J&K JUDICIAL ACADEMY
e-NEWSLETTER

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From the Editor's Desk

"At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom."*-Pt. Jawaharlal Nehru, in his famous "tryst with destiny" speech on 15 August 1947 at Parliament House, in New Delhi.*

Bharat, that is India, observed its 76th Independence Day on August 15, 2022, to commemorate 75 years of independence from centuries of exploitative colonial capture. Amidst euphoric celebrations marking the momentous occasion, the nation has been revisiting the essence of patriotism as a common monochrome us-hued thread running through all of us -irrespective of the Gods that we worship or the faiths that we follow. It was indeed gratifying to see *the* overflowing fervor *of nationalism in the preceding month with the bedazzling sight of t*he national flag fluttering high with a sense of pride, mightily powered by the heroism of our great freedom fighters and the supreme sacrifices of unsung heroes of the freedom struggle, with its horizontal tricolors viz saffron, white and green, spread in equal ratio, fervently signifying strength, peace, and growth thereby symbolizing the objectives and values that we all stand for in the collective task of nation-building and development. In March 2021, we began the *'Azadi ka Amrit Mahotsav'* to reminisce the noble vision underlying the freedom struggle, and thereafter, the *'Har Ghar Tiranga Abhiyan'* piqued the nationalistic sentiment across all diversities of the country reinforcing "Unity", which is the essence of our ancient civilization. The country has come a long way since the era of authoritative suppression and the horrors of partition, to establish itself as the world's largest democracy and to register stellar growth in the sectors of information technology, accessible and affordable health care, agriculture production, economy, nuclear & space technology, education, infrastructure, et al, cumulatively having a considerable impact on the overall living standards of its people. But in the exuberant *joie de vivre* that the nation is gripped with and understandably so on the attainment of a milestone, we must perceive independence to be a holistic concept, comprehensively encompassing all sectors of the society including those facing disconnection, exclusion and marginalization from the social mainstream. There is also an incessant need and urgency to strategically tackle the ubiquitous challenges that are deeply pervasive in the socio-economic landscape significantly blurring the vision of a truly free and independent Bharat. The clarion call by the first prime Minister on the eve of independence for no resting for any one of us till we make all the people of India what destiny intended them to be, is to be resonated homogenously so that we redeem the solemn resolve of constituting India into a sovereign, socialist, secular, democratic, republic securing

Justice, Equality, liberty, and Fraternity to all its citizens and take the nation to new and greater heights of glory, as conceived in the poetic imagination of Nobel laureate *Rabindranath Tagore* depicting his vision of a new and awakened India.

*"Where the mind is without fear and the head is held high, Where knowledge is free, Where the world has not been broken up into fragments by narrow domestic walls, Where words come out from the depth of truth, Where tireless striving stretches its arms towards perfection, Where the clear stream of reason has not lost its way Into the dreary desert sand of dead habit, Where the mind is led forward by thee Into ever-widening thought and action; Into that heaven of freedom, my Father, let my country awake."-**Chitto Jetha Bhoyshunno,Collection Gitanjali, 1913***

LEGAL JOTTINGS

"The purpose of judicial writing is not to confuse or confound the reader behind the veneer of complex language. The judge must write to provide an easy-to-understand analysis of the issues of law and fact which arise for decision. Judgments are primarily meant for those whose cases are decided by judges. Judgments of the High Courts and the Supreme Court also serve as precedents to guide future benches. A judgment must make sense to those whose lives and affairs are affected by the outcome of the case. While a judgment is read by those as well who have training in the law, they do not represent the entire universe of discourse. Confidence in the judicial process is predicated on the trust which its written word generates. If the meaning of the written word is lost in language , the ability of the adjudicator to retain the trust of the reader is severely eroded."

Dr. D.Y. Chandrachud, J., In State Bank of India and anr v. Ajay Kumar Sood, Civil Appeal No. 5305 of 2022

CRIMINAL

SUPREME COURT JUDGEMENTS

Criminal Appeal No 1260 of 2022
Oriental Bank of Commerce v. Prabodh Kumar Tewari
Decided on: August 16, 2022

Hon'ble Supreme Court Bench of Justices DY Chandrachud and AS Bopanna , in an appeal against the decision of the Delhi High Court permitting the accused in a cheque bounce case to engage a hand-writing expert to determine whether the details that were filled in the cheque were in his hand , observed that a drawer of a cheque is liable even if the details in the cheque have been filled up not by the drawer, but by some other person and the presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. It was observed," *17. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the defense whether cheque was issued towards payment of a debt or in discharge of a liability."*

Criminal Appeal No. 1290 of 2010

Makhan Singh v. The State Of Haryana
Decided on: August 16, 2022

Hon'ble Supreme Court bench comprising Justice B.R. Gavai and Justice PS Narasimha held that in a case of conflicting dying declarations, the one recorded after a medical examination with regard to the fitness of the deceased is to be relied upon. It was observed that the court was required to examine whether a dying declaration was true and reliable; whether it had been recorded by a person at a time when the deceased was fit physically and mentally to make the declaration and; whether it had been made under any tutoring/duress/ prompting. The court further observed that in case there were multiple dying declarations and there existed inconsistencies between them, the dying declaration recorded by a higher officer like a Magistrate could be relied upon. However, this was with the condition that there was no circumstance giving rise to any suspicion about its truthfulness.

Criminal Appeal No. 1021 of 2022
Varsha Garg v. The State of Madhya Pradesh & Ors.
Decided on: August 08, 2022

Hon'ble Supreme Court Bench of Justices DY Chandrachud and AS Bopanna while examining the scope of section 311 CrPC in a criminal appeal against the decision of Indore Bench of the High Court of Madhya Pradesh, observed that an application under Section 311 CrPC cannot be dismissed merely on the ground that it will lead to filling in the loop holes of the prosecution's case. It was held," *The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case and is not constrained by the closure of evidence".*

Criminal Appeal No 1184 of 2022
XYZ v. State of Madhya Pradesh & Ors
Decided on: August 05, 2022

Hon'ble Supreme Court Bench comprising Justices DY Chandrachud and JB Pardiwala has held that a Judicial Magistrate has the duty to order police investigation under Section 156(3) of the Code of Criminal Procedure when the complaint prima facie shows the commission of cognizable offense and the facts indicate the need for a police investigation. It was observed that though Section 156(3) CrPC uses the word "may", giving discretion to the Magistrate to order police investigation, the Court held that such discretion must be exercised in a judicious manner *24. Therefore, in such cases, where not only does the Magistrate find the commission of a cognizable offence alleged on a prima facie reading of the complaint but also such facts are brought to the Magistrate's notice which clearly indicate the need for police investigation, the discretion granted in Section 156(3) can only be read as it being the Magistrate's duty to order the police to investigate. In cases such as the present, wherein, there is alleged to be documentary or other evidence in the physical possession of the accused or other individuals which the police would be best placed to investigate and retrieve using its powers under the CrPC, the matter ought to be sent to the police for investigation."*

Criminal Appeal No. 704 of 2018
Jai Prakash Tiwari v. State of Madhya Pradesh
Decided on: August 04, 2022

Hon'ble Supreme Court bench comprising CJI NV Ramana and Justices Krishna Murari and Hima Kohli while considering an appeal filed by an accused who was concurrently convicted under

Section 307 of the Indian Penal Code, 1860, observed that while examining an accused under Section 313 CrPC, all the adverse evidence have to be put in the form of questions so as to give an opportunity to the accused to articulate his defense and give his explanation but such an omission does not ipso facto vitiate the trial, unless the accused fails to prove that grave prejudice has been caused to him. It was also observed that it is the solemn duty of the courts below to consider the defence of the accused. The same must be considered with caution and must be scrutinized by application of mind by the judge. The Court may accept or reject the same; however it cannot be done cursorily. The reasoning and the application of mind must be reflected in writing.

Criminal Appeal No. 1124 of 2022
Dauvaram Nirmalkar v. State Of Chhattisgarh
Decided on: August 02, 2022

Hon'ble Supreme Court Bench of Justices Sanjiv Khanna and Bela M. Trivedi while considering an appeal filed by a person who was convicted under Section 302 IPC, observed that for the purpose of Exception 1 of Section 300 IPC, the last provocation has to be considered in light of the previous provocative acts or words, serious enough to cause the accused to lose his self-control and that this principle does not do away with the requirement of immediate or the final provocative act, words or gesture. Further, this defence would not be available if there is evidence of reflection or planning as they mirror exercise of calculation and premeditation. *"13. Thus, the gravity of the provocation can be assessed by taking into account the history of the abuse and need not be confined to the gravity of the final provocative act in the form of acts, words or gestures."*

HIGH COURT OF J&K AND LADAKH JUDGMENTS

CRA No. 34/2018
Mushtaq Ahmad Peer v. State of Jammu and Kashmir
Decided on: August 26, 2022

Hon'ble Division Bench of the High Court of Jammu & Kashmir and Ladakh in a Criminal conviction appeal filed against the Judgment passed by the Court of learned Special Judge Anti-Corruption, Srinagar for the commission of offences punishable under Sections 420, 406, 201, 120-B of the erstwhile Ranbir Penal Code (RPC) and Section 5(1) (d) read with 5 (2) of the Prevention of Corruption Act clarified the rule position in the context of a conjoint reading of Sub-Rule 9 of Rule 29 of the Rules of 1999 read with the mandate of Section 35 (3) and Section 410 of the Code of Criminal Procedure and held that an appeal shall lie against the order of conviction and sentence passed by the Court of Sessions before the Division Bench of the High Court ,when the sentence of imprisonment awarded by the trial Court exceeds the term of ten years whilst, in the alternative, if the term of sentence amounts to a period of less than ten years, then the appeal is to be heard and decided by the Single Judge. It was observed," *A bare perusal of the aforesaid provisions of law, when appreciated conjointly, makes it unambiguously clear that: (i) any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court; (ii) a criminal appeal shall lie to the single Bench of the High Court in a case in which a sentence of imprisonment for a term not exceeding ten years has been passed; and (iii) Page 7 of 10 CRA No. 34 of 2018 for purpose*

of appeal, the aggregate of consecutive sentences passed in case of convictions for several offences at one trial shall be deemed to be a single sentence. In other words, what emerges from the above legal position is that the hearing of a criminal appeal in case in which a sentence of imprisonment for a term exceeding 10 years has been passed is to be heard and decided by the Division Bench of this Court."

CrlM No.4395/2022
State Through P/S Zainapora v. Zia Mustaffa & Ors
Decided on: August 24, 2022

Hon'ble High Court of Jammu & Kashmir And Ladakh, in an application filed by the prosecution seeking recall of order passed by the Court in Criminal Revision, whereby the criminal revision petition was dismissed, observed that the power of recall is different from the power of review of the judgment. Referring to case law in *Madan Lal Kapoor vs. Rajiv Thapar and others, (2007) 7 SCC 623*, it was reiterated that a criminal matter cannot be dismissed for default and that it must be decided on merits because such matters related to the administration of criminal justice and also that a criminal revision petition cannot be dismissed for non-prosecution. Reliance was also placed on *State of Punjab vs. Davinder Pal Singh Bhullar and others, (2011) 14 SCC 770* to observe that a Court does have jurisdiction to recall an order which is a nullity in the eyes of law.

WP(Cr1) No. 222/2021
Faheem Sultan Gojree v. UT of J&K and another
Decided on: August 12, 2022

Hon'ble High Court of Jammu & Kashmir and Ladakh in a petition seeking quashing of detention order passed by the District Magistrate, Srinagar ordering the detention of detenu under Section 8 of the Jammu and Kashmir Public Safety Act, 1978 observed personal liberty as one of the most precious rights guaranteed under the Constitution. Hon'ble Court also made an observation regarding object of the preventive detention laws which is to protect society from activities that would deprive a large number of people of their life and personal liberty. It was observed."
08. It is well settled that the purpose of the preventive detention is detaining of a person and not to punish him for something he has done but to prevent him from doing a particular act which is prejudicial either to the security of the State or to the maintenance of the public order. In Haradhan Saha V. State of West Bengal, (1975) 3 SCC 198, Hon'ble the Supreme Court has held that there is no parallel between prosecution in a Court of law and a detention order under the Public Safety Act. One is a punitive action and the other is a preventive act. In one, case a person is punished to prove his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in the Act."

CRMC No.167/2018
Anis Ahmad Choudhary v. State of J&K & Ors.
Decided on: August 04, 2022

Hon'ble High Court of Jammu & Kashmir and Ladakh in three petitions filed under Section 561-A of the J&K Cr. P. C, which is in parimateria with Section 482 of the Central Cr. P. C, challenging FIRs registered for offences under Section 5(2) of J&K Prevention of Corruption Act and Section 120-B RPC has explained the constituents of a valid entrustment Order.

Hon'ble court relied upon *State of J&K vs. Dr. Saleem Ur Rehman, 2021*, to observe that merely because elaborate reasons have not been given in the entrustment orders, the same is no ground to observe the non-adherence to the provisions of the second proviso to Section 3 of the J&K PC Act. Hon'ble Court also made an observation regarding the marked distinction between sec 5 and sec 3 of the Act in as much as while the second proviso to Section 5-A(1) provides that an offence referred to in clause (e) of subsection (1) of Section 5 cannot be investigated without the order of a police officer not below the rank of Superintendent of Police whereas the second proviso to Section 3 of the J&K PC Act provides that an officer of the rank of Assistant Superintendent of Police and above can authorize in writing an officer of the Vigilance Organization of an above the rank of a Sub-Inspector to investigate the offence under the provisions of the said Act.

"Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with the march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the commin man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable."

K. Ramaswamy, J. in Madhu Kishwar v. State of Bihar, (1996) 5 SCC 297125, para 37

CIVIL

SUPREME COURT JUDGEMENTS

Civil Appeal No. 5783 of 2022
Union of India & Anr v. M/S. Ganpati Dealcom Pvt. Ltd
Decided on: August 23, 2022

Hon'ble Supreme Court Bench comprising Chief Justice of India NV Ramana, Justice Krishna Murari and Justice Hima Kohli , in an appeal filed by the Central Government against a Calcutta High Court Judgment holding that that 2016 amendment Act was prospective in nature, held Section 3(2) of the Benami Transactions (Prohibition) Act 1988 as unconstitutional on the ground of being manifestly arbitrary. Hon'ble Court further also held that Benami Transactions (Prohibition) Amendment Act 2016 cannot be applied retrospectively and that it cannot be held as merely procedural. *18.1 In view of the above discussion, we hold as under: a) Section 3(2) of the unamended 1988 Act is declared as unconstitutional for being manifestly arbitrary. Accordingly, Section 3 (2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution."*

Civil Appeal No. 5784 of 2022
Palace Mutually Aided Co-Operative Society v. B. Mahesh & Ors.
Decided on: August 23, 2022

Hon'ble Supreme Court bench of CJI

NV Ramana, Justices Krishna Murari and Hima Kohli observed that a person who is affected by a judgment but is not a party to the suit, can prefer an appeal with the leave of the Court. It was observed," *The sine qua non for filing an appeal by a third party is that he must have been affected by reason of the judgment and decree which is sought to be impugned*."It was also held that that the inherent power under Section 151 of the Code of Civil Procedure can be invoked only in circumstances where alternate remedies do not exist.

Civil Appeal No. 5539-5540 Of 2022
Surinder Singh Dhillon & Ors v. Vimal Jindal
Decided on: August 22, 2022

Hon'ble Supreme Court Bench of Justices Hemant Gupta and JB Pardiwala while setting aside the order of the High Court of Punjab & Haryana and remitting the matter to the Appellate Authority, observed that the demand of increase of rent is wholly irrelevant to determine the bonafide requirement of the premises of a landlord. It was observed," *We find that even if a notice is served upon by a landlord to increase the rent, that notice has nothing to do with the bonafide requirement as the landlord is statutorily prohibited from increasing the rent in respect of the tenanted premises in terms of Section 6 of the Act. The demand of rent beyond the agreed rent is not permissible in terms of Section 6 of the Act"*

Civil Appellate Jurisdiction
M/S. Patil Automation Private Limited and Ors v. Rakheja Engineers Private Limited
Decided on: August 17, 2022

Hon'ble Supreme Court bench of Justices KM Joseph and Hrishikesh Roy, in the context of holding that Section 12 A of the the Commercial Courts Act, 2015 is mandatory and that any suit instituted violating the mandate of Section 12 A must be visited with rejection of the plaint under Order VII Rule 11, observed that a Court has power to reject a plaint suo motu invoking its powers under Order VII Rule 11 of the Code of Civil Procedure, 1908 and the Court has to hear the plaintiff before it invokes this power.

Civil Appeal No 5305 of 2022
State Bank of India and another v. Ajay Kumar Sood
Decided on: August 16, 2022

Hon'ble Supreme Court Bench comprising Justices DY Chandrachud and AS Bopanna, while disposing of an appeal against a judgment of Himachal Pradesh High Court that had upheld an order of Central Government Industrial Tribunal, observed that judgments should be accessible to persons from all sections of society including persons with disability and that the judgments should be signed using digital signatures. Hon'ble Court also broadly drew the guidelines on readability and accessibility of the judgments. It was observed,

20. It is also useful for all judgments to carry paragraph numbers as it allows for ease of reference and enhances the structure, improving the readability and accessibility of the judgments. A Table of Contents in a longer version assists access to the reader.

21. On the note of accessibility, the importance of making judgments accessible to persons from all sections of society, especially persons with disability needs emphasis. All judicial institutions must ensure that the judgments and orders being published by them do not carry improperly placed watermarks as they end up making

the documents inaccessible for persons with visual disability who use screen readers to access them. On the same note, courts and tribunals must also ensure that the version of the judgments and orders uploaded is accessible and signed using digital signatures. They should not be scanned versions of printed copies. The practice of printing and scanning documents is a futile and time-consuming process which does not serve any purpose. The practice should be eradicated from the litigation process as it tends to make documents as well as the process inaccessible for an entire gamut of citizens."

Civil Appeal No. /2022
H.S. Deekshit & Anr v. M/S. Met Ropoli Overseas Limited & Ors.
Decided on: August 16, 2022

Hon'ble Supreme court bench of Justices Hemant Gupta and Vikram Nathwhile hearing the appeal against the decision of High Court of Karnataka allowing a revision petition filed by the defendant and rejecting the plaint in terms of Order 7 Rule 11(a) and (b) of the Code observed that the averments in the plaint alone are to be examined while considering an application under Order 7 Rule 11 of the Code of Civil Procedure and no other extraneous factor can be taken into consideration.

HIGH COURT OF J&K AND LADAKH JUDGMENTS

OWP No. 177/2012
M/s Alson Motors Through Mubeen Shah v. State of JK & Ors.
Decided on: August 16, 2022

Hon'ble Division Bench of the High Court of Jammu & Kashmir and Ladakh in a petition challenging the quashing of the order of the Commissioner, Commercial Taxes J&K, Government and the consequential order passed by Assessing Authority, Commercial Taxes and the Recovery to recover the assessed amount of interest and penalty, observed that a passive acceptance or an implied consent to any order amounts to acquiescence with the result that the person giving such tacit acceptance is estopped under law from challenging the said order. It was observed,*" 23. Acquiescence is a principle of equity and estoppel follows acquiescence. A passive acceptance or an implied consent to any order amounts to acquiescence with the result that the person giving such tacit acceptance is estopped under law from challenging the said order. A Constitution Bench of the Supreme Court in Pannalal Binjraj vs. Union of India & Ors. AIR 1957 SC 397 explained the scope of estoppel following acquiescence by observing that when an order is passed against a person and he submits to the jurisdiction of the said order without raising any objection, he cannot be permitted to challenge the said order subsequently merely because he could not succeed there. Such participation of the person in the proceedings subsequent to the order on the basis of his conduct disentitles him from any relief."*It was also observed that the doctrine of "Approbate and Reprobate" is one of the species of estoppel and where a person knowingly accepts the benefits of an order, he is estopped on the doctrine of "Approbate and Reprobate" to challenge its correctness

WP (C) no. 2043/2021
Shahnawaz Shah v. High Court of J&K and others
Decided on: April 22, 2022

Hon'ble High Court of Jammu & Kashmir and Ladakh in a petition challenging the Order in terms whereof the

service of the petitioner posted as Orderly and under probation, were terminated with immediate effect in application of Rule 21-(1) (b) of the Jammu and Kashmir Civil Services (Classification, Control And Appeal) Rules, 1956, held that unauthorized absence cannot and must not amount to automatic cessation of service even if the delinquent is a probationer. Hon'ble Court referring to case law V. P. Ahuja v. State of Punjab and others, AIR 2000 SC 1080 and State of J&K and others v. Kamal Kumar, 2017 SLJ 699 observed that a probationer, like a temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily. It was further observed that the power available with the competent authority under Rule 21-1-B of the CCA Rules of 1956 is only to discharge the probationer from probation in the event his performance is not found satisfactory and not on account of unauthorized absence." *33. The other important aspect of the matter is that the provision of law pressed into service by the respondents does not call for termination of a probationer on his unauthorized absence. The power, as observed hereinbefore, available with the competent authority under the said Rule is only to discharge the probationer from probation in the event his performance is not found satisfactory which is admittedly not the case set out against the petitioner. The petitioner has been proceeded against on account of unauthorized absence and not on unsatisfactory performance, therefore, the very provision of law, on which the order of termination is based, is against facts and irrational."*

"The life of the law is not idle abstraction or transcendental mediation but fitment to concrete facts to yield jural results-a synergetic action, not isolated operation."

V.R. Krishna Iyer, J. In Controller of Estate Duty v. Kantilal Trikamlal, (1976) 4 SCC 643, para 15

One Day Refresher Training Programme on "Arbitration & Conciliation Act, 1996: Law, Practice and Procedure"

Jammu & Kashmir Judicial Academy organized One Day Refresher Training Programme on *"Arbitration & Conciliation Act, 1996: Law, Practice and Procedure" f*or District & Sessions Judges of UTs of J&K and Ladakh through physical as well as virtual mode on 20th August, 2022 at J&K Judicial Academy, Mominabad, Srinagar. The training programme was inaugurated by Hon'ble Mr. Justice Pankaj Mithal, Chief Justice, High Court of Jammu & Kashmir and Ladakh in the august presence of Hon'ble Ms. Justice Sindhu Sharma, Chairperson J&K Judicial Academy who had joined the inaugural session of the programme through virtual mode, from Jammu. Sh. Manish Mehrotra, Advocate, High Court, Lucknow was the Resource Person for the training programme.

In his inaugural address, Hon'ble Mr. Justice Pankaj Mithal described Arbitration as an extremely powerful medium of dispute resolution which should be simple, clear, and more responsive to the requirements of the situation. Hon'ble Chief Justice, while emphasizing the importance of the inclusion of an arbitration clause in all agreements and deeds executed between the parties also stressed upon the necessity of developing the arbitration law in India capable of catering to the specific requirements of dispute resolution in the Indian context instead of adopting a foreign model. He stated that it is necessary to evaluate the effectiveness of the present law and its usefulness, particularly in small business ventures to realize the objective of dispute resolution through the mode of arbitration.

Sh. Manish Mehrotra, resource person of the programme, in his special remarks described arbitration as a parallel system of dispute resolution for dispensing justice although it is more often seen as an alternative mode of dispute resolution. He underscored the effectiveness of arbitration as a medium of peaceful settlement of discords.

Mr. Shahzad Azeem, Director, J&K Judicial Academy welcomed the participants and gave an overview of the programme. He stated that arbitration is a healer of conflicts and is a trusted mechanism for attaining justice and establishing peace. He also stated that arbitration has been a practiced concept of non-judicial dispute resolution much prior to any codified law and is a credible resort for peaceful dispute

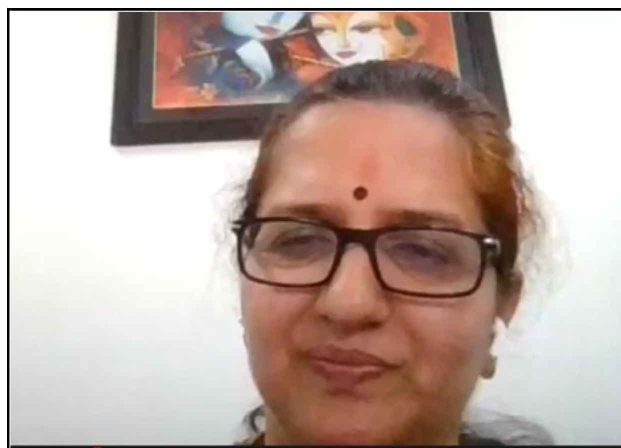
resolution which must be simple, technical and more responsive to the realities of the situation.

In the first technical session, the resource person deliberated upon the objectives and basic provisions of the Arbitration and Conciliation Act and the scope of injunctions and relief u/s 9 of the Act. He referred to the Arbitration agreement in the light of the legal provisions and discussed the scope of reference to arbitration. The resource person also deliberated on the application and effect of legal proceedings on Arbitration. In the second technical session, the Challenge to award u/s 34 and the scope of Court interference in arbitral awardswere discussed in detail along with the Execution Proceedings, as provided under the law. The resource person also covered the concepts of expeditious disposal of matters relating to Arbitration proceedings and the problems, issues and redress of the issues confronting arbitral proceedings as are arising under the Act.

The technical sessions were followed by an interactive session during which the resource person satisfactorily settled the queries of the participants.

One Day Special Orientation Programme on "Law relating to Motor Accidents Claims, Claim Cases and computation of compensation, Compliance of directions of Hon'ble Supreme Court dated 16-03-2021 passed in Bajaj Allianz General Insurance Company v/s U.O.I WP 534/2020, Tools and Techniques for handling large-scale litigation in MACT cases."

J&K Judicial Academy organized One Day Special Orientation Programme on *"Law relating to Motor Accidents Claims, Claim Cases and computation of compensation, Compliance of directions of Hon'ble Supreme Court dated 16-03-2021 passed in Bajaj Allianz General Insurance Company v/s U.O.I WP 534/2020, Tools and Techniques for handling large-scale litigation in MACT cases"* for District Judges including those on deputation & Sub-Judges of UTs of J&K and Ladakh through virtual mode on



27th August, 2022. The training programme was inaugurated by Hon'ble Ms. Justice Sindhu Sharma, Chairperson, J&K Judicial Academy who had joined the inaugural session of the programme through virtual mode, from Jammu. Sh. R.K. Jain, Sr. Advocate, High Court of J&K and Ladakh was the Resource Person for the orientation programme. The programme was moderated by Ms. Swati Gupta, Sub-Judge, J&K Judicial Academy.

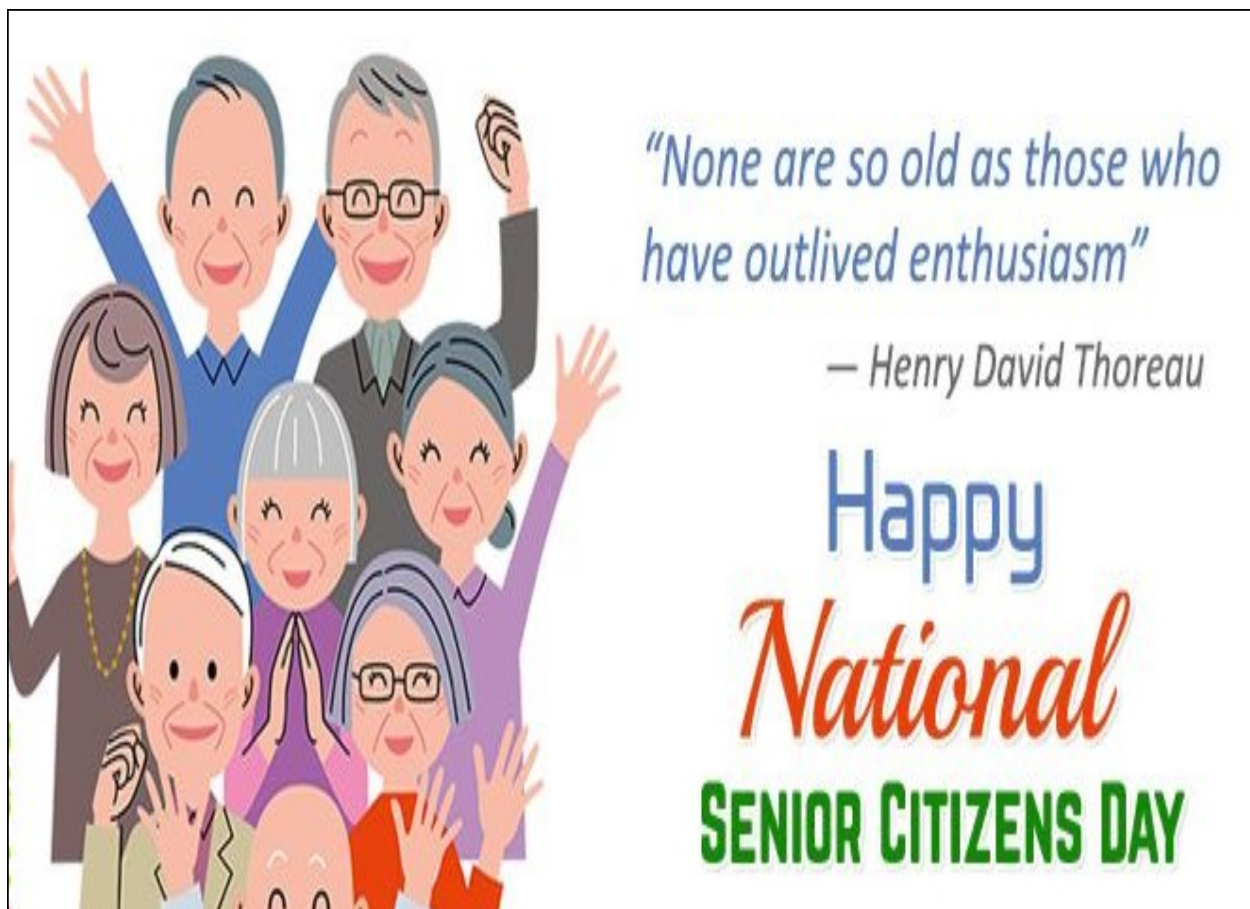
In her inaugural address, Hon'ble Ms. Justice Sindhu Sharma described the law relating to MACT claims as an evolving one with new amendments being introduced frequently. She expressed concern on the whopping figure of the persons affected by vehicular accidents every year and highlighted the scope and objective of the legislation as providing relief to the litigants with time being the essence for ensuring timely justice. Justice Sindhu Sharma also underscored the importance of critical factors and aspects of MACT claims while

computation of compensation including

those in the cases of child victims and housewives.

In the first technical session, the resource person Mr. R.K. Jain, Sr. Advocate deliberated upon the jurisdiction, practice & procedure in claim cases and also discussed the provision, criteria and principles of assessment and computation of compensation. In the second technical session, the resource person discoursed on the tools and techniques for handling large-scale litigation in MACT cases. A detailed analysis was also made on various judgments on the subject and the practical difficulties and issues confronted in observance of the provisions and procedure of the Act .

The technical sessions were followed by an interactive session during which the resource person satisfactorily settled the queries of the participants.



LEGAL AID DEFENCE COUNSEL SYSTEM

"Litigation is like a bleeding wound — the more you let it bleed, the more the man suffers. Especially when it comes to criminal cases, these are not thrust by choice but the person is forced by his circumstances, which is why the reaction time is very less and consequently, the person gets sucked in a trap for which he has to sell or mortgage his property,"

(Hon'ble Mr. Justice Uday Umesh Lalit)

Models of Legal Aid

Contract Counsel or Services System, Counsel Assignment System and Public Defender System are the three major models of legal aid which are in existences across the world**.** In most of the countries, Legal Aid Delivery Models are combination of these three systems.

"Contract Counsel or Services System", delivers legal services to the eligible persons through a contract with an attorney**,** law firms or other entity to deal with the legal aid cases. Under the **"Counsel Assignment System",** cases are assigned to the panel lawyers by the Legal Services Institutions**.** In this system, the panel lawyers, however, can carry on with their private practice also**.** In **"Public Defender System",** the hired lawyers are paid salary/ retainership/ honorarium for dealing the legal aid cases on monthly basis but they can't take up private cases.

Assigned Counsel System of delivery of Legal Aid

"Assigned Counsel System of delivery of Legal Aid", is in vogue in our Country which envisages assigning of cases to the panel lawyers. The empanelled lawyers are paid honorarium on **Case to Case** basis. They are not hired on monthly honorarium/salary/retainership and are free to take up their private practice alongwith the legal aid cases assigned to them.

Experience bears the testimony that the panel lawyers under the Assigned Counsel System of delivery of Legal Aid, do not exclusively devote their time to the legal aided cases. Accountability, accessibility and availability of such lawyers, many a times, is an issue.

Legal Aid Defence Counsel System (LADCS)

To bring further reforms in the existing Legal Aid Movement of India, the National Legal Services Authority, has taken a quantum leap by come up with a laudable project known as **"Legal Aid Defence Counsel System".** This system has been developed on the lines of **"Public Defender System"** and has been conceived to provide effective, efficient and competent legal aid to the underprivileged and disadvantaged sections of the society and to further strengthen the Court based legal services in more professional manner.

Speaking at the launch of expansion of Legal Aid Defence Counsel System in 22 State Legal Services Authorities, Hon'ble Mr. Justice Uday Umesh Lalit said: "*Over 70 per cent of the population is below poverty line, but only 12 per cent opt for legal aid. What does the population between 12 per cent to 70 per cent do? They are forced to opt for private lawyers. They must have sold their assets, they must have sold their jewellery, they must have mortgaged their property, that is what the litigation brings in."*

"Legal Aid Defence Counsel System" is a NALSA funded project to ensure that opportunities for securing justice are not denied to any citizen by

reason of economic or other disabilities and to secure that the operation of legal system promotes justice on a basis of equal opportunity to all.

Legal Aid Defense Counsel System envisages engagement of **"salaried lawyers"** with Assistants who would be dealing exclusively with the legal aid work in criminal matters. The **"salaried lawyers"** thus engaged are not permitted to take up private cases under this system. A Legal Aid Defense Counsel has to devote his/her full time to his/her duties for the office of Legal Aid Defense Counsel during the term of employment. The System is thus bound to enhance accountability, accessibility and availability of such Counsel and shall also create institutional capacity to effectively provide legal aid to underprivileged and disadvantaged seekers of justice in the criminal justice system.

Initially, this System was introduced as a pilot project in few districts of the Country only and was confined to conducting trials and appeals including all miscellaneous work before the Sessions Court. The success of the system has prompted the NALSA to expand it to all the Courts having criminal jurisdiction.

Legal Aid Defence Counsel System in UT of Jammu and Kashmir

In the UT of Jammu and Kashmir, in the first phase, 10 Districts, which include Districts of Srinagar, Anantnag, Baramulla, Kulgam and Kupwara in Kashmir Division and Districts of Jammu, Kathua, Poonch, Udhampur and Kishtwar in Jammu Division, have been shortlisted for introducing "Legal Aid Defence Counsel System".

Human resource and monthly honorarium/ retainership fees

Under the project, the J&K Legal Services Authority is tasked with the responsibility of providing human resource and infrastructure for making the system operational. In the form of human resource, full time legal aid lawyers with designations as **Chief Legal Aid Defense Counsel**, **Deputy Legal Aid Defense Counsel** and **Assistant Legal Aid Defense Counsel** with monthly honorarium/ retainership fees ranging from Rs. 80,000/- per month to 25,000/- per month for different positions shall be engaged by the authorities. The Counsels thus engaged shall be eligible to leaves also. The handsome monthly honorarium/ retainership fees coupled with attractive engagement conditions are bound to attract best legal minds towards this promising and progressive System.

Eligibility

To be eligible for applying for the position of Chief Legal Aid Defense Counsel, practice in Criminal law for atleast 10 years is mandatory. The applicant must have also handled atleast 30 criminal trials in Sessions Courts, though in appropriate cases, this condition can be relaxed. Similarly, for the position of Deputy Legal Aid Defense Counsel, practice in Criminal law for atleast 07 years is mandatory and the applicant must have also handled atleat 20 criminal trials in Sessions Courts and in appropriate cases, this condition can also be relaxed. In case of Assistant Legal Aid Defense Counsel, practice in Criminal law of 0 to 3 years is mandatory.

Another added advantage of this system is that the Law students can also be engaged with the Legal Aid Defense Counsel office so as to give them meaningful exposure to practical aspects of criminal law including preparing a defense strategy and doing legal research in various factual

scenarios.

"Legal Aid Defence Counsel System" is aimed at ensuring effective and efficient representation by seasoned lawyers which was found lacking earlier. Timely and effective client consultations and professional management of legal aid work in criminal matters with enhanced responsiveness leading to updating of legal aid seekers about the progress of their cases are the few other advantageous features of this system. From providing legal advice and assistance to conducting trials and appeals as well as handling bail applications and other legal aided work related to Criminal matters in most professional and time bound manner, the Legal Aid Defense Counsel System shall definitely revolutionize the concept of legal aid to the underprivileged and disadvantaged sections of the society.

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BAIL IN INDIA AND JUDICIAL DISCRETION

"Society has a vital interest in grant or refusal of bail because every criminal offence is an offence against the state. the order granting or refusing the bail must reflect perfect balance between the conflicting interests, namely sanctity of the individual liberty and the interest of the society."

Justice Dalveer Bhandari
(in S. S. Mehtre vs. State of Maharashtra (2010))

Introduction & Conceptual Analysis

It is in the interest of justice that any person who has committed an offence must be arrested and brought to justice. Arrest of a person ensures his presence at the trial. But if his presence can be ensured by other means then it is unfair to deprive the person of his liberty. Chapter XXXIII of the Criminal Procedure Code, 1973 provides for the remedy of 'Bail' wherein a person can be released on bail pending trial. The word 'bail' has been derived from the French word 'baillier' which means 'to give' or 'to deliver'. The term 'Bail' has been defined by the Black's Law Dictionary as a security such as cash or bond especially security required by a court for the release of a prisoner who must appear at a future date. Further Webster Law Dictionary defines bail as a temporary release of a person in exchange for security given for the prisoner's appearance at a later hearing.

Interestingly, the word 'Bail' has not been defined the Code. It only defines bailable offences and non-bailable offences that too with reference to the offences mentioned in the First Schedule of the Code. Section 2(a) of Cr. P. C defines bailable offence as an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force whereas non bailable offence are defined as any other offence other than bailable. On a perusal of the offences mentioned in the First Schedule it becomes apparent that the offences of grave nature like Murder (Section 302, IPC), Rape (Section 376, IPC), Voluntary causing Grievous Hurt (Section 326, IPC) etc are made non-bailable whereas offences of comparatively lesser grievous nature like Cheating (section 407, IPC, Afffray (Section

160, IPC) etc are categorised as bailable offences. In the case of non-bailable offences the punishment is three years or more.

The basic principle for granting bail is that every person must enjoy his life and personal liberty as guaranteed to him under Article 21 of the Constitution of India. It is a basic right which is protected by the State. Whether to grant bail or not is very complex decision which depends on so many delicate and conflicting considerations. A person is not considered guilty until proven so. Not granting the bail might result in curtailment of liberty of an innocent accused, on the other hand, granting of bail might result in freedom to the actual culprit, who, in turn may be a threat to the victim, his family or even the society. The Hon'ble Supreme Court in ***Kamlapati vs. State of West Bengal AIR 1979 SC 777*** has defined the bail as "a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public's interest on which a person's release in conditioned on the surety to produce the accused person in the Court and stand the trial.

Kinds of Bail provided in Cr.P.C.

The legislature has very broadly divided the heads for bail:

(1) Bail in cases of bailable offences:

Section 436- When any person other than person accused of a non-bailable offence is arrested or detained without warrant by an officer in-charge of the police station, or appears or is brought before a court, and is prepared, at any time, while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail: Provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Section 436A, further, provides that where a person has during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under the law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

(2) Bail in cases of non-bailable offences:

Section 437- when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or is appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

Such person shall not be released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more.

(3) Anticipatory Bail:

Section 438- When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction

under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

Bail and Judicial Discretion

In the case of bailable offences under section 436, bail is granted as of right provided that the accused complies with the bail terms whereas, in case of non-bailable offences, the grant or refusal of bail depends on judicial discretion. While granting bail section 437 (3) requires the Magistrate court to impose the following conditions "that such person shall attend following the conditions of bond executed under this chapter; that such person shall not commit an offence similar to the offense of which he is accused, or suspected, of the commission of which he is suspected, and that such person shall not make any inducement directly or indirectly".

The judicial discretion on grant or refusal of bail has to be exercised on well established tests. Though there is no such rigid or fixed criteria but following circumstances can be used as guiding principles:

1. the enormity of the charge,
2. the severity of punishment in case of conviction,
3. the danger of accused person's absconding,
4. the health, age and sex of the accused,
5. the nature and gravity of the circumstances in which the offence has been committed,
6. the probability of accused commiting more offences if released on bail,
7. Interest of the society, etc.

In ***Sidharth Vashisth alias Manu Sharma vs. State of Delhi, 2004 Cr.L.J. 684***, following principles were laid down for refusing bail under section 437:

1. Bail should not be refused unless the crime charged is of highest magnitude and the punishment of it assigned by law is of extreme severity;
2. Bail should be refused when the court may reasonable presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgement;
3. Bail should be refused if the course of justice would be thwarted by the person who seeks the benignant jurisdiction of the Court to be freed for the time being;
4. Bail should be refused if there is likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice; and
5. Bail should be refused if the antecedents of a man who is applying for bail show a bad record, particularly a cored which suggests that he is likely to commit serious offences while on bail.

It must be understood that judicial discretion is never on whimsical grounds and always operates in well defined channels. The discretion needs to be exercised with utmost caution and not arbitrarily. It must be exercised in accordance with and not in opposition to the well established principles of law. In the case of ***Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav and Anr 2004 (7) SCC 528***, the Hon'ble Supreme Court of India observed that "the court granting bail should exercise its discretion in a judicious manner and not a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need to be undertaken, there is need to indicate in such orders for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from

non-application of mind".

In ***Gudikanti Narasimhalu vs. Public Prosecutor AIR 1978 SC 429***, the honourable Supreme Court very succinctly pointed out that "bail belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet the issue is one of liberty, justice, public safety and burden of public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process".

Another area where discretion is exercised is that of anticipatory bail. Both the High Court and the Sessions Court have concurrent jurisdiction to grant anticipatory bail and the legislature has granted wide discretion in this regard. The Supreme Court in this connection observed in the case of ***Gurbaksh Singh Sibba vs. State of Punjab 1980 SCC (Cri) 465*** that there are several considerations so numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail.

Keeping in view the intricacies of the subject matter, recently, in the case of ***Satender Kumar Antil vs. CBI*** the Hon'ble Supreme Court gave a series of guidelines regarding bails and suggested that the Government of India may consider the introduction of a separate enactment in the nature of a Bail Act to streamline the grant of bails. It is, indeed, need of the hour as it will help solve many issues in the administration of criminal justice system.

Conclusion

The criminal justice system is based on the presumption of innocence until proven guilty. It is in accordance with the fundamental rights guaranteed to all the citizens under the ambits of Articles 19, 21 and 22, which grant fundamental freedoms to the individual. In contrast, there are demands of the society as well that demands secure atmosphere free of fear and intimidation. Therefore, a just balance has to be drawn while making a decision with regard to grant or refusal of bail. An analysis of the decisions cited above gives a broad idea as to the circumstances in which bail should not be granted. The legislature has conferred discretion on the judicial officers to decide the matter as per the circumstances of the case. The only caution to be observed is that it should not be on arbitrary or fanciful grounds which might result in defeat of justice.

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