal ban, it exits. It is increasing. Rather than decreasing. Its elimination does not seem possible. 'Transplantation' tourism is flourishing. The demand is manifold. The supply is so limited. The economic disparity is increasing. The moral and ethical values are de-valuing.

In order to meet the shortage in human material, Dr. Barry Zacob, US based Doctor came up with a plan. Way back in 1983. He saw poverty and starvation deaths in Bangladesh on TV News. Dr. Jacob told the Washington Post : "The waste of all those organs is lying there." He decided to set up his business. Incorporated International Kidney Exchange Company in Virginia. The idea was to buy 'the waste' dirt cheap from third world countries. Sell the same in economically advanced countries. At his own quoted price. His dream was big business. The spirit of humanism and brotherhood was missing in him. The US Surgeons boycotted Dr. Jacob. On the other hand, Dr. Jacob was determined to promote free trade in human organs and material. His mission was : Free Trade is what life is all about. In this context, the US Congress came forward with the National Organ Transplant Act, 1984. It prohibits the sale of human organs, through inter-state commerce. Anyone indulging in such practice was liable to be criminally prosecuted. The venture of Dr. Jacob was inhuman. Sad as well. This I had shared in one of my talks in early 1990's.

In this backdrop, each citizen has a fundamental duty to develop humanism. Also

the duty to promote spirit of brotherhood. The Preamble requires : Fraternity assuring the dignity of the individual. Therefore, let us remind ourselves that we are dependent upon each other. It is this understanding alone which can help. The right to human body cannot be absolute. There are no absolute rights. There are always reasonable restrictions. The right over the human body is no exception.

The Act of 1994 allows the close relations to donate/gift an organ to save his or her life. The reluctance on the part of even the close relations is understandable. Consequently, after death, if the immediate relations consent, his or her organs can provide life to others. We are meant to serve humanity. This would help to serve even after death. Service above self. Service beyond life is even better. In such a situation, one would be remembered for giving life even in death. The man is no more. His family including the extended family remains. What a good and positive feeling. The recipient and his family would remain indebted. What a bond of two families. Many families, though not related, would continue to live in happiness. Always willing to help each other. In Normal and difficult times. The added beauty is, it would add to human dignity even in death. In death, you give life to others. By sharing you organs. Can there be a better act than giving life! It is putting life into another life. This is the real recipe for human dignity.

As I was finalising this piece, a news came that 34 years old man was declared brain dead by doctors at G.G. Hospital in Chennai on August 27, 2020. His wife agreed to donate his organs. The G.G. Hospital retained the lungs. 48 years old man, his lungs were damaged due to COVID-19 infection. He had virtually no chance of survival. The survival became possible because of the timely possibility of transplantation. Not only this, one Monika More who had got severed both her hands in a train accident. This happened seven years back. Both her hands have now been transplanted. It is rare that such a dream could become possible. The heart transplant surgery was also performed at the Chennai Hospital. One body has given life to three more.

Let us resolve to pledge our bodies. After death nothing remains. Why not save the lives of others. The mind set needs to change. We all have to die. Let this realisation prompt you to take this step. In Spain, France, Norway, Sweden, Greece and Turkey, there is presumed consent. All citizens are potential donors unless specifically you opt out.

Right to life includes the right to die with dignity. One can pledge one's body during life-time. One can also register one's 'Living Will'. 'Will' your organs. You would add dignity even in death. You will continue to live. For each other. This is the beauty of Life. This will be constitutional value-in-action. In abundance.

Let us change our mind-set. There is nothing unethical. No myths. Pure and simple. Life must continue. May be in another human body. It is creating a human chain. Each link would carry it further. Will that not be the real joy of life! I pause for a positive response. After all, we are all part of the human family. The human race.

- Dr. Balram K Gupta
Director (Academics)
Chandigarh Judicial Academy

We can be contacted on the following mailing addresses:

jkja@nic.in
jandk.sja@gmail.com

- Editor