SJA e-NEWSLETTER

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

Volume 4 | Monthly | September 2021

Contents

Editor
Sanjay Parihar
Director

Composed by:
Vishali Razdan
Computer Operator

From the Editor's Desk

The astronomical growth of the Internet in just a couple of years has pushed this generation to a revolutionary rearrangement. The need for access to the internet was especially felt in this time of Covid when almost all working activities absorbed a virtual platform. The number of customers on e-commerce sites and social media sites has doubled. This escalation has instead catalyzed the unlawful activities happening across the internet. The main question which arises here is whether the intermediaries, i.e. the social media websites, e-commerce websites, blogging platforms, search engines, discussion boards, etc. can be held liable for any unlawful or scrupulous content, product, or service posted on their respective website, platform or board by a third party and to what extent?

The term "intermediary" has been defined under the Information Technology Act, 2002("IT ACT")and is protected through the safe harbor principle under Sec 79 of the same act. Thus, intermediary liability, which is based on the legal principle of vicarious liability, means that the service providers shall be held accountable for any illegal act of the user on their platform. But at the same time, it is very hypocritical to expect that the websites will be able to regulate the data flowing through them owing to their mammoth size. Thus the cases against internet websites require a balance that can only be answered through judicial discretion. For example in the area of intellectual property rights, the onus of the responsibility and whether it has acquiesced can only be decided by determining the factual matrix and the contentions made.

The various statutory provisions and the judicial pronouncements that have been made till now show that the rights, immunities, and liabilities of intermediaries in India are ever-changing and constantly evolving. An apparent trend, that can be found in the recent decisions of the Hon'ble High Court of Delhi, promotes the stringent application of intermediary liability. At the same time, there is a recognized need to ensure that the evolving jurisprudence on intermediary liability must not hold implausible expectations against the third parties in respect to the enjoyment of the Right to freedom of speech & expression on the internet. Therefore, the present law in India we expect, to be carefully developed by both legislature and judicial bodies to create a clear, comprehensive, and fair framework concerning intermediary liability.

LEGAL JOTTINGS

"It is not justified for any conscientious trial Judge to ignore the statutory command, not recognise 'the felt necessities of time' and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes 'fair trial' for the accused as well as the prosecution."

Dipak Misra, J. In Vinod Kumar v. State of Punjab, (2015) 3 SCC 220, para 3

CRIMINAL

Supreme Court Judgments

Criminal Appeal No. 875 of 2021
Manjeet Singh v. State of Haryana
Decided on: August 24, 2021

Hon'ble Supreme Court Bench comprising Justices DY Chandrachud and MR Shah, in a significant judgment summarized the scope and ambit of the powers of the Court under Section 319 of the Code of Criminal Procedure. Certain observations were made in the appeal arising out of a murder case against the Trial Court's dismissal of the application under Section 319 Cr.P.C and refusing to summon some persons to face the trial in exercising the powers under Section 319 Cr.P.C. The bench, allowing the appeal, summarized the principles as follows:

"13. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 Cr.P.C can be summarized as under: (i) That while exercising the powers under Section 319 Cr.P.C and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished; (ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly; (iii) the law has been properly codified and modified by the legislature under the Cr.P.C indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law; (iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished; (v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial; 36 (vi) Section 319 Cr.P.C allows the court to proceed against any person who is not an accused in a case before it; (vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency; (viii) Section 319 Cr.P.C is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial; (ix) the power under Section 319(1) Cr.P.C can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 Cr.P.C, committal, etc. which is only a pre-trial stage intended to put the process into motion; 37 (x) the court can exercise the power under Section 319 Cr.P.C only after the trial proceeds and commences with the recording of the evidence; (xi) the word "evidence" in Section 319 Cr.P.C means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents; (xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 Cr.P.C is to be exercised and not on the basis of material collected during the

investigation; (xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s); (xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised; (xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the 38 court need not has to wait till the said evidence is tested on cross-examination; (xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses); (xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial".

Cr. Appeal No. 883 of 2021
Harjit Singh v. Inderpreet Singh @ Inder and another
Decided on: August 24, 2021

Hon'ble Supreme Court Bench comprising of Justices DY Chandrachud and MR Shah while setting aside a bail granted by the High Court to a murder accused summarized the principles for granting bail and observed that seriousness of crime is an aspect to be considered while granting bail to an accused. In its judgment allowing the appeal, the Hon'ble Court has referred to earlier judgments on how to exercise the discretionary power for grant of bail and the duty of the appellate court, particularly when bail was refused by the court(s) below and the principles and considerations for granting or refusing the bail. The Court reiterated its observation and held that deprivation of freedom by refusal of bail is not for punitive purposes but for the bifocal interests of justice. The nature of the charge is a vital factor and the nature of the evidence is also pertinent. The severity of the punishment to which the accused may be liable if convicted also bears upon the issue. Another relevant factor is whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. The Court has also to consider the likelihood of the applicant interfering with the witnesses for the prosecution or otherwise polluting the process of justice. It is further observed that it is rational to enquire into the antecedents of the man who is applying for bail to find out whether he has a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail. Referring to catena of decisions in *Gudi kanti Narasimhuluvs Public Prosecutor, High Court of A.P.(1978) 1SCCC240 ; Ash Mohammad v. Shiv Raj Singh, (2012) 9 SCC 446 ; State of Maharashtra v. SitaramPopatVetal, (2004) 7 SCC 521; ; Mahipal v. Rajesh Kumar (2020) 2 SCC 118;Ramesh BhavanRathod v. Vishanbhai Hirabhai Makwana (koli) 2021 (6) SCALE 41*, the Hon'ble Court observed where the discretion of the High Court to grant bail has been exercised without the due application of mind or in contravention of the directions of this Court, such an order granting bail is liable to be set aside.

Cr. Appeal No. 818-820 of 2021
Dumya Alias Lakhan Alias Inamdar v. State of Maharashtra
Decided on: August 13, 2021

The Hon'ble Supreme Court Bench comprising the Justices UU Lalit and Ajay Rastogi observed that the default sentences imposed on a convict cannot be directed to run concurrently. In this case, the accused were convicted under 3(1)(ii) ,3(2) and 3 (4) of the Maharashtra Control of Organised Crime Act read with Section 120-B of the Indian Penal Code and were sentenced to imprisonment of 7/10 years.

Rupees Five lacs fine was imposed on each and in default three years rigorous imprisonment was ordered. However, all the sentences were ordered to run concurrently. In appeal, it was contended that the default sentences awarded to the convicts were on the excessive side given their economic conditions. While considering these contentions, Hon'ble Bench noted that in Sharad Hiru Kilambe vs. State of Maharashtra &Ors. [(2018) 18 SCC 718] it was observed that Sections 31 and 427 of the Code which deal with substantive sentences, empower the courts in certain cases to direct concurrent running of more than one sentences. But no such specification is available in Section 64 of IPC and in Section 30 of the Code or in any other provision dealing with power to impose sentence of "imprisonment for non- payment of fine" or in connection with default sentence. Accordingly, it was held that the default sentence cannot be directed to run concurrently.

SLP(Crl)7284/2017
Shabbir Hussain v. State of Madhya Pradesh
Decided on: July 26, 2021

The Hon'ble Supreme Court bench of Justices L. Nagaswera Rao and Aniruddha Bose reiterated that mere harassment would not amount to an offence of abetment of suicide under Section 306 of the Indian Penal Code and it was observed that, in order to bring a case within Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigating or by doing a certain act to facilitate the commission of suicide. Referring to judgment in Amalendu Pal v. State of West Bengal (2010) 1 SCC 707, it was observed that

"In order to bring a case within the provision of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigating or by doing a certain act to facilitate the commission of suicide. Mere harassment without any positive action on the part of the accused proximate to the time of occurrence which led to the suicide would not amount to an offence under Section 306 IPC". The court referred to Chitresh Kumar Chopra v. State (Government of NCT of Delhi)(2009) 16 SCC 605 and added that abetment by a person is when a person instigates another to do something and that the instigation can be inferred where the accused had, by his acts or omission created such circumstances that the deceased was left with no option except to commit suicide.

Criminal Appeal No. 700 of 2021
Pramila v. State of Uttar Pradesh
Decided on: July 07, 2021

The Hon'ble Supreme Court bench of Justices Navin Sinha and R. Subhash Reddy observed that the burden of proof on an accused in support of the defence taken under Section 313 of Code of Criminal Procedure is not beyond all reasonable doubt as it lies on the prosecution to prove the charge. The accused has merely to create a doubt and it is for the prosecution then to establish beyond reasonable doubt that no benefit can flow from the same to the accused, the said while acquitting a woman accused of murdering her sister in law. It was observed that

" It has repeatedly been held that the procedure under Section 313 CrPC is but a facet of the principles of natural justice giving an opportunity to an accused to present the defence. The burden of proof on an accused in support of the defence taken under Section 313 CrPC is not beyond all reasonable doubt as it lies on the prosecution to prove the charge. The accused has merely to create a doubt. It will be for the prosecution then to establish beyond reasonable doubt that no benefit can flow from the same to the accused."

J&K High Court Judgments

WP(Crl) No. 54/2020
Balbir Chand v. UT of J&K and others
Decided on: August 21, 2021

Hon'ble High Court of Jammu &

Kashmir and Ladakh while deciding a petition preferred against the order of District Magistrate, Kathua whereby the petitioner was placed under preventive detention with a view to prevent him from indulging in the criminal activities which are detrimental to the society; observed that non-communication of information to the detenue that independent of his right to file representation against his detention to the government, has also right to submit a representation to detaining authority till detention was considered by the government and accorded approval thereto, is in essence, violation of constitutional & statutory rights of detenue, guaranteed under Article 22(5) of the Constitution of India and Section 13 of the Act of 1978 and infraction of provisions of section 13 of the Act of 1978 read with Article 22(5) of the constitution of India.

It was observed that:"*In reliance to State of Maharashtra and others v. Santosh Shankar Acharya (2000) 7 SCC 463, in the present case detaining authority did not informed detenue that detenue, independent of his right to file representation against his detention to the Government, has also right to submit a representation to detaining authority till detention was considered by the Government and accorded approval thereto. Detaining authority has, in essence, violated constitutional & statutory rights of detenue, guaranteed under Article 22(5) of the Constitution of India and Section 13 of the Act of 1978 and resultantly vitiates impugned detention ."*

Placing reliance on case laws Noor-ud-Din Shah v. State of J&K & Ors. 1989 SLJ 1, Naba Lone v. District Magistrate 1988 SLJ 300 & Jai Singh and Ors. V. State of Jammu & Kashmir AIR 1985 SC 764, the Hon'ble Court observed that passing of an order of detention in a routine manner oblivious to the import of preventive detention goes to the root of its validity. Accordingly, the order impugned was observed to be verbatim copy of Police Dossier and was accordingly quashed.

"The finest hour of justice comes when court and counsel constructively collaborate to fashion a relief in the individuals case and fathom deeper to cure the institutional pathology which breeds wrongs and defies rights.."

V.R. Krishna Iyer,J. In Sunil Batra(II) v. Delhi Admn., (1980) 3 SCC 488, para 1

CIVIL

Supreme Court Judgments

CA 2049 of 2013

Union of India v. S. Narasimhulu Naidu (Dead)

Decided on: August 27, 2021

The Hon'ble Supreme Court Bench comprising Justices Sanjay Kishan Kaul and Hemant Gupta in a judgment examined the applicability of res judicata between co-defendants. The court referring to the decision in Govind ammal (Dead) by LRs &Ors. v. Vaidiyanathan observed that the requisite conditions to apply the principle of res judicata as between co-defendants are that:(a) there must be conflict of interest between the defendants concerned;(b) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (c) the question between the defendants must have been finally decided. It was also observed that the principle of Res Judicata will not apply if the subject matter of the suit is not same as that of earlier suit. 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.

"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.

CA 7697 of 2014
High Court of Judicature of Rajasthan v. Bhanwar Lal Lamror
Decided on: August 24, 2021

The Hon'ble Supreme Court Bench of Justices AM Khanwilkar and Sanjiv Khanna observed that solitary remark regarding lack of integrity is sufficient to order compulsory retirement of a Judicial Officer. The bench set aside a Rajasthan High Court judgment which directed reinstatement of a judicial officer who was compulsorily retired. Factually, a judicial officer was compulsorily retired from Rajasthan Higher Judicial Services upon attaining the age of 50 years. The order was passed on the basis of recommendation made by the Administrative Committee which commended to the Full Court of the High Court. However, allowing the writ petition filed by the judicial officer, the High Court, on its judicial side, set aside the order of compulsory retirement, and consequently directed his reinstatement in service with all consequential benefits. The High Court's administrative side filed appeal in the Supreme Court against the said order of its own judicial side. The issue was whether it was open to the High Court to substitute its view for the one recorded by the Administrative Committee, which commended to the Full Court of the High Court, pursuant to which the order of compulsory retirement came to be issued?

"It is settled position in law that the competent authority is supposed to consider the entire service record of the judicial officer and even if there is a solitary remark of lack and breach of integrity, that may be sufficient for a Judicial Officer to be compulsory retired as expounded in Tarak Singh Vs. Jyoti Basu reported in (2005) 1 SCC 201. The High Court took notice of this judgment, but still ventured to examine the entire record by itself, overlooking the thorough examination conducted by the Administrative Committee, which was affirmed and commended to the Full Court.®The court observed that it was not open to the High Court to substitute its own view for the satisfaction arrived at by the Full Court of the High Court regarding the necessity or otherwise of the judicial officer continuing in the Rajasthan Higher Judicial Services. It was also not open to the High Court to re-write the annual confidential reports by taking over the role of inspecting or confirming authority, the court observed while allowing the appeal.

Civil Appeal No: 4800 of 2021
Oriental Insurance Company Limited v. Kahlon @ Jasmail Singh Kahlon (deceased)
Decided on: August 16, 2021

The Hon'ble Supreme Court Bench comprising Justices Navin Sinha and R. Subhash Reddy observed that a motor accident claim petition does not abate even after the death of the injured claimant. It was observed that the right to sue survive to his heirs and legal representatives in so far as loss to the estate is concerned. The court added that the loss of estate would include expenditure on medicines, treatment, diet, attendant, Doctor's fee, etc. including income and future prospects which would have caused reasonable accretion to the estate but for the sudden expenditure which had to be met from and depleted the estate of the injured, subsequently deceased. The bench noted that in Madhuben Mahesh bhai Patel vs. Joseph Francis Mewan 2015 (2) GLH 49, Joti Ram vs. Chamanlal, AIR 1985 P&H 2,Thailammai vs. A.V. Mallayya Pillai, 1991 ACJ 185, the view taken was that that even

after the death of the injured claimant, claim petition does not abate and right to sue survive to his heirs and legal representatives in so far as loss to the estate is concerned, which would include personal expenses incurred on the treatment and other claim related to loss to the estate. The court further observed that the Act is beneficial and welfare legislation.

"*9....Section 166(1) (a) of the Act provides for a statutory claim for compensation arising out of an accident by the person who has sustained the injury. Under Clause (b), compensation is payable to the owner of the property. In case of death, the legal representatives of the deceased can pursue the claim. Property, under the Act, will have a much wider connotation than the conventional definition. If the legal heirs can pursue claims in case of death, we see no reason why the legal representatives cannot pursue claims for loss of property akin to estate of the injured if he is deceased subsequently for reasons other than attributable to the accident or injuries under Clause 1(c) of Section 166. Such a claim would be completely distinct from personal injuries to the claimant and which may not be the cause of death. Such claims of personal injuries would undoubtedly abate with the death of the injured. What would the loss of estate mean and what items would be covered by it are issues which has to engage our attention. The appellant has a statutory obligation to pay compensation in motor accident claim cases. This obligation cannot be evaded behind the defence that it was available only for personal injuries and abates on his death irrespective of the loss caused to the estate of the deceased because of the injuries.*"

CA 4665 of 2021
Srihari Hanuman das Totala v. Hemant Vithal Kamat
Decided on: August 09, 2021

In a significant judgment, it was observed by the Hon'ble Supreme Court Bench comprising Justices DY Chandrachud and MR Shah observed that the Res Judicata cannot be a ground for rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Procedure.

"Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.".

In the suit filed by the plaintiff, the defendant filed an application for rejection of plaint under Order 7 Rule 11 of the CPC on the ground that the suit was barred by res judicata as the grounds relating to the validity of the sale deed and the issue of title were raised in the previous suit. The Trial Court, while rejecting this application held that the issue as to whether the suit is barred by res judicata cannot be decided in an Order 7 Rule 11 application but has to be decided in the suit. The High Court dismissed the Revision Petition filed against the order of the Trial Court. In appeal, the bench noted that the Order 7 Rule 11(d) of CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law".

"Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case."

The court also referred to various decisions on the aspect of res judicata and summarized the guiding principles for deciding an application under Order 7 Rule 11(d) CPC. *(i) To reject a plaint on the ground that the suit is barred by any law, only the averments in the plaint will have to be referred to; (ii) The defense made by the defendant in the suit must not be considered while deciding the merits of the application; (iii) To determine whether a suit is barred by res judicata, it is necessary that (i) the 'previous suit' is decided, (ii) the issues in the subsequent suit were directly and substantially in issue in the former suit; (iii)*

the former suit was between the same parties or parties through whom they claim, litigating under the same title; and (iv) that these issues were adjudicated and finally decided by a court competent to try the subsequent suit; and (iv) Since an adjudication of the plea of res judicata requires consideration of the pleadings, issues and decision in the 'previous suit', such a plea will be beyond the scope of Order 7 Rule 11 (d), where only the statements in the plaint will have to be perused.

CA 4492-4493 of 2021
Amazon.com NV Investment Holdings LLC v. Future Retail Limited
Decided on: August 06, 2021

The Hon'ble Supreme Court bench comprising Justices RF Nariman and BR Gavai held that Order XXXIX, Rule 2-A of the Code of Civil Procedure requires not "mere disobedience" but "wilful disobedience. It was observed that Rule 2-A is primarily intended to enforce orders passed under Order XXXIX, Rules 1 and 2, and also observed that the judgment in U.C. Surendranath v. Mambally's Bakery (2019) 20 SCC 666 requires review by a larger bench.

"50. It is one thing to say that the power exercised by a court under Order XXXIX, Rule 2-A is punitive in nature and akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. It is quite another thing to say that Order XXXIX, Rule 2-A requires not "mere disobedience" but "wilful disobedience". We are prima facie of the view that the latter judgment in adding the word "wilful" into Order XXXIX, Rule 2-A is not quite correct and may require to be reviewed by a larger Bench. Suffice it to say that there is a vast difference between enforcement of orders passed under Order XXXIX, Rules 1 and 2 and orders made in contempt of court. Orders which are in contempt of court are made primarily to punish the offender by imposing a fine or a jail sentence or both. On the other hand, Order XXXIX, Rule 2-A is primarily intended to enforce orders passed under Order XXXIX, Rules 1 and 2, and for that purpose, civil courts are given vast powers which include the power to attach property, apart from passing orders of imprisonment, which are punitive in nature. 1 Orders passed under Section 17(2) of the Arbitration Act, using the power contained in Order XXXIX, Rule 2-A are, therefore, properly referable only to the Arbitration Act. Neither of the aforesaid judgments are an authority for any proposition of law to the contrary"

CA 4492-4493 of 2021
Amazon.com NV Investment Holdings LLC v. Future Retail Limited
Decided on: August 06, 2021

The Hon'ble Supreme Court bench comprising Justices RF Nariman and BR Gavai held that Order XXXIX, Rule 2-A of the Code of Civil Procedure requires not "mere disobedience" but "wilful disobedience. It was observed that Rule 2-A is primarily intended to enforce orders passed under Order XXXIX, Rules 1 and 2, and also observed that the judgment in U.C. Surendranath v. Mambally's Bakery (2019) 20 SCC 666 requires review by a larger bench.

"50. It is one thing to say that the power exercised by a court under Order XXXIX, Rule 2-A is punitive in nature and akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. It is quite another thing to say that Order XXXIX, Rule 2-A requires not "mere disobedience" but "wilful disobedience". We are prima facie of the view that the latter judgment in adding the word "wilful" into Order XXXIX, Rule 2-A is not quite correct and may require to be reviewed by a larger Bench. Suffice it to say that there is a vast difference between enforcement of orders passed under Order XXXIX, Rules 1 and 2 and orders made in contempt of court. Orders which are in contempt of court are made primarily to punish the offender by imposing a fine or a jail sentence or both. On the other hand, Order XXXIX, Rule 2-A is primarily intended to enforce orders passed under Order XXXIX, Rules 1 and 2, and for that purpose, civil courts are given vast powers which include the power to attach property, apart from passing orders of imprisonment, which are punitive in nature. 1 Orders passed under Section 17(2) of the Arbitration Act, using the power contained in Order XXXIX, Rule 2-A are, therefore,

properly referable only to the Arbitration Act. Neither of the aforesaid judgments are an authority for any proposition of law to the contrary"

J&K High Court Judgments

LPA No. 58/2021
Doulat Ram and Another v. Roop Chand and Others
Pronounced on: August 24, 2021

Hon'ble High Court of J&K and Ladakh ,in an appeal filed under clause 12 of the Letters Patent directed against order passed by a learned Single Judge, whereby the petition of the appellants for re-admission (RESC No.23/2018) of Civil First Appeal (CFA No. 22/2013) was dismissed vide order and judgment dated 17.09.2018, has been rejected, while deciding the appeal identified the following questions of seminal importance for consideration:- i) Whether the judgment of the learned Single Judge dated 17.09.2018 ,passed in the absence of appellants or their counsel on 20.07.2018 when the matter was heard and reserved, is an order or judgment passed under Order-41 Rule 17(1) of the Code of Civil Procedure and, therefore, application under Order 41 Rule 19 of the Code of Civil Procedure for its re-admission lies and is maintainable? ii) If answer to the question No. (i) is in the affirmative; whether order of rejection of the application filed by the appellants under Order 41 Rule 19 of the Code of Civil Procedure seeking readmission of the appeal is appealable under clause 12 of the Letters Patent and whether the bar created by Section 100-A CPC that no further appeal shall lie from an order of the learned Single Judge hearing and deciding an appeal from an original or appellate decree or order, would be attracted?

Reference was made to Order 41 of the Code of Civil Procedure which deals with appeals from original decrees and procedure for hearing which is laid down in Rules 16 to 29. It was observed that it is the appellant that is given the right to be heard first in support of the appeal on the date fixed or any other date to which the hearing may be adjourned by the appellate court. If, upon hearing the appellant, the court does not dismiss the appeal at once, it would hear the respondent against the appeal and in such case the appellant shall be entitled to reply. It was also observed that Rules 16,17 and 19, when read altogether, would unequivocally provide that if on the date fixed or any other date to which the hearing may be adjourned, the appellant does not appear, the only option with the appellate court is to dismiss the appeal for default and not on merits. Hon'ble Court placed reliance on Division Bench of the Court in the case of Ghulam Qadir and others v. Sikander and others, 1981 AIR (J&K) 30 and held that order and judgment dated 17.09.2018 in CFA which was dismissed by the learned Single Judge on merits yet it shall be deemed to be the one passed by the learned Single Judge under Rule 17(1) of Order 41 CPC. That being the position, application under Order 41 Rule 19 CPC was clearly maintainable against order dated 17.09.2018 and the order passed by the appellate court rejecting the application under Order 41 Rule 19 is appealable order in terms of Order 43 Rule 1(t). Hon'ble Court discussed Section 4 of the Code of Civil Procedure and section 100 -A of the Code containing non-obstante clause i.e. "notwithstanding anything contained in any Letters Patent of the High Court or in any instrument having the force of law or in any other law for the time being in force in the State", which means that Section 100- A is a specific provision to the contrary in terms of Section 4 and, therefore, has overriding effect on Clause 12 of the Letters Patent of this Court where it is an appeal heard and decided by a Single Judge of the High Court from original or appellate decree or order. It was accordingly observed:

"22) When we examine the instant case in light of the provisions of Section 100-A CPC, we do not find that the order impugned before us is the one passed by the Single Bench of this Court hearing and deciding any appeal from an original or appellate decree or order. The impugned order is an order passed by the Single Bench under Order-41 Rule 19, whereby the

petition filed by the appellants for re-admission of the appeal dismissed vide judgment dated 17.09.2018, has been rejected. This order cannot be said to have decided an appeal either from original or appellate decree or order."

Hon'ble Court accordingly held the appeal to be maintainable and while allowing the same and remanded the case back to the learned Single Judge for hearing and deciding the Civil First Appeal afresh.

CIMA No. 100/2013
Chief Engineer & Ors v. M/S K. K. Chibber
Pronounced on: August 21, 2021

In an appeal filed under section 37 of The Jammu and Kashmir Arbitration and Conciliation Act, 1997, the appellants had challenged the dismissal of the application filed under section 34 of the Act challenging the award of the sole Arbitrator and had assailed the judgment of Ld. District Judge, Kishtwar, stating that it was against Section 2 (e) of the 1997 Act because the cause of action arises within the jurisdiction of the District Judge. In opposition of the argument, the respondent had supported the judgment by saying that parties have agreed to the seat of Arbitration being in Delhi and the law applicable being the Arbitration and Conciliation Act of 1996, therefore, award could not be challenged in the court of District Judge Kishtwar even if the work was executed within the jurisdiction of District Kishtwar.

Hon'ble High Court of J&K and Ladakh relied on *'State of Maharashtra V/s Atlanta Ltd. 2014(II) SCC 619'*, with reference to Section 42 of the Act and *Indus Mobile Distribution Private Limited V. Datawind Innovations Private Limited and others,' (2017) 7 SCC 678* observed that District Judge, Kishtwar was right in dismissing the application filed under Section 34 of the J&K Arbitration and Conciliation Act, 1997, but he should have refrained from expressing any opinion on which Court will have jurisdiction. Observing that , it is only Section 42 of the Act which determines the jurisdiction of the court notwithstanding anything contrary to the Act, the Hon'ble Court relied on para 29 of the Atlanta case, reproduced under, and dismissed the appeal as not maintainable

"29. The first issue which needs to be examined is, whether a challenge to an arbitration award (or arbitral agreement, or arbitral proceeding), wherein jurisdiction lies with more than one court, can be permitted to proceed simultaneously in two different courts. For the above determination, it is necessary to make a reference to Section 42 of the Arbitration Act. The aforesaid provision accordingly is being extracted hereunder: "42. Jurisdiction. -Notwithstanding anything contained elsewhere in this part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court."

A perusal of Section 42 of the Arbitration Act reveals a clear acknowledgment by the legislature, that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could most definitely arise in more than one court simultaneously. To remedy such a situation Section 42 of the Arbitration Act mandates, that the court wherein the first application arising out of such a challenge is filed, shall also have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time. The above legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts."

AA No. 5/2020
Supinder Kour v. Mdn Edify Education Pvt. Ltd.
Decided on: August 20, 2021

In an appeal preferred by the petitioner under Section 37 of the Arbitration and Conciliation Act, 1996

against the order dated 29.02.2020 passed by the learned 2nd Additional District Judge, Jammu, whereby the court without touching the merits of the case dismissed the petition of appellant herein filed under Section 9 of the Act on the ground that it lacked jurisdiction to adjudicate upon the matter, the Hon'ble High Court of J&K and Ladakh held that the moment the seat is designated, it is akin to an exclusive jurisdiction clause and where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. Hon'ble Court made reference to paragraphs 4, 5, 15, 16, 17 & 18 of the judgment delivered by the Supreme Court in *Civil Appeal No. 5850/2019 decided on 25.07.2019* and observed that It is well settled that where more than one court has jurisdiction, it is open for the parties to exclude all other courts.

"16. Where the contract specifies the jurisdiction of the court at a particular place, only such court will have the jurisdiction to deal with the matter and parties intended to exclude all other courts. In the present case, the parties have agreed that the "venue" of arbitration shall be at Bhubaneswar. Considering the agreement of the parties having Bhubaneswar as the venue of arbitration, the intention of the parties is to exclude all other courts. As held in Swastik, non -use of words like "exclusive jurisdiction", "only", "exclusive", "alone" is not decisive and does not make any material difference."

Accordingly, while observing that the Order impugned required no interference, the appeal was dismissed.

OW 104 No. 02/2015
Puran Chand v. Tarsem Lal
Decided on: August 10, 2021

Hon'ble High Court of Jammu & Kashmir and Ladakh while dismissing a petition invoking supervisory jurisdiction of the Hon'ble Court seeking setting aside of the order dated 15.11.2014 passed by the learned Principal District Judge, Samba in a misc. appeal before the appellate court against the order of dismissal of application for interim relief accompanying the suit, by the Court of learned Sub Judge, Samba reiterated the legal position under Order 7 Rule 14 CPC envisaging that where a plaintiff sues upon a document or relies upon a document in his possession or power in support of his claim, the plaintiff has to enter such documents in a list, and produce it in court when the plaint is presented by him and also at the same time deliver the document and a copy thereof, to be filed with the plaint. During the pendency of the said appeal the applicant/petitioner moved an application for placing on record a compromise deed dated 23.07.2011 claiming therein that the parties have executed a compromise deed amongst themselves in respect of the land in question which the respondents objected as being forged. It was observed that

"Although sub-rule 3 of Rule 14 of Order 7, postulate that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit."

Hon'ble Court relied on law laid down by the Apex Court in cases titled *Shalini Shyam Sheety and another vs. Rajinder Shankar Patgil, reported in 2010 (8) SCC 3291* and *Radhey Shyam and another vs. Chhabi Nath and others, reported in 2015 (5) SCC 423.* and observed that

"6. As has been noticed in the preceding paras upon perusal of the record, the appellate court is seized of a misc. appeal testing the legality or otherwise of the order dated 12.07.2014 passed in the application for interim relief accompanying the suit. Filing of the application before the appellate court while it is considering a misc. appeal, therefore, has rightly not been entertained by the said court. Nothing prevented the petitioner to seek the leave of the court for production of compromise deed before the trial court which is seized of the main suit, notwithstanding the objections raised by the respondent in his objections in opposition to the said application."

ACTIVITIES OF THE ACADEMY

One Day Training Programme on "Criminal Justice System with stress on Role of Prosecutor, Sensitization towards victims of sexual violence with need for reforms in investigation process, in order to meet expectations of accused, victim and society."

J&K Judicial Academy, the Judicial Academy organized one day training programme on "Criminal Justice System with stress on role of prosecutor, sensitization towards victims of sexual violence with need

for reforms in investigation process, in order to meet expectations of accused, victim and society" for Public Prosecutors and Investigating Officers of Kashmir division on 7th August, 2021. The training programme was organized in the august presence of Hon'ble Mr. Justice Vinod Chatterji Koul, Judge, High Court of Jammu and Kashmir and Ladakh and in the presence of S D Singh Jamwal, Director, Police Academy, Udhampur and Nisar Hussain Draboo, Director Prosecution, Kashmir who were Resource Persons and the participating officers. Director, Judicial Academy gave an overview of the programme and emphasized that foundation for the criminal justice system is fair investigation by the police and efficient prosecutor. Justice Vinod Chatterji Koul, Judge, High Court of Jammu and Kashmir and Ladakh in his inaugural address said that foundation of Criminal Justice system in India is based on four main pillars including Police, Prosecution, Prison and Judiciary besides correctional services. "The Prosecutor must be fair, impartial and constantly guided by the principles of equity, justice and good conscience in all actions to secure justice", he added.

Justice Koul said that foremost functioning of criminal justice system must focus on protecting the rights and interests of the victim. "A victim of crime has only hope in four pillars so we have added responsibility towards them. We should pursue and serve hard to achieve this goal dedicatedly to provide a crime-free-society to our next generations. Director, Police Academy Udhampur and Director Prosecution, presided over the working sessions and deliberated in detail upon various issues relating to sensitization towards victims of sexual violence, role of prosecutor with need for reforms in investigation process, in order to meet expectations of accused, victim and society. Both the resource persons gave their presentations to the participants comprising Public Prosecutors and Investigating Officers who had been nominated by Home Department of the UT administration. They stressed upon the need that all stakeholders in Criminal Justice System should work with synergy in raising efficiency in the individual delivery of services by each institution. During interactive session, Public Prosecutors and Investigating Officers discussed problems and solutions besides suggesting remedies towards ensuring fair and speedy trial of criminal cases. The training programme/workshop was informative as well as interactive wherein the queries of the participants were duly responded.

One Day Special Training Programme for Clerks/Ahlimads of District Courts.

J&K Judicial Academy organized one day special training programme for Clerks/ Ahlimads of District Courts (Srinagar, Budgam & Baramulla) on 12th August, 2021. Mr. Abdul Gani Khan, Faculty Member, J&K Judicial Academy and Mr. Faheem Manzoor, System Officer, E-Court, Srinagar were the resource persons who trained the participants representing various district courts about the relevant provisions of CPC applicable to the duties of Ahlimads and clerks. They were also trained

on the maintenance aspects of files, registers, record of process & service, pasha, cause list & that of execution of summons and assisting the presiding officers in the day-to-day work. The difficulties in functioning were also identified and effective solutions were suggested.

Online Training Programme on "Plea Bargain" its efficient use for satisfactory disposition of cases.

J&K Judicial Academy organized Online Training Programme on "Plea Bargain" its efficient use for satisfactory disposition of cases for a batch of 20 sub-judges on 21st August, 2021. Mr. Yash Paul Bourney, Principal District & Sessions Judge, Udhampur were the resource person . The resource person guided the trainees on various contours of the provisions of plea bargaining and its efficient use for satisfactory disposition of cases. The resource person discussed the statutory provisions in the Criminal Procedure Code and its practical applicability in dispute resolution. He also cited the advantages of the process and the various judicial pronouncements relevant to the context.

Online Training Programme on "Plea Bargain" its efficient use for satisfactory disposition of cases.

J&K Judicial Academy organized Online Training Programme on "Plea Bargain" its efficient use for satisfactory disposition of cases for a batch of 20 sub-judges on 27th August, 2021. Sh. Jaffer Hussain Beigh, Principal District & Sessions Judge, Kathua were the resource person. The resource person discussed in detail the procedural aspects of the concept of plea bargaining including the stages of filling application, eligibility, step-wise procedure & provisions envisaged under section 265 CrPC. Effective feedback was obtained from the participants with regard to the use of provisions in day-to-day functioning of courts.

Training Programme-cum-Workshop on "Exercise of power u/s 156(3) CrPC and grant of Injunctions besides delay in disposal of interim injunction applications."

J&K Judicial Academy organized training programme-cum-Workshop on "Exercise of power u/s 156(3) CrPC and grant of Injunctions besides delay in

disposal of interim injunction applications" for a batch of 25 Munsiffs on 28th August, 2021. The Training Programme was presided over by Justice Javed Iqbal Wani, Judge, High Court of Jammu and Kashmir & Ladakh (Member, J&K Judicial Academy), who presented thought provoking and inspiring inaugural address. He apprised the participants with the statutory framework and enlightened them with valuable and enriching inputs on the given topics. concept. Justice Javed Iqbal further laid stress that power under 156(3) CrPC should be exercised strictly in accordance with law laid on the subject and that discretion should be exercised in a fair and transparent manner. While dealing with the subject of grant of injunction he stressed that injunction being equitable remedy, it is in the discretion of the Court and such discretion must be exercised after satisfying the cardinal principles of law and every effort be made to dispose off application for injunction within 30 days thereby satisfying mandate of order 39 Rule 3A CPC.

The programme was mostly in interactive sessions which was moderated by Director, J&K Judicial Academy. The participating Judicial Officers discussed the relevant provisions of the Code of Criminal Procedure and Code of Civil Procedure concerned with the subject under discussion. The issues cropped up during discussion were resolved in the backdrop of the relevant provisions of law and judicial precedents from the Superior Courts.

Personality Development-In Pursuit of Justice

In India, the traditional perception, from times immemorial, is that judges are God-incarnate and it is God Himself who dispenses justice through human agency. Therefore, quite obviously, judges are expected to possess a superlative personality embellished with sterling qualities. Socrates aptly described the essential qualities of a good judge:

"Four things belong to a judge: To hear courteously; to answer wisely; to consider soberly; and to decide impartially."

These words remain as true today as they were when Socrates first spoke them more than 2,400 years ago.

The attributes of a judge were brought out lucidly in the judgment of Justice K. Ramaswamy of the Supreme Court in *C. Ravichandran Iyervs A.M. Bhattacharjee (1995) 5 5CC 457* wherein he listed that :

a) A judge should be endowed with sterling character, impeccable integrity and upright behaviour;

b) *Judges should be men of fighting faith with a tough fibre not susceptible to any pressure, economic, political or of any sort; and*

c) *Judges cannot be men of clay, amenable to all human failings and all frailties and foibles of life.*

The summary of the obiter, therefore, is that the distinctive personality of a Judge must be an embodiment of a collection of variegated qualities which must be a visible aspect of his character. The interplay of assorted personality attributes, mostly running concurrently, includes his role as a communicator, visionary, motivator, leader, innovator, analyst and also a strategist; collectively ensure functional excellence in his pursuit of justice. These basic personality traits have to compulsorily augmented with qualitative traits of integrity, ethics, conduct, judicial temperament, impartiality, competence, intelligence, propriety, empathy, health, courage and discernment which are symptomatic of his performance in the entire gamut of justice delivery mechanism. Some of these values have been accorded a sacrosanct place in the Bangalore Principles of Judicial Conduct, 2002. These qualities should be demonstrated not sporadically but in a consistent manner, and are to be adopted as a way of life rather than a shroud wrapped only during professional timings. Consistent efforts must also be made to develop and tone up the personality in order to catch up parallel with the ever dynamic and changing system. When a Judge sits in a trial, his own personality is under a trial. The trust and confidence of people in the judicial system rests on the bedrock of ability and efficacy of a Judge who must be impervious to any aberrations which are antagonistic to normative standards of a judicial personality.

In reference to context and as an addendum thereto, a Judge is in a leadership role as the captain of the ship in the trial Court in the sense that he is in complete charge of all activities in his Court room, both on the administrative as well as judicial sides. Leadership is the ability to influence others which may be derived through management effectiveness, achieving equilibrium in the existing resource reserves, harmonizing inter- personal relations, adept conflict management and problem solving skills. As a team leader, a judge is expected to plan and organise resources strategically, manage quality standards, encourage and facilitate teamwork for effective sailing of the ship in calm as well as tumultuous situations. He or she must appropriately deal with performance issues of staff and employ creativity and undertake initiatives to solve problems. Case-flow management, human resource utilization, maintaining records, ensuring public trust and confidence, time management et al are all areas where a Judge has to adorn the leadership mantle. But, leadership does not work in isolation. It requires cooperation, respect and the honest exchange of ideas and concerns of all

stakeholders leading to galvanized cooperative relationships for holistic achievement of Justice. Therefore, leadership which most of the times may be commanding, must also be cooperative and collaborative. The personal skills and personality traits of the Judge come into action time and again thus playing a pivotal role in the entire mechanism. Most of the times, he has to be a visionary focusing on the goal, purpose, and vision, with clear priorities.

A leader is a change agent, taking risks on new initiatives while deploying strategies for functional needs. Also, he has to be an effective communicator which, inter-alia, embraces activities like conversations, listening and being accessible. A leader leads by example in the way he conducts himself and the personality that he reflects for others to follow. He is, infact, at the vortex of the Justice Administration system and with all his fallibilities, must impeccably and unambiguously steer the ship that he is commanding, in the set direction.

The check is that at the end of the day, after the last case has been called and the court has been hammered to a close, a judge must be able to say: I heard courteously, I decided impartially and I captained effectively.

-Contributed by:

Ms. Swati Gupta
Sub-Judge, LRP
J&K Judicial Academy