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Contents

Editor
Sanjay Parihar
Director

Composed by:
Vishali Razdan
Computer Operator

From the Editor's Desk

"Justice delayed is justice denied", the oft quoted phrase, coined by William Ewart Gladstone, axiomatically describes the disastrous consequences of delay which has clandestinely crept into the judicial system , corroding the vitality and quality of administration of justice in our country .It is also an accurate observation that *delay defeats justice.* In the discourse of jurisprudence, justice and fairness are closely related terms. Pragmatically, Justice is the assortment of key principles by which fairness is administered. However, the entire interplay of justice and fairness is rendered incapacitated when inordinate and unnecessary delay is permitted to insinuate in the judicial landscape. As per the data and information available on National Judicial Data Grid (NJDG), there are total 4,09,34,646 cases pending before Courts across all jurisdictions of the Country with an overwhelming figure of 7.76% cases (of both civil and criminal nature) which are more than ten years old, including cases which are more than thirty years old .The data comprehensively reflects frequent applications, awaiting record, unattended cases, stay, securing presence as the causative agents of delay. As an addendum thereto, frequent adjournments , delay in service of summons, non-adherence to the provisions of Sec. 89 CPC and plea bargaining et al , are also contributory factors escalating delay in trials. The Apex Court in its various landmark judgments held that "right to speedy trial is a fundamental right which is implicit under Art. 21 of the Constitution."Reference may be had to notable case laws on the point viz: *Hussainara Khatoon v. Home Secretary, State of Bihar (AIR 1979 SC 1360), A.R. Antulay v R.S. Nayak(1992) 1 SCC 225, S.C. Advocates on Record Association v. UOI(AIR 1994 SC 268),*wherein it was held that the right to speedy trial is in consonance with the spirit and ethos of Constitution and its precept of Justice. It is an existent predicament that the judicial system is severely debilitated by the pervasive ingression of delay, yet a multitude of institutional improvements, working in a mosaic, are required to ameliorate the state of affairs. By developing and inculcating strategic damage control approaches including adopting ADR techniques, functionally, keeping a check on unnecessary adjournments, implementing the provisions of procedural codes in letter and spirit, continuing judicial education and training in various disciplines etc, the balloon of delay can be punctured at various points. However, it must also be borne in mind that for the sake of minimizing delay, no institution is allowed to ignore the procedural requirements as mandated under the Codes because that would prejudicially affect the cause of Justice, which is at the centre stage of all activity in the process of administration of Justice. We are committed constitutionally to ensure justice and fairness in our dispositions and even though the results may not be immediate, the mosaic of colours will surely be visible on the horizon for all of us to see. As Martin Luther King, Jr., reminded us that "the arc of the moral universe is long, but it bends toward justice."

LEGAL JOTTINGS

"It is necessary for every judge to remember constantly and continually that our Constitution is not a non-aligned national charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function."

P.N. Bhagwati, J. In S.P. Gupta v. Union of India, 1981 Supp SCC 87, para 27

CRIMINAL

Supreme Court Judgments

Special Leave Petition (Crl.) No. 6220 of 2018
Md. Alfaz Ali v. State of Assam
Decided on: September 14, 2021

Hon'ble Supreme Court bench comprising Justices L Nageswara Rao and BR Gavai , while disposing two special leave petitions, in which the court had issued a limited notice on the question of propriety of specifying rigorous imprisonment while imposing life sentence has reiterated that a sentence of imprisonment for life means rigorous imprisonment for life.

The special leave petitions were filed challenging two judgments of High Courts which upheld the conviction and sentence of petitioners for the offence of murder under Section 302 of the Indian Penal Code. It was observed that the issue has been settled in Naib Singh v. State of Punjab &Ors (1983) 2 SCC 454.

"By taking into account the earlier judgments of this Court in Pandit Kishori Lal v. King Emperor 3 and Gopal Vinayak Godse v. State of Maharashtra, this Court in Naib Singh's case held that the sentence of imprisonment for life has to be equated to rigorous imprisonment for life. The law laid down by this Court in Naib Singh's was followed by this Court in three judgments Dilpesh Balchandra Panchal v. State of Gujarat, Sat Pal alias Sadhu v. State of Haryana 5 and Mohd. Munna v. Union of India."

Accordingly, the SLPs were dismissed.

Criminal Appeal No .963 Of 2021
Sadique v. State of Madhya Pradesh
Decided on: September 07, 2021

Hon'ble Supreme Court Bench comprising Justices Uday Umesh Lalit, S. Ravindra Bhat and Belam M Trivedi, held that magistrates would not be competent to extend the time to complete investigations in UAPA cases. The only competent authority to consider such request would be "the Court" as specified in the proviso in Section 43-D (2)(b) of the UAPA.

In the factual matrix of the case, Chief Judicial Magistrate, Bhopal while dismissing the application for grant of bail , had also granted extension sought in an application moved by the Investigating Machinery under Section 43-D(2)(b) of the UAPA. The High Court upheld these orders holding that the period available for the Investigating Machinery to complete the investigation stood extended to 180 days.

Taking note of the decision in Bikramjit Singh vs. State of Punjab (2020) 10 SCC 616, the bench observed as follows:

After considering various provisions of the relevant statues, it was concluded that "so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D (2)(b) is nonexistent". Consequently, in so far as "Extension of time to complete investigation" is concerned, the Magistrate

would not be competent to consider the request and the only competent authority to consider such request would be "the Court" as specified in the proviso in Section 43-D (2)(b) of the UAPA.

With this observation, the Hon'ble Court held that the accused are entitled to default bail and thus allowed the appeal.

Cra 876 Of 2021
Shakuntala Shukla v. State of Uttar Pradesh
Decided on: September 07, 2021

Hon'ble Supreme Court Bench comprising Justices DY Chandrachud and Mr Shah while allowing an appeal filed by widow of deceased against the Allahabad High Court order granting bail pending appeal to murder accused. explained the 'importance of judgment; purpose of judgment and what should be contained in the judgment'. It was observed that a judgment should have clarity, both on facts and law and on submissions, findings, reasoning's and the ultimate relief granted. What the court says, and how it says it, is equally important as what the court decides.

The court said it has come across many judgments which lack clarity on facts, reasoning and the findings. "*Many a times it is very difficult to appreciate what the learned judge wants to convey through the judgment and because of that, matters are required to be remanded for fresh consideration.*®the bench observed. Delving into the term "Judgment", the Hon'ble Court observed as follows:*"9.2 First of all, let us consider what is "judgment". "Judgment" means a judicial opinion which tells the story of the case; what the case is about; how the court is resolving the case and why "Judgment" is defined as any decision given by a court on a question or questions or issue between the parties to a proceeding properly before court. It is also defined as the decision or the sentence of a court in a legal proceeding along with the reasoning of a judge which leads him to his decision. The term "judgment" is loosely used as judicial opinion or decision. Roslyn Atkinson, J., Supreme Court of Queensland, in her speech once stated that there are four purposes for any judgment that is written: i) to spell out judges own thoughts; ii) to explain your decision to the parties; iii) to communicate the reasons for the decision to the public; and iv) to provide reasons for an appeal court to consider*."

It was further observed that It is not adequate that a decision is accurate, it must also be reasonable, logical and easily comprehensible. The judicial opinion is to be written in such a way that it elucidates in a convincing manner and proves the fact that the verdict is righteous and judicious. What the court says, and how it says it, is equally important as what the court decides.

"Every judgment contains four basic elements and they are (i) statement of material (relevant) facts, (ii) legal issues or questions, (iii) deliberation to reach at decision and (iv) the ratio or conclusive decision. A judgment should be coherent, systematic and logically organised. It should enable the reader to trace the fact to a logical conclusion on the basis of legal principles."

It was also observed **"***It is not adequate that a decision is accurate, it must also be reasonable, logical and easily comprehensible. The judicial opinion is to be written in such a way that it elucidates in a convincing manner and proves the fact that the verdict is righteous and judicious. What the court says, and how it says it, is equally important as what the court decides.*

In this case, the bench, referring to the High Court order, noted that the order granting bail to the accused pending appeal lacks total clarity on which part of the judgment and order can be said to be submissions and which part can be said to be the findings/reasonings and a detailed counter affidavit which was filed on behalf of the State opposing the bail pending appeal has not been even referred to by the High Court.

CrA 940-941 of 2021
Gumansinh @ Lalo @ RajuBhikhabhaiChauhan v. State Of Gujarat
Decided on: September 03, 2021

The Supreme Court bench comprising Justices S. Abdul Nazeer and Krishna Murari, observed that to attract the presumption as to abetment of suicide by a married woman u/s 113-A of the Evidence Act, three conditions are required to be fulfilled viz: that the woman has committed suicide, such suicide has been committed within a period of seven years from the date of her marriage and that the charged-accused had subjected her to cruelty. If all the three conditions stand fulfilled, presumption can be drawn against the accused and if he could not rebut the presumption by leading evidence, he can be convicted.

In the factual matrix, the prosecution case against the accused was that his wife committed suicide by consuming poison at her matrimonial home for the sole reason that she was unable to bear the continuous mental and physical cruelty meted out to her by him and his relatives. This happened within a short span of eight months of marriage. The Trial Court convicted the accused under Section 498 A (Cruelty) and 306 (Abetment to suicide) of Indian Penal Code. The conviction was upheld by the High court.

It was also observed that the evidentiary value of the close relatives/ interested witness is not liable to be rejected on the ground of being a relative of the deceased and that the Court in its appreciation of the evidence of any interested witness, has to be very cautious in weighing their evidence or in other words, the evidence of an interested witness requires a scrutiny with utmost care and caution.

On the charge of Section 306 IPC, the bench noted that the prosecution has placed reliance on Section 113-A of the Evidence Act to establish the charge of abetment against the accused.

"32. From the above observations, it becomes clear that to attract the applicability of Section 113-A of the Evidence Act, three conditions are required to be fulfilled:- i. The woman has committed suicide, ii. Such suicide has been committed within a period of seven years from the date of her marriage, iii. The charged-accused had subjected her to cruelty. 33. From the facts of the case at hands, all the three conditions stand fulfilled. There is no dispute about the facts that the deceased committed suicide within a period of seven years from the date of her marriage and charged-accused had subjected her to cruelty, as we have confirmed the findings of the Trial Court as well as High Court that prosecution has been successful in proving the charge of cruelty under Explanation (b) of Section 498-A IPC. It is no doubt correct that the existence and availability of the above said three circumstances are not to be invoked, like a formula, to enable the 18 presumption being drawn and the presumption is not an irrebuttable one,.", the bench said.

While dismissing the appeal, the Hon'ble Court referred to definition of 'shall presume' in Section 4 of the Evidence Act and made the observation:

36. The above definition of the words 'may presume' makes it clear that whenever the act provides that the Court may presume a fact, the said fact is to be regarded as proved, unless and until it is disproved. 37. Admittedly, in the case at hands, the evidence clearly establishes the offence of cruelty or harassment caused to the deceased and thus the foundation for the presumption exists. Admittedly the appellants have led no evidence to rebut the presumption.

Criminal Appeal No. 929 of 2021
Aman Preet Singh v. CBI
Decided on: September 02, 2021

Magistrate While Accepting Chargesheet Has To Invariably Issue Summons And Not Arrest Warrant: Supreme Court

Hon'ble Supreme Court bench comprising Justices Sanjay Kishan Kaul and M Sundresh observed that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. The Hon'ble Court observed that, while accepting charge-sheet, the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest.In case he seeks to

exercise the discretion of issuing warrants of arrest, he is required to record the reasons that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him, the court observed.

Factually, the Chief Judicial Magistrate (CBI), Bhubaneswar, in his order, observed that since the accused persons had been charge sheeted for Economic offences, it was appropriate to issue non-bailable warrants of arrest against the accused. Hon'ble Supreme Court, at the outset, observed that this is one more case based on a misconception and misunderstanding of Section 170 Cr.P.C. Hon'ble Court noticed the observations made by the Delhi High Court in *Court on its own Motion vs. Central Bureau of Investigation (2004) 72 DRJ 629* and observed that the directions contained therein are the guiding principle for a Magistrate while exercising powers under Section 170, Cr.PC. It was observed

"The Magistrate or the Court empowered to take cognizance or try the accused has to accept the charge sheet forthwith and proceed in accordance with the procedure laid down under Section 173, CrPC. It has been rightly observed that in such a case the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest. In case he seeks to exercise the discretion of issuing warrants of arrest, he is required to record the reasons as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. In fact the observations in Sub-para (iii) above by the High Court are in the nature of caution.

Insofar as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) 8 of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this"

It was further observed *"In our view, the purport of Section 170, Cr.PC should no more be in doubt in view of the recent judgment passed by us in Siddharth vs. State of Uttar Pradesh & Anr.*

High Court of Jammu & Kashmir and Ladakh Judgments

CRMC No.51/2018
Aasim Farooq Shah v. Mohammad Yousuf Hakeem & Anr.
Decided on: September 30, 2021

A Single Bench of Hon'ble High Court of J&K and Ladakh in a petition challenging the Order passed by Chief Judicial Magistrate, Srinagar, issuing directions to the crime branch to undertake enquiry into the complaint alleging commission of a non-cognizable offence decided the issue as to whether the Chief Judicial Magistrate had the jurisdiction to direct the Crime Branch, Kashmir, to undertake enquiry. Hon'ble Court observed that the expression "inquiry" is quite distinct from the expression "investigation". It was observed that the power to order enquiry can be passed only after taking cognizance of the offence. *"11) So, there is a clear distinction between expression "inquiry" and "investigation". While the inquiry can be directed by a Magistrate after taking cognizance of an offence and after recording preliminary statements of complainant and the witnesses, the investigation into a non-cognizable offence can be directed by a Magistrate at pre-cognizance stage authorizing the police to undertake investigation."*

CRMC No. 383/2018
Sushil Pandit v. State of J&K and another
Decided on: September 22, 2021

A Single Bench of Hon'ble High Court of Jammu & Kashmir And Ladakh, in a petition filed under section 561-A CrPC (now 482) for quashing FIR for commission of offence under section 505 RPC registered with Police Station, Pampore, Kashmir observed that mensrea is an essential ingredient of offence under section 505 RPC and as it provides a reasonable restriction on the fundamental right to freedom of speech and expression therefore the same is required to be strictly construed. Referring to case law in *Kedar Nath Singh v. State of Bihar, reported in AIR 1962 SC 955* and *Bilal Ahmad Kaloo vs. State of Andhra Pradesh, 1997 (3) Crimes 130 (SC)*, it was reiterated that mensrea is a necessary postulate for the offence under Section 505 IPC*." 16. Thus mensrea is an essential ingredient of offence under section 505 RPC and as it provides a reasonable restriction on the fundamental right to freedom of speech and expression therefore the same is required to be strictly construed. The intention to generate the consequences as envisaged by section 505 RPC must be forthcoming from the plain reading of the statement/report or rumour and should not left at the discretion of a particular person."*

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"Judges should be made of stern stuff unbending before the power, economic or political which alone would ensure fair and effective administration of justice. The officer exercising judicial power vested in him must be, of necessity, free to act upon his own conscience and without apprehension of personal consequences to himself or lure of retiral rehabilitation. The judges should be made independent of most of their restraints, checks and punishments which are usually called into play against other public officers and he should be devoted to the conscientious performance of his duties. Therefore, he must be free from external as well as internal pressures. The need for independent and impartial judiciary manned by persons of sterling character, impeccable integrity, undaunting courage and determination, impartiality and independence is the command of the constitution and call of the people.

K. Ramaswamy,J. In Kartar Singh v. State of Punjab, (1994) 3 SCC 569, para 412

CIVIL

Supreme Court Judgments

Civil Appeal No. 5819-5822 of 2021
Rajendra Bajoria v. Hemant Kumar Jalan
Decided on: September 21, 2021

Hon'ble Supreme Court Bench of Justices L. Nageswara Rao and BR Gavai observed that a court has to reject a plaint if it finds that none of the reliefs sought in it can be granted to the plaintiff under the law. In such a case, it will be necessary to put an end to the sham litigation so that further judicial time is not wasted. The Hon'ble Court observed that underlying object of Order VII Rule 11 of CPC is that when a plaint does not disclose a cause of action, the court would not permit the plaintiff to unnecessarily protract the proceedings.

In this case, a civil suit was filed by the plaintiffs before the Calcutta High Court claiming various reliefs in connection with assets and properties of a firm It was the case of the plaintiffs that in spite of demise of the three original partners of the partnership firm, through whom the plaintiffs were claiming, the defendants have been carrying on the business of the partnership firm. The defendants filed application seeking rejection of the plaint on

the ground that the plaint does not disclose any cause of action, and the relief as claimed in the plaint could not be granted. Hon'ble single bench dismissed these applications, but the same were allowed by the Division Bench. Aggrieved of the same, the appeal was preferred. Referring to the judgments in T. Arivandandam v. T.V. Satyapal (1977) 4 SCC 467 and Pearlite Liners (P) Ltd. v. Manorama Sirsi (2004) 3 SCC 172) ,the Apex Court observed:

15. It could thus be seen that this Court has held that reading of the averments made in the plaint should not only be formal but also meaningful. It has been held that if clever drafting has created the illusion of a cause of action, and a meaningful reading thereof would show that the pleadings are manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, then the court should exercise its power under Order VII Rule 11 of CPC. It has been held that such a suit has to be nipped in the bud at the first hearing itself.

Civil Appeal No. 5641 of 2021
Salim D. Agboatwala and others v. Shamal ji, Oddav ji Thakkar and others
Decided on: September 17, 2021

Hon'ble Supreme Court Bench comprising Justices Hemant Gupta and V Ramasubramaniam, while reversing a Bombay High Court's judgment which had upheld a civil court's order to reject a plaint, has held that a plaint cannot be rejected under Order VII Rule 11(d) of the Code of Civil Procedure if the issue of limitation is a mixed question of law and fact. The appeal before the apex Court was preferred after the plaint having been rejected by the trial court under Order VII Rule 11 (d) of the Code of Civil Procedure, 1908, and the said rejection having been confirmed by the High Court in a first appeal

Specifically with regard to the issue of limitation, the Supreme Court noted that the plaintiffs had raised a contention that the suit was filed within the period of limitation from the date they got knowledge about the order of Agricultural Lands Tribunal and the truthfulness of the claim was a triable issue, and should not have been rejected at the threshold itself.¦*...the rejection of plaint under Order VII Rule 11 is a drastic power conferred on the Court to terminate a civil action at the threshold. Therefore, the conditions precedent to the exercise of the power are stringent and it is especially so when rejection of plaint is sought on the ground of limitation. When a plaintiff claims that he gained knowledge of the essential facts giving rise to the cause of action only at a particular point of time, the same has to be accepted at the stage of considering the application under Order VII Rule 11",* the Supreme Court observed. The appeal was accordingly allowed and the judgment and decree of the Trial Court as well as the High Court were set aside and the suit was restored to file.

Civil Appeal No. 5577 Of 2021
T.V. Ramakrishna Reddy Vs. M. Mallappa
Decided on: September 07, 2021

Hon'ble Supreme Court Bench comprising of Justices L. Nageswara Rao and B.R. Gavai observed that a suit simpliciter for permanent injunction without claiming declaration of title is maintainable only in cases where the plaintiff's title is not in dispute or under a cloud. The bench observed that if the matter involves complicated questions of fact and law relating to title, the court has to relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

The observation was made in the Special Leave Petition wherein the appellant -/plaintiff had challenged the judgment and order passed by the learned single judge of the High Court of Karnataka at Bengaluru dated 19.3.2020. The plaintiff/-appellant had filed a suit for grant of perpetual injunction against the defendants before the Trial Court restraining them or anybody claiming through them from interfering with the plaintiff's peaceful possession and enjoyment of the suit property. The Trial Court decreed the suit aggrieved whereof Regular First Appeal was preferred before the High Court of Karnataka at Bengaluru. The learned single judge of the Karnataka

High Court found that in the facts and circumstances of the case, the suit simpliciter for permanent injunction without seeking a declaration of title was not tenable and as such, allowed the appeal and set aside the decree. Being aggrieved thereby, an appeal by way of special leave was filed before the Apex Court

The Hon'ble Bench referred to Anathula Sudhakar v. P. Buchi Reddy (dead) (2008) 4 SCC 594, and observed as follows:

"10. *It could thus be seen that this Court in unequivocal terms has held that where the plaintiff's title is not in dispute or under a cloud, a suit for injunction could be decided with reference to the finding on possession. It has been clearly held that if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.. No doubt, this Court has held that where there are necessary pleadings regarding title and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. However, it has been held that such cases are the exception to the normal rule that question of title will not be decided in suits for injunction.*"

Reference was also made of the judgment in Jharkhand State Housing Board v. Didar Singh (2019) 17 SCC 692, in which it was held that when the defendant raises a cloud over the title of the plaintiff, a suit for bare injunction is not maintainable. While dismissing the appeal the court said: "*In the facts of the present case, it cannot be said at this stage that the dispute raised by the defendant No. 2 with regard to title is not genuine nor can it be said that the title of the plaintiff- appellant over the suit property is free from cloud. The issue with regard to title can be decided only after the full- fledged trial on the basis of the evidence that would be led by the parties in support of their rival claims.*

SLP(C) 13146/2021
Jitendra Singh v. State of Madhya Pradesh

Decided on: September 06, 2021

A Special Leave Petition was preferred before the Apex Court against the decision of Madhya Pradesh High Court wherein the Hon'ble High Court in a petition filed by some parties, set aside the order of Additional Commissioner, Rewa Division, Rewa, who had directed to mutate the name of the petitioner in the revenue records, on the basis of a will produced by him and directed the petitioner to approach the appropriate court to crystallise his rights on the basis of the alleged will dated, Hon'ble Supreme Court Bench comprising Justices MR Shah and Aniruddha Bose, while upholding the High Court judgment dismissed the Special Leave Petition and observed that mutation entry in the revenue record is only for fiscal purposes and does not confer any right, title or interest in favour of a person. It was observed that

*"If there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to approach the appropriate civil court/court and get his rights crystallized and only thereafter on the basis of the decision before the civil court necessary mutation entry can be mad*e, the bench of observed.

'5. Be that as it may, as per the settled proposition of law, mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose. As per the settled proposition of law, if there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to approach the appropriate civil court/court and get his rights crystallised and only thereafter on the basis of the decision before the civil court necessary mutation entry can be made",

The court referred to the judgment in *Balwant Singh v. Daulat Singh (D) (1997) 7 SCC137*; *Suraj Bhan v. Financial Commissioner, (2007) 6 SCC 186* and a catena of judicial precedents to reiterate the point.

"Though the first suit is between the same parties, but the subject matter is not the same. For res judicata to apply, the matter in the former suit must have been alleged by one party and either denied or admitted, expressly or impliedly by the other. Since the issue in the suit was restricted to 4971.5 sq. 36 yards, the decree would be binding qua to that extent only. The issue cannot be said to be barred by constructive res judicata as per Explanation IV as it applies to the plaintiff in a later suit. The appellants have denied the claim of the plaintiffs in the first suit to the extent that it was the subject matter of that suit alone. Therefore, the decree in the first suit will not operate as res judicata in the subsequent matters", the court observed.

High Court of Jammu & Kashmir and Ladakh Judgments

CR no. 22 of 2021
Mohammad Ashraf Shah and anr v. Zahoor Ahmad Shah
Decided on: September 28, 2021

A Single Bench of Hon'ble High Court Of Jammu & Kashmir and Ladakh while deciding a Civil Revision, wherein the petitioners had challenged and sought the setting aside of the order passed by the court of learned City Judge (Sub Judge), Srinagar by virtue of which the trial court had granted permission to the respondent/ plaintiff to amend the suit despite the fact that the main suit was not maintainable observed and reiterated that no revision will lie against an order which is interim in nature and does not finally decide the lies. Referring to case law *Manohar Lal v. Romesh Chander reported as 2012 (1) JKJ 411*, It was observed that *"23. There are absolutely no two opinions about the maintainability of a revision petition when it questions the order which is of interim nature and does not decide the suit. The proviso to Section 115 CPC provides in unambiguous terms that no revision will lie against an order that has not decided the suit as a whole or by virtue of which the proceedings do not get culminated. 24. The further interpretation of the proviso attached with Section 115 of the CPC is made by this Court in case titled Manohar Lal v. Romesh Chander reported as 2012 (1) JKJ 411 holding that no revision will lie against an order which is interim in nature and does not finally decide the list."*

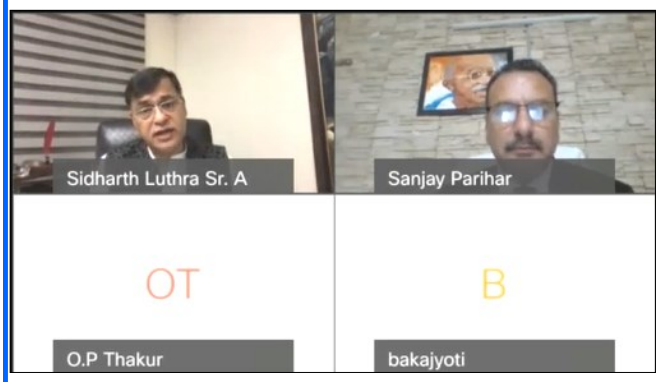
CR No. 05/2017
Mst. Rafiqa Begum & ors v. Mst. Sarwa Begum &ors
Decided on: September 17, 2021

In a revision petition against the order of Ld. Sub-Judge Sopore by virtue of which application filed by the petitioners under Order VII Rule 11 of CPC was dismissed, Hon'ble High Court of Jammu & Kashmir and Ladakh observed that while deciding the application under Order VII Rule 11, only the averments made in the plaint are to be considered. Referring to the case law *Popat and Kotecha Property V. State Bank of India Staff Association,' 2005 (7) SCC 510* and *Saleem Bhai V. State of Maharashtra and others', 2003 (1) SCC 557* in reference to the scope of Order VII Rule 11 CPC, it was observed by the Hon'ble Court that the plea of limitation is a mixed question of law and the fact and very strict application of Order VII Rule-11(d) CPC is required to be met in order to reject the claim. Further observed that *"The issue regarding limitation in the suit, therefore, is a mixed case of law and facts and, as such, the claim of the plaintiffs regarding cause of action at this stage has to be accepted and it cannot be said that the suit is barred by limitation in view of the law laid down by Hon'ble the Supreme Court in M/s Shakti Bhog Food Industries V. The Central Bank of India and another, 2020 online SCC 137, has held that: "13. It is well established position that the cause of action for filing a suit would consists of bundle of facts. Further, the factum of suit being barred by limitation, ordinarily, would be a mixed question of fact and law. Even for that reason, invoking Order VII Rule 11 of the CPC is ruled out."*

ACTIVITIES OF THE ACADEMY

Webinar on "Emerging Trends in Victimology –Striking balance with Pardons, Remissions and Sentencing.

J&K Judicial Academy organized a Webinar on "Emerging Trends in Victimology



–Striking balance with Pardons, Remissions and Sentencing for Munsiffs on 10th September, 2021 for Judicial Officers of Union Territories of J&K and Ladakh. Sh. Siddharth Luthra, senior Advocate, Supreme Court of India was the Resource person in the webinar.

The Resource person in his discourse during the session, apprised the attendees about the importance of facts, Law and application of law to the facts in the Legal field. He also laid stress on self training for the purpose of visualizing, identifying the evidentiary facts relevant for a material fact. He also explained the procedure of breaking down a statute into its elements and sub elements. The Resource person also dealt with the procedure involved in Trials in both cognisable as well as non cognisable offences. The proceedings of the programme were moderated by Sh. Sanjay Parihar, Director J&K Judicial Academy.

The training programme/workshop was informative as well as interactive wherein the queries of the participants were duly responded.

One Day Training Programme on:(A) Personality Development, a pursuit of justice (B) Leadership role of a Judge as captain of ship in the trial court

J&K Judicial Academy organized One Day Training Programme on:(A) Personality Development, a pursuit of justice (B) Leadership role of a Judge as captain of ship in the trial court on 18th September, 2021

for Munsiffs of Kashmir Province at J&K Judicial Academy, Srinagar Campus.

The training programme was inaugurated Hon'ble Mr Justice Sanjay Dhar, Judge, High Court of J&K and Ladakh and member, Governing Committee, J&K Judicial Academy in the august presence of Hon'ble Mr Justice Muzaffar Hussain Attar, Former Judge, High Court of J&K who was the resource person for the programme and Mr. Mohammad Akram Choudhary, Principal D&S Judge, Srinagar.

Justice Sanjay Dhar in his inaugural address laid stress on inculcating the values and virtues of independence, impartiality, moral stability, ethics, empathy and precision in pursuit of Justice. He also laid emphasis on maintaining the high standards of integrity personally and in professional lives. Justice Muzaffar Hussain Attar described judging as a divine service towards society and stated that a judge has to be a role model for the society and should tirelessly defend justice. He advised them to develop capacity of self-restraint and self-abstention and rise above personal urges, needs and desires. Judges must guard against the temptations both inside and outside the court rooms. The programme concluded with vote of thanks by Mr. Sanjay Parihar, Director, J&K Judicial Academy.

4th Phase of Training for Advocate Master Trainers on e-Court Services

J&K Judicial Academy organized 4th Phase of Training for Advocate Master Trainers on e-Court Services on 23rd September, 2021 at J&K Judicial Academy in Srinagar in collaboration with Information

Technology Committee, High Court of J&K and Ladakh. Hon'ble Mr. Justice Ali Mohammad Magrey, Judge High Court of J&K and Ladakh

and Chairman IT Committee inaugurated the Training Programme.

In his inaugural address, Justice Magrey laid stress on making best use of e-Court services to ensure speedy justice delivery system. He said that the Judiciary has adopted all new technologies for vibrant functioning of e-Court services to ensure easy access to Justice. He also impressed upon advocates to make best use of the trainings and get benefitted out of these programmes. He also guided the participants regarding the functioning of e-Court services which is not only paperless from filing of cases to its disposal but also transparent, affordable, easily accessible and ensures speedy delivery of justice to the people. He expressed confidence that all concerned would play their role to ensure a vibrant e-Court system.

Principal District and Sessions Judge, Srinagar, Mr. Mohammad Akram Choudhary in his welcome address said that with remarkable team work, e- court services has turned into a successful project besides, milestones have been achieved in ensuring people friendly and easy access to litigants seeking justice. He stressed on making best use of trainings to ensure prompt disposal of pending cases

Mr. Sanjay Parihar, Director Judicial Academy presented Vote of Thanks on the occasion. The programme was also attended by Mr. M.K Sharma, member Secretary, J&K Legal Services Authority, Ms. Bala Jyoti, Sr. District Judge and other Judicial Officers at Srinagar District Headquarters. Mr. Umesh Sharma and Mr. Mir Wajahat, Master Trainers on e-Courts services were the resource persons who imparted training on overview of e-court project, electronic case management tools for advocates, e-court mobile services 24x7, service delivery in court complexes , e-filing of cases, virtual courts, video conferencing, document scanning, Pdf access, document uploading help desk for advocates and other related topics.

The programme was moderated by Mr. Anoop Kumar Sharma, CPC e-courts project and was attended personally as well as virtually and live streamed on Youtube also.

JUDICIAL OFFICERS' COLUMN

NEED FOR CONTINUING JUDICIAL EDUCATION

"Education is not the learning of facts but the training of mind" -Albert Einstein

Education is a lifelong and continuous process of learning, expansion of knowledge and skill sets. Whereas continuing education is an all-encompassing term with myriad connotations and facets, professional development is one species of the genus which strives to improve professional knowledge, competence, skill, and effectiveness. When the term is used in the judicial sphere and context, continuing judicial education is imperative for developing judicial competence, skill based knowledge thereby augmenting the performance of Courts ultimately resulting in improving the quality of justice.

It was observed in ***All India Judges' Association vs. Union of India (1993) 4 SCC 288:"*** *The Judicial service is not a service in the sense of 'employment'. Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. The Judges, at whatever level they may be, represent the State and its authority*

unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally". The prodigious trust invested on the judiciary by the Supreme Court, in fact lodges a huge responsibility on judicial shoulders to undertake persistent endeavors to enhance and maintain judicial competence and judicial training is seen as a crucial component of upgrading and elevating the quality of judicial performance by helping judges to acquire the tools for professional competence. The need for judicial education and its continuance throughout professional journey has been strongly recognized by various Law Commission reports, deliberative discourses of the intelligentsia and the obiter dicta of the Courts. While as the ultimate objective of Judicial Education is to herald judicial reforms through amplification of the cannons of competence, impartiality and efficiency, it is also a vehicle of social engineering through the tool of justice. The human resources of the Judiciary therefore must be not only willing but rather enterprising in response to all pursuits of institutional training including field trainings. Proposing topics for interactive discussions, providing astute feedbacks and productively utilizing the pedagogical and learning material supplied by the training institution/ academy, are some ways of participating actively and conscientiously in the training/ refresher programmes. The training and development of the juridical faculties of a judicial officer therefore must be holistic and participative. Also, the institutes of training must devise and develop such types of programs which respond pragmatically to the general and complex judicial role in the contemporary and future legal landscape.

Training and development of the human resources must also focus on the the use of information technology. All institutions are modernizing their systems through the introduction of information technology. The importance of use of virtual platforms in particular and the information technology mechanism in general has been underpinned during the pandemic times and entire resource is indispensible for all times to come. However, there is an incessant need and urgency in upscaling the competence in this arena.

As a major supplement to the concept of continuing institutional judicial training, micro level training at District level under the direct supervision of the senior most judge of the district would be a productive exercise where regular interface with the peer groups and senior colleagues would ensure problem solving and dispelling of all queries and doubts employing interactive and mentoring techniques.

Judicial education is now an accepted part of judicial life in many countries. Back home, we have opened up to the concept of capacity building and undertaking measures of improving the quality of administration of justice. Judges must constantly get into the role as learners and continue receiving the education which is both obligatory on their part as well as is mandatory in all pursuits of Justice. That is of the essence for the actual implementation of all judicial reforms.

-Contributed by:
Ms. Swati Gupta
Sub-Judge,
J&K Judicial Academy.

THE PUBLIC POLICY

A critical analysis of judicial interpretations and statutory changes to the public policy ground under sections 34 & 48 of the Arbitration and Conciliation Act, 1996.

The 'public policy of India' ground for setting aside arbitral awards in India has gone through an extreme ebb and flow phase. Right from 1996, judicial interpretations gradually led to substantial expansion in the meaning of the

term until the Arbitration and Conciliation (Amendment) Act, 2015 decided to contract its meaning and liberate the arbitration process from excessive judicial intervention under sections 34 and 48. This article seeks to trace the judicial history and conclude by discussing the present construction of the term 'public policy of India' post the amendments carried out in 2015.

THE EXPANSION PHASE:

Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 as it stood originally provided that an arbitral award could be set aside if it is in conflict with the 'public policy of India'. An explanation immediately following the provision provided that 'without prejudice to the generality of sub-clause (ii)', an award would be in conflict with public policy of India if making of the award was induced or affected by fraud, corruption, or made in violation of sections 75 or 81 of the Act. The preservation of generality in sub-clause (ii) meant that there were no statutory fetters on the expanse of the term *'public policy of India'* and the same was left open to judicial interpretations and creativity.

Renusagar Power Co. Ltd. v. General Electric Co.

To understand how the expansion transpired after enactment of the 1996 Act, it is important to recede a bit into the pre-1996 regime under which foreign awards were enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. There, the enforcement of a foreign award could be refused if an award was found to be contrary to *'public policy'*. The Supreme Court in Renusagar Power Co. Ltd. v. General Electric Co. (1994 Supp(1) SCC 644) construed the term to include three sub-grounds, namely, *(i) the fundamental policy of Indian law; (ii) the interest of India and (iii) justice and morality*. Examples were given where disregarding orders of superior courts was considered contrary to fundamental policy of Indian law, violation of an economic legislation like FERA was considered contrary to interest of India but violation of a simple statute was considered not to be contrary to the interest of India and thus not contrary to public 1994 Supp (1) SCC 644 policy. Therefore, all these aspects were covered in the '*public policy'* on account of the expression *'without prejudice to the generality of sub-clause (ii)'* used in explanation to section 34(2)(b)(ii).

ONGC v. Saw Pipes

Coming back to the position after enactment of the 1996 Act, the general expanse of the term '*public policy of India'* used in sections 34 and 48 of the Act should nonetheless have been confined to the interpretation made in Renusagar apart from the grounds of fraud, corruption and violation of sections 75 and 81 which had been specifically incorporated in the explanation to section 34(2)(b)(ii). This was so until the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes (2003) 5 SCC 705* decided to read a fourth sub -ground in addition to the three sub-grounds already propounded by Renusagar under the umbrella of *'public policy of India'*. The fourth expansive sub-ground thus read into was, (iv) patent illegality. While explaining this newly introduced sub-ground, the Supreme Court held that the patent illegality in order to render an award contrary to public policy and thus incapable of being enforced must go to the root of the matter and not be of trivial nature. It should be so unfair and unreasonable that the conscience of the court is shook. It held that an award would be patently illegal if it is contrary to the substantive provisions of any law including the Arbitration Act or against the terms of the contract among other things. This judgment of the Supreme Court caused some unintended effects which became a major reason for amending the Act in 2015.

This aspect is discussed in greater detail in the later part of this article.

ONGC v. Western Geco

Even though the interpretation of the term *'public policy'* had expanded by a substantial degree in Renusagar and Saw Pipes, the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Western Geco (2014) 9 SCC 263* further enlarged its coverage by interpreting the expression *'the fundamental policy of Indian law*', the first sub-ground that was read into the meaning of '*public policy'* in Renusagar. The court opined that the purport of the expression *'fundamental policy of Indian law'* could not be exhaustively enumerated but referred to three distinct and fundamental principles that must necessarily be understood as part and parcel of the expression. The first of these principles was '*judicial approach'*, meaning that the tribunal must decide the dispute in a fair, reasonable and objective manner and not be guided by extraneous considerations. The second consideration was adherence to the '*principles of natural justice'* which subsumes the audi alteram partem rule and the application of mind demonstrated by a reasoned award. The third consideration was that the award should *'not be perverse or so irrational that no reasonable person would have arrived at it'.* As the three principles were further incorporated into the meaning of the expression *'the fundamental policy of Indian law'* without placing any limits on the extent and type of inquiry that could be conducted by a court to test the award on these principles, it left ample scope for the courts to review the merits of the dispute and venture into examination of the evidence on the basis of which the tribunal passed the award.

Associate Builders v. DDA

While the two-judge bench of the Supreme Court in *Associate Builders v. Delhi Development Authority (2015) 3 SCC 49* was posed with the precedential burden of the three-judge bench judgment in Western Geco, it appeared cognizant of the problems that the earlier judgments had caused by allowing unfettered inquest into merits of the dispute and the resultant invasive interference by the courts akin to appellate jurisdiction which was never the intention of legislature. Therefore, while remaining within the bounds of judicial propriety, the court made an effort to mitigate the effects of Western Geco and summarise the expanse of '*public policy of India'* according to the judicial precedents at that time. In doing so, the court formally recognised that merits of an arbitral award could be looked into only under specified circumstances where the award is in conflict with the public policy of India. While summarising the exposition of the ground '*public policy of India'*, the court referred to Western Geco and held that the first sub-ground *'fundamental policy of Indian law'* would comprise of compliance with *(i) the statutes and judicial precedents; (ii) judicial approach; (iii) principles of natural justice and (iv) Wednesbury reasonableness principle.* While elaborating the Wednesbury reasonableness principle, the court held that an award would be in conflict with the same and thus '*perverse'* if based on *no evidence, irrelevant evidence or in ignorance of vital evidence*. While expounding the second sub-ground of '*interest of India',* it held that an award could be set aside if it is contrary to the interests of India. It was observed that this ground may need to evolve on a case-by-case basis. With respect to the third sub-ground of '*justice or morality',* the court held that an award is against '*justice*' when it shocks the conscience of the court and against *'morality'* when it is against mores of the day. With regard to the fourth sub-ground of 4 (2015) 3 SCC 49 '*patent illegality*', the court relied upon Saw Pipes and held that it entails *(i) contravention of substantive law of India; (ii) contravention of Arbitration and Conciliation*

Act, 1996 and (iii) contravention of the terms of the contract.

Though the court held that *the arbitrator has the last word on facts, yet its observation that the merits of an arbitral award are to be looked into under certain specified circumstances* kept open a wider scope for the courts to intervene. In a way, the court rendered the scope of section 34(2)(b)(ii) larger than the sum of its parts.

THE CONTRACTION PHASE:

For almost a period of two decades since the enactment of the 1996 Act, while the courts were increasingly liberal in their interpretation of the term '*public policy of India'*, tension was being felt on the policy and legislative sides due to the increasingly invasive intervention of courts with the arbitral awards under sections 34 and 48. At the time of passing of the amendments in 2015, India's rank in contract enforcement stood at 178 out of the 189 nations of the world (Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Bill, 2015). The seeds of the contraction phase of the '*public policy of India'* were sown with the publication of the 246th Report of the Law Commission of India in August, 2014 and its Supplementary Report in February, 2015 which aimed at improving the ease of doing business in India and attracting investment.

Reports of the Law Commission of India

A combined reading of the aforementioned Reports reveals that the 1996 Act was enacted with a view to develop arbitration as a more user-friendly, cost effective and expeditious process of dispute resolution with least court intervention. However, the wider interpretation of the '*public policy of India'* by the courts had led to increase in interference of courts and delay in disposal of arbitration proceedings, both of which were defeating the very purpose of the Act. The 246th Report of the Law Commission of India noted the fact that the judgments in *Saw Pipes, Western Geco and Associate Builders* had unduly expanded the meaning of the '*public policy of India'*.

The 246th Report of the Law Commission of India also noted an unintended consequence of *Saw Pipes* wherein the ground of '*patent illegality'* which should have been confined only to purely domestic arbitral awards (India-seated with Indian parties) had been impliedly extended Statement of Objects and Reasons, Arbitration and Conciliation (Amendment) Bill, 2015 to domestic awards in international arbitrations (India-seated with atleast one foreign party) and foreign awards (foreign-seated). The Law Commission using *these expressions* commented that such a position was in conflict with the best global practices wherein the legitimacy of judicial intervention in case of a purely domestic award is considered to be far more than in a case in which the court is examining correctness of a domestic award in an international arbitration or a foreign award. It was in this background that the aforementioned Reports of the Law Commission recommended various amendments to the Act.

Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Act, 2015 made various changes in sections 34 and 48 of the Act in order to restrict the meaning of the term '*public policy of India'* and exhaustively enumerate its purport. The key changes brought in 2015 were:

a. The explanation to section 34(2)(b)(ii) which previously opened with the expression '*without prejudice to the generality of sub-clause (ii)*' and gave a great leeway to the courts in interpreting

'public policy of India' was substituted by an exhaustive expression, '*an award is in conflict with public policy, only if*', thus restricting the scope of the term.

b. The original provision as it stood in 1996 read with *Renusagar and Saw Pipes* had meant '*public policy of India'* to include (i) fraud, corruption or violation of sections 75 or 81; (ii) fundamental policy of Indian law; (iii) interest of India; (iv) justice and morality and (v) patent illegality. The amendment abridged the term to include only (i) fraud, corruption or violation of sections 75 or 81; (ii) fundamental policy of Indian law and (iii) most basic notions of morality and justice. The 'interest of India' was deleted and the 'patent illegality' was separated from the public policy of India.

c. While *Western Geco and Associate Builder* had allowed the courts to review the merits of the dispute to test if an award is in conformity with the 'fundamental policy of Indian law', the amendment inserted explanation 2 to section 34(2)(b)(ii) and specifically provided that the test as to whether there is contravention with the fundamental policy of Indian law *'shall not entail a review on the merits of the dispute'*.

d. The changes noted in points a, b and c above were also incorporated in section 48 which deals with enforcement of foreign awards (foreign-seated).

e. *Saw Pipes* while introducing the sub-ground of 'patent illegality' under the ground of 'public policy of India' had the unintended consequence of extending it to domestic awards in international arbitrations (India -seated with atleast one foreign party) and foreign awards (foreign-seated) also instead of confining it to purely domestic arbitral awards (India-seated with Indian parties). Section 34 was amended and sub-section (2A) was added to accomplish three objectives. First, 'patent illegality' was separated from 'public policy of India'. Second, 'patent illegality' was consciously confined to purely domestic arbitral awards (India-seated with Indian parties) and made inapplicable to domestic awards in international arbitrations (India-seated with atleast one foreign party). Similarly, 'patent illegality' ground was made inapplicable to foreign awards (foreign-seated) by consciously not incorporating anything *pari materia* with section 78(6A) in section 48 occurring in Part II of the Act which deals with the grounds for refusing enforcement of foreign awards. Third, the scope of 'patent illegality' was further reduced by adding a proviso to section 34 (2A) clarifying that '*an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence'.*

f. *Saw Pipes* while introducing the sub-ground of '*patent illegality*' under the ground of '*public policy of India'* had also commented that an award would also be patently illegal if it is found to be against the terms of the contract. This interpretation was supported by section 28(3) as it stood originally in the 1996 Act which provided that an arbitral tribunal shall decide a dispute '*in accordance with the terms of the contract'.* Section 28(3) was amended in 2015 and now provides that while deciding and making an award, the arbitral tribunal shall *'take into account the terms of contract'*. Greater leeway has now been given to the arbitrators for taking into account contract clauses while deciding the disputes *instead of deciding strictly in accordance with them.* This further diminishes a ground for judicial intervention with an arbitral award under section 34.

Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India

The Supreme Court in *Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India* (645[3]) 59 SCC 575 took judicial note of the amendments carried out in 2015 and made important remarks regarding their effect on the meaning of '*public policy of India'* as interpreted in Renusagar, Saw Pipes, Western Geco and Associate Builders. The court noted that the scope of the term '*public policy of India'* has now become even tighter than the Renusagar position inasmuch as the obscure ground of '*interest of India'* is no more its part and parcel.

For domestic arbitral awards (Indian seated arbitrations)

The court in *Ssangyong* held that the broad interpretation of '*fundamental policy of Indian law'* as propounded in *Western Geco* and followed in *Associate Builders* has now been rendered obsolete. It now entails only (*i) disregarding orders of superior courts (Renusagar) and (ii) principles of natural justice (Western Geco).* The court held that the ground of non-adoption of judicial approach has been discarded as permitting the same would necessarily entail a review on merits of the dispute which it found to be now prohibited by explanation 2 to section 34(2)(b)(ii) introduced by the amendment.

The court observed that the 'interest of India' is no more a ground of challenge post 2015 amendment and that the ground '*justice or morality'* would now have to be construed as a conflict with the *'most basic notions of morality or justice'.* Only the arbitral awards that utterly shock the conscience of the court are against *'justice*' and the awards which are against the mores of the day and thus shock the conscience of the court are against '*morality*' and can be set aside on such counts.

Further, the court noted that insofar as purely domestic (India-seated with Indian parties) arbitral awards are concerned, the ground of '*patent illegality'* has gained statutory recognition by insertion of section 34(2A). It elaborated that the *'patent illegality'* in order to be fatal must go to the root of the matter and any challenge on this ground cannot be made merely on account of erroneous application of law like transgression of an Indian statute not linked to public policy. This was a departure from what had been stated in *Saw Pipes and followed in Associate Builders*. The court noted that re-appreciation of evidence by the court under this ground is prohibited. Further, the court enumerated the circumstances under which this ground may be 6 (2019) 15 SCC 131 invoked as being the arbitrator's (i) failure to give reasons in the award in violation of section 31(3) of the Act; (ii) taking of an impossible view in construction of the terms of the contract; (iii) transgression of his jurisdiction and dealing with matters not referred to him; and lastly (iv) making of a perverse finding based on no evidence, ignorance of vital evidence or on basis of documents taken as evidence behind the back of a party.

For foreign arbitral awards (foreign seated arbitrations)

While discussing the international jurisprudence on the enforceability of foreign awards, the court applied the standard of non-interference by courts on merits with even greater force. Relying on Renusagar, the court took support from the fact that sections 34 and 48 of the Arbitration and Conciliation Act, 1996 are borrowed from Article V of the New York Convention *(Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958)* which does not postulate any challenge to an award on merits. It noted that such a position has been approved by the torchbearers of international arbitration

jurisprudence around the globe and particularly the UNCITRAL Guide (*UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)(2016 Edn.))* on the New York Convention. Therefore, it held that the scope for setting aside a foreign award is extremely narrow and no refusal in enforcement can be made by going into merits and finding errors of fact or law made while passing of the award. The notion of '*public policy of India'* in relation to foreign awards has to be construed narrower than its construction in the domestic context in line with the international practices.

CONCLUSION:

After almost two long decades of meandering, the confines of '*public policy of India' h*ave been interpreted adequately to strike a cordial balance between arbitration, a process which respects party autonomy and the right of the enforcing jurisdiction, India, to honour its public policy in cases where there is gross violation of the same. However, the situation continues to remain precarious as there still remains ample scope for mischief. One such example was recently seen in the judgment of the Supreme Court in *NAFED v. Alimenta SA AIR 2020 SC 2681*, wherein the court refused to enforce a foreign award after disregarding the arbitrator's findings on the basis of erroneous application of law. It not only perused a clause of the contract in abundant detail, but went to the extent of exploring the minutes of telex exchanges between the parties and the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 8 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016 Edn.) 9 AIR 2020 SC 2681 Government, thus conducting an in-depth inquiry into merits of the dispute. Be that as it may, the judgment in Alimenta is largely seen as a departure from the now well-settled narrow interpretation of *'public policy'* in line with the New York Convention, 1958 and the international jurisprudence. *Ssangyong* which has been subsequently followed the Supreme Court in its decision in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors. 2020 11 SCC 1* which dealt with enforcement of a foreign award continues to be the authoritative judgment on the scope of '*public policy of India'* ground under sections 34 and 48 of the Arbitration and Conciliation Act, 1996.

-Contributed by:
Mr. Sakal Bhushan,
a Delhi-based Advocate.