JUDICIAL ACADEMY JHARKHAND

SNIPPETS

OF

SUPREME COURT JUDGMENTS

(May, 2019)

Prepared by :-

ABHIJEET TUSHAR
ISHA ANUPRIYA
Research Scholars,
JUDICIAL ACADEMY JHARKHAND

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1. ***State of Bihar and Others v. Bihar Secondary Teachers Struggle Committee, Munger and Others (2019 SCC OnLine SC 722)***

Decided on – 10.05.2019

Bench – (1) Hon'ble Mr. Justice Uday Umesh Lalit
(2) Hon'ble Ms. Justice Abhay Manohar Sapre

(Discussion on the doctrine of "equal pay for equal work" in relation to Niyojit Teachers in the State of Bihar)

Facts

In 1981, all non-Government Secondary Schools were nationalized and the management was taken over by State of Bihar. Consequently, all teaching and non-teaching staff were given salaries and emoluments at the Government scales. With the schemes like Sarva Shiksha Abhiyan, introduction of Article 21A in the Constitution and coming into force of the Right of Children to Free and Compulsion Education Act, 2009 ('RTE Act', for short), the State was required to induct large number of teachers in order to meet the required obligations. These teachers employed at Panchayat, Nagar Panchayat and Municipal levels were not given same salaries and emoluments like the teachers who were paid at the Government scales. The petitions seeking same salaries and emoluments on the principle of "equal pay for equal work" filed by the latter category of teachers, were allowed by the Patna High Court, which had been challenged in this Appeal.

Three sets of Rules came into effect in July, 2006. Bihar Panchayat Elementary Teachers (Employment and Service Conditions) Rules, 2006 dealing with elementary teachers come into force on 01.07.2006; Bihar Municipal Body Secondary and Higher Education Teachers (Employment and Service Conditions) Rules, 2006 dealing with teachers employed in secondary and higher secondary teachers in urban areas came into effect on 11.7.2006. Bihar District Board Secondary Higher Secondary Teachers (Employment and Service Conditions) Rules, 2006 dealing with secondary and higher secondary teachers in rural areas also came into effect on 11.7.2006. These three sets of Rules, for facility, are hereinafter referred to as '2006 Rules' and the teachers appointed in terms of said Rules, again for facility, are referred to as 'Niyojit Teachers', which expression appears in all official circulars and resolutions.

After the framing of Rules of 2006, the appointments to the posts of teachers in urban as well as rural areas in respect of nationalized schools in the State were made on the basis of said Rules of 2006. The service conditions and emoluments payable to those teachers were governed under the provisions of the respective sets of 2006 Rules as aforesaid. The emoluments payable to those teachers were, however, lower than the emoluments paid to all the teachers who were appointed before said Rules of 2006 had come into force. Thus, there were two categories of teachers, the first being those teachers who upon nationalization

continued or were appointed in all Government schools before 2006 and the second category was all the teachers appointed under 2006 Rules. The First category i.e. regular Government Teachers were entitled to a pay-scale and certain emoluments, whereas the Second category of teachers was appointed by Local Authorities on a fixed salary.

It was, however, the policy decision of the State that post 2006 there would not be any fresh regular appointments in the First category and all regular appointments post 2006 would be only in terms of 2006 Rules i.e. in the Second category. There is, however, an exception under which certain teachers were appointed under the First category even after 2006 which will be dealt with hereafter. Barring such exception, the policy decision had been that no fresh appointments be made in the First category and that the First category would be treated as a dying or vanishing cadre.

After the coming into force of the RTE Act on 01.04.2010, in exercise of powers conferred by Section 38 of the RTE Act, the State of Bihar made, The Bihar State Free and Compulsory Education of Children Rules, 2011. Soon thereafter Bihar Panchayat Elementary Teachers (Employment and Services Conditions) Rules, 2012 came into force on 03.04.2012, which defined "primary school", "middle school" and "elementary school". It also laid down the service conditions of "Niyojit Teachers" under Rule 15. Similar provisions for teachers working in urban areas were made by the Bihar Nagar Elementary Teachers (Employment and Service Conditions) Rules, 2012.

Though after the enforcement of 2006 Rules, the regular cadre of Government Teachers was to be taken as a dying or vanishing cadre and fresh appointments were to be made only in terms of 2006 Rules on fixed pay and power appointment was vested with Panchayati Raj Institutions, there was an exception and some Assistant Teachers in regular pay scale as Government Teachers in secondary schools came to be appointed in the year 2013 in following circumstances.

Sometime in December 2003, an advertisement was issued by the State to fill up the posts of Assistant teachers. However, certain irregularities were found in the preparation of panels during selection process. Therefore, orders were issued for cancellation of panels. A challenge was raised by some candidates and the High Court directed the State to recalculate the vacancies and to go ahead with the process of selection. Special Leave Petition filed in the Supreme Court by the State was withdrawn. Thereafter, the State attempted to fill the vacancies in terms of 2006 Rules which led to the filing of Contempt Petition No. 297 of 2007 in the Supreme Court. By order dated 9.12.2009, the Court directed the State Government to fill up 34540 posts of Assistant teachers as per advertisement published in December 2003 as one time appointment.

The Bihar Special Primary Teachers Appointment Rules, 2010 were therefore framed. These Rules were to deal with exceptional situation which was styled as "One Time Appointment." Accordingly, 34540 teachers were appointed in 2013 as Government Teachers on regular pay

scales. The developments including the difficulty expressed by the State in accommodating teachers because of change in policy were dealt with by the Court in ***Nand Kishore Ojha v. Anjani Kumar Singh***[1]. As a result, 34,540 primary school teachers came to be appointed in the year 2012-13. These teachers though appointed after 2006 were not appointed in terms of 2006 Rules but Special Recruitment Rules called 2013 Rules were formulated. An association of teachers called Parivartankari Prarambhik Shikshak Sangh approached the High Court by filing Civil Writ Jurisdiction Case No. 7089 of 2013 contending that the Panchayat elementary teachers were entitled, under the principle of "equal pay for equal work", to same pay-scales which were being given to the teachers appointed under the State Government. The matter was contested and the Single Judge of the High Court dismissed the said Writ Petition by observing "*if the State Government has framed a policy/scheme for evolving a way of balancing between the requirement of teachers and the financial liability together with devolution of power to the Panchayats, the Court would not interfere and disturb the equilibrium.*"

Around this time, several other writ petitions were filed, being aggrieved by the differential treatment, where the Niyojit Teachers appointed under Rules of 2006 were not been given the same pay-scales and were differentially treated. These petitions highlighted denial of concept of "equal pay for equal work" and challenged the validity of relevant provisions of 2006 Rules. The matters were taken up by the Division Bench of the High Court, the lead matter being CWJC 21199 of 2013 filed by the Bihar Secondary Teachers Struggle Committee, Munger.

Contentions before the Division Bench of the Patna High Court

When the matters were taken up for consideration by the Division Bench, it was submitted on behalf of the Writ Petitioners that both categories of teachers i.e. Government Teachers and Niyojit Teachers were imparting instructions in the same nationalized schools and yet there was considerable difference in the emoluments paid to Niyojit Teachers; that both the categories of teachers were discharging same responsibility and were teaching the same syllabus and there was no difference in the performance of their duties and responsibilities; that the distinction made between these two categories was completely unreasonable and that on the basis of constitutional principle of "equal pay for equal work" Niyojit Teachers were entitled to same salary, pay-scales and emoluments as were payable to the Government Teachers in nationalised schools. Strong reliance was placed on the decision of this Court in ***State of Punjab v. Jagjit Singh***[2] and particularly on paras 42 and 44 thereof.

While defending the action on part of the State, the learned Advocate General submitted *inter alia* that the Writ Petitioners were appointed under the provisions of 2006 Rules and as such, they could not challenge the validity of the Rules under which they were

[1] (2014) 11 SCC 405.
[2] (2017) 1 SCC 148.

appointed; that the teachers appointed before 2006 were appointed by the Director on the recommendations of Vidyalaya Seva Board/Bihar Public Service Commission/Subordinate Service Selection Board whereas Niyojit Teachers were appointed under completely different sets of Rules; that the teachers appointed prior to 2006 was a dying or a vanishing cadre and there were no fresh appointments in that category; thus the Niyojit Teachers could not claim any parity on the basis of "equal pay for equal work".

Decision of the Patna High Court

It was observed by the High Court that there was no pleading that the Niyojit Teachers appointed after 2006 were, in any manner, inferior in qualification or training and that there was no material to suggest that they were discharging different duties and responsibilities in the same institution. It was found that the admitted position was that both categories of teachers were discharging similar duties of imparting instructions in same schools and were having necessary qualifications as were possessed by the teachers appointed before 2006. The High Court placed reliance on the decisions of this Court in *Jagjit Singh* (supra) and ***Jaipal v. State of Haryana***[3] and found that the action on part of the State in denying the pay-scales to Niyojit Teachers was arbitrary and unreasonable. Finally, the High Court directed, *inter alia*,

> *(ii) The petitioners are entitled to "equal pay for equal work"*
>
> *(iii) The respondents are directed to fix their pay-scale like regular teachers of the nationalised school with effect from the initial date of appointment notionally and actual payment with effect from 8.12.2009, the date of filing of CWJC No. 17176 of 2009, in view of the fact that such grant of relief from the date of filing of the writ application was approved by the Apex Court in the case of State of Haryana v. Charanjit Singh discussed in the judgment of Jagjit Singh's case (supra) and I have held that Rule 8 is inoperative, in effective, inapplicable from the date of inception as it is arbitrary and unconstitutional and violative of Article 14 of the Constitution so far as the Niyojit Shikshak are concerned.*
>
> *(iv) The respondents are also directed to revise the pay-scale of the petitioners according to the principles of pay revision under recommendation of the 7th Pay Revision to the Niyojit Shikshak like other regular employees after granting equal pay for equal work notionally from the date of their appointment and actual payment with effect from the date of filing of 1st of the batch of writ petitions, i.e. 8.12.2009.*
>
> *(v) Such exercise must be completed within a period of three months from today and monetary benefits admissible to the Niyojit Shikshak must be paid to them within a further period of three months.*

[3] (1988) 3 SCC 354.

Issues for consideration before the Hon'ble Supreme Court

a) Whether the Niyojit Teachers are right in their submission that they are entitled to and were rightly granted 'equal pay for equal work'; and

b) Whether the State is justified in its approach and is right in claiming that the distinction made by it was correct and fair.

Observations and Decision of the Supreme Court

The Hon'ble Court analysed the facts of the case and observed that **in** the year 2002 itself, Scheme known as Sarva Shiksha Abhiyan was introduced at the Central level. In terms of the Scheme, the facilities of education and infrastructure were required to be spread through the length and breadth of the respective States. The steps taken in that behalf, specially in the present matter, indicate that sometime in 2002 more than one lakh Shiksha Mitras were appointed by the State. These Shiksha Mitras were not part of the regular cadre of Government Teachers, were not appointed through the regular process of selection and their services were engaged on a fixed salary. These Shiksha Mitras, who were outside the regular cadre of teachers, were entrusted with the job of manning schools in the remotest corners of the State. Sometime in 2006, certain decisions were taken by the Cabinet Ministers, Government of Bihar. The control in respect of appointment of teachers in all nationalized schools and other aspects, which were hithertobefore with the State Government, were given over to various Panchayat Raj institutions. This was in conformity with Articles 243G read with Serial No. 17 of the Eleventh Schedule in respect of Panchayats at the village, intermediate and at district levels and also in terms of Article 243W read with Serial No. 13 of the Twelfth Schedule in respect of Nagar Panchayats, Municipal Councils or Municipal Corporations. The decisions taken by the Cabinet were in accord with the constitutional mandate of enabling Panchayat Raj Systems on one hand while on the other, the decision also raised the number of teachers substantially so that national parameters on student: teacher ratio could be achieved by the State. According to the statistics on record, about 12% children in the State who were outside the schools had to be brought within the stream of education. After the decision of the Cabinet, the idea was translated in an appropriate statutory regime and new set of Rules viz. 2016 Rules were put in place. A decision was taken that there would be no further appointments in the cadre of existing teachers viz. Government Teachers and a completely new cadre of teachers named Niyojit Teachers was created. The erstwhile Shiksha Mitras were absorbed in this new cadre of Niyojit Teacher and fresh employments were made at Panchayat/Block levels so that teachers in sufficient numbers could be appointed. The Hon'ble Court further observed that the developments indicate that presently about four lakh such teachers have been appointed and the statistics presented by the State show the advances made by the State in that behalf.

Regarding the contention of the Respondents related to **the doctrine of "equal pay for equal work", the Hon'ble Court noted that one of the fundamental aspects to be considered is**

nature of duties and held that the nature of duties performed by Niyojit Teachers are certainly same or similar to those performed by the Government Teachers. As a matter of fact, both the sets of teachers are teaching in the same school and teaching same syllabus. There is no distinction or difference as regards nature of duties performed and responsibilities discharged by the Niyojit Teachers. Some of the Niyojit Teachers have also been acting as Headmasters.

However, the Hon'ble Court held that the Rules in question viz. 2006 Rules clearly indicate that the method of recruitment of Niyojit Teachers was completely different from the one under which Government Teachers were recruited. The Selection Committee contemplated under the provisions of 2006 Rules comprised of officials at the Panchayat or Block levels. The selection was also at local levels and not through Bihar Public Service Commission or Schools Selection Board. The distinction brought out in that behalf by the State in para 13 of its supplementary counter affidavit filed in the High Court clearly shows the difference in mode of recruitment. The Hon'ble Court, therefore, held that the mode of recruitment and the standards of selection were different but the nature of duties performed by the Niyojit Teachers have been absolutely identical.

The Hon'ble Court then went to discuss the development of the doctrine of 'equal pay for equal work' and whether it admits of any qualifications or exceptions and referred to the following cases[4]:-

(i) ***Kishori Mohanlal Bakshi* v. *Union of India***[5] - The Income Tax Officers were divided into two categories and Class-I Income Tax Officers alone were entitled to be considered for promotion to the posts of Commissioners and Assistant Commissioners. There could be no such direct promotion from amongst officers who were Income Tax Officers Class-II. The submission that this was violative of Article 16(1) of the Constitution was rejected. Further submission was that both the categories were doing same kind of work but their pay-scales were different and as such the doctrine of 'equal pay for equal work' stood violated. While considering said submission, the Constitution Bench stated:—

> *"3. The only other contention raised is that there is discrimination between class I and Class I Officers inasmuch as though they do the same kind of work their pay-scales are different. This, it is said, violates article 14 of the Constitution. If this contention had any validity, there could be no*

[4] *See* also, *State of Haryana* v. *Charanjit Singh* (2006) 9 SCC 321; *State of Haryana* v. *Jasmer Singh* (1996) 11 SCC 77; *Orissa University of Agriculture & Technology* v. *Manoj K. Mohanty* (2003) 5 SCC 188; *Govt. of W.B.* v. *Tarun K. Roy* (2004) 1 SCC 347; *State of W.B.* v. *W.B. Minimum Wages Inspectors Assn.* (2010) 5 SCC 225; *Union of India* v. *Dineshan K.K* (2008) 1 SCC 586; *Finance Deptt.* v. *W.B. Registration Service Assn.* 1993 Supp (1) SCC 153, *State of U.P.* v. *J.P. Chaurasia* (1989) 1 SCC 121, *Union of India* v. *Pradip Kumar Dey* (2000) 8 SCC 580 and *State of Haryana* v. *Haryana Civil Secretariat Personal Staff Assn.* (2002) 6 SCC 72 *Bhagwan Dass* v. *State of Haryana* (1987) 4 SCC 634; *State of Haryana* v. *Tilak Raj* (2003) 6 SCC 123; *State of Karnataka* v. *Umadevi (3)* (2006) 4 SCC.

[5] AIR 1962 SC 1139.

incremental scales of pay fixed dependent on the duration of an officer's service. The abstract doctrine of equal pay for equal work has nothing to do with article 14. The contention that article 14 of the constitution has been violated therefore also fails."

(ii) *Randhir Singh v. Union of India*[6] - The principle of "equal pay for equal work" is not expressly declared by our Constitution to be a fundamental right. But it certainly is a constitutional goal and the principle "equal pay for equal work" is deducible from the Articles of the Constitution and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer.

(iii) *State of Haryana v. Charanjit Singh*[7] **-**

"19. *Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh (1996) 11 SCC 77, Tilak Raj (2003) 6 SCC 123, Orissa University of Agriculture & Technology (2003) 5 SCC 188 and Tarun K. Roy (2004) 1 SCC 347 lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by the competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of*

[6] (1982) 1 SCC 618.
[7] (2006) 9 SCC 321.

work. There may be qualitative difference as regards reliability and responsibility. ***Functions may be the same but the responsibilities make a difference.*** *Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regard. In any event, the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a court, the court must first see that there are necessary averments and there is a proof. If the High Court is, on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective writ petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."* (emphasis supplied)

(iv) ***SC Chandra v. State of Jharkhand***[8] -

"33. It may be mentioned that granting pay scales is a purely executive function and hence the court should not interfere with the same. It may have a cascading effect creating all kinds of problems for the Government and authorities. Hence, the court should exercise judicial restraint and not interfere in such executive function vide Indian Drugs & Pharmaceuticals Ltd. v. Workmen (2007) 1 SCC 408."

* * * * * *

35. In our opinion fixing pay scales by courts by applying the principle of equal pay for equal work upsets the high constitutional principle of separation of powers between the three organs of the State. Realising this, this Court has in recent years avoided applying the principle of equal pay for equal work, ***unless there is complete and wholesale identity between the two groups*** *(and there too the matter should be sent for examination by an Expert Committee appointed by the Government instead of the court itself granting higher pay).*

36. It is well settled by the Supreme Court that only because the nature of work is the same, irrespective of educational qualification, mode of appointment, experience and other relevant factors, the principle of equal pay for equal work cannot apply vide Govt. of W.B. v. Tarun K. Roy (2004) 1 SCC 347.

37. Similarly, in State of Haryana v. Haryana Civil Secretariat Personal Staff Assn. (2002) 6 SCC 72 the principle of equal pay for equal work was considered in great detail. In paras 9 and 10 of the said judgment the Supreme Court observed that ***equation of posts and salary is a complex matter which should be left to an expert body****. The courts must realise that the job is both a difficult and time consuming task which even experts having the assistance of staff with requisite expertise have found it difficult to undertake. Fixation of pay and determination of parity is a complex matter which is for the executive to discharge. Granting of pay parity by the court may result in a cascading effect*

[8] (2007) 8 SCC 279.

and reaction which can have adverse consequences vide Union of India v. Pradip Kumar Dey (2000) 8 SCC 580." (emphasis in original)

(v) ***Official Liquidator* v. *Dayanand***[9] **-** Similarity in the designation or quantum of work are not determinative of equality in the matter of pay scales and that before entertaining and accepting the claim based on the principle of equal pay for equal work, the Court must consider the factors like the source and mode of recruitment/appointment, the qualifications, the nature of work, the value judgment, responsibilities, reliability, experience, confidentiality, functional need, etc.

(vi) ***State of Punjab* v. *Surjit Singh***[10] - Grant of the benefit of the doctrine of "equal pay for equal work" depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity. equal pay must be for equal work of equal value and that the principle of equal pay for equal work has no mathematical application in every case, it has been held that Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who are left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. Enumerating a number of factors which may not warrant application of the principle of equal pay for equal work, it has been held that since the said principle requires consideration of various dimensions of a given job, normally the applicability of this principle must be left to be evaluated and determined by an expert body and the court should not interfere till it is satisfied that the necessary material on the basis whereof the claim is made is available on record with necessary proof and that there is equal work of equal quality and all other relevant factors are fulfilled.

(vii) ***Steel Authority of India Limited* v. *Dibyendu Bhattacharya***[11] – Parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The Expert Committee has to decide such issues, as the fixation of pay scales, etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions, etc. is found to be bona fide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will

[9] (2008) 10 SCC 1.
[10] (2009) 9 SCC 514.
[11] (2011) 11 SCC 122.

not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre.

(viii) *State of Punjab* **v.** *Jagjit Singh*[12] - The issue discussed in this case was whether temporarily engaged employees (daily-wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and the like), are entitled to minimum of the regular pay scale, along with dearness allowance (as revised from time to time) on account of their performing the same duties which are discharged by those engaged on regular basis, against sanctioned posts.

(ix) *Secretary, Finance Department* **v.** *West Bengal Registration Service Association*[13] - Discussed how a "pay structure" is evolved.

> *12. ... ... Ordinarily a pay structure is evolved keeping in mind several factors, e.g., (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v.) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc. We have referred to these matters in some detail only to emphasise that several factors have to be kept in view while evolving a pay structure and the horizontal and vertical relativities have to be carefully balanced keeping in mind the hierarchical arrangements, avenues for promotion, etc. Such a carefully evolved pay structure ought not to be ordinarily disturbed as it may upset the balance and cause avoidable ripples in other cadres as well. ... ..."*

After evaluating the facts of the case and referring to the aforementioned cases and the principles of law, the Hon'ble Court proceeded on the following premise :-

(1) It was open to the State to have two distinct cadres namely that of 'Government Teachers' and 'Niyojit Teachers' with Government Teachers being a dying or vanishing cadre. The incidents of these two cadres could be different. The idea by itself would not be discriminatory.
(2) The pay structure given to the Niyojit Teachers was definitely lower than what was given to Government Teachers but the number of Government Teachers was considerably lower than the number of Niyojit Teachers.
(3) The parity that is claimed is by the larger group with the lesser group as stated above which itself is a dying or a vanishing cadre.
(4) The mode of recruitment of Niyojit Teachers is completely different from that of the Government Teachers as stated above.

[12] (2017) 1 SCC 148.
[13] 1993 Supp (1) SCC 153.

The Hon'ble Court held that if a pay structure is normally to be evolved keeping in mind factors *such as* "method of recruitment" and "employer's capacity to pay" and if the limitations or qualifications to the applicability of the doctrine of 'equal pay for equal work' admit *inter alia* the distinction on the ground of process of recruitment, the stand taken on behalf of the State Government is not unreasonable or irrational. Going by the facts, the Hon'ble Court observed that the statistics presented by the State Government, it was an enormous task of having the spread and reach of education in the remotest corners. Furthermore, the literacy rate of the State which was lagging far behind the national average was also a matter which required attention. The advances made by the State on these fronts are quite evident. All this was possible through rational use of resources.

The Hon'ble Court further held that it is true that the budgetary constraints or financial implications can never be a ground if there is violation of Fundamental Rights of a citizen. Similarly, while construing the provisions of the RTE Act and the Rules framed thereunder, that interpretation ought to be accepted which would make the Right available under Article 21A a reality. As the text of the Article shows the provision is essentially child-centric. There cannot be two views as regards the point that Free and Compulsory Education ought to be quality education. However, such premise cannot lead to the further conclusion that in order to have quality education, Niyojit Teachers ought to be paid emoluments at the same level as are applicable to the State Teachers. The modalities in which expert teachers can be found, whether by giving them better scales and/or by insisting on threshold ability which could be tested through examinations such as TET Examination are for the Executive to consider.

The Hon'ble Court finally held :-

> *"**129.** In our considered view, there has been no violation of the Rights of the Niyojit Teachers nor has there been any discrimination against them. We do not find that the efforts on part of the State Government could be labelled as unfair or discriminatory. Consequently, the submissions as to how the funds could and ought to be generated and what would be the burden on the State Government and the Central Government, do not arise for consideration."*

The Hon'ble Court appreciated the efforts of the State observing that it has galvanised itself into action and not only achieved the objectives of having schools in every neighbourhood but has also succeeded in increasing the literacy rate. However, the Court raised concerned over the fact that at the initial stage the Niyojit Teachers are given such emoluments which are lesser than peons and clerks in the same school is a matter which requires attention and therefore, the Hon'ble Court suggested the State to devise a pay structure for Niyojit Teachers indicating that the courts may not interfere in policy matters but, if there is an imbalance of the nature as presented before this Court, the matter raises concern since the teachers must be entitled to decent emoluments.

2. *Federation of Obstetrics and Gynecological Societies of India (FOGSI) v. Union Of India(Writ Petition(Civil) No. 129 of 2017)*

Decided on: 03.05.2019
Bench: 1. Hon'ble Mr. Justice Arun Mishra
2. Hon'ble Mr. Justice Vineet Saran

(Non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error.)

FACTS

The Federation had approached the Apex Court seeking decriminalizing of anomalies in paperwork/record keeping/clerical errors in regard of the provisions of the PCPNDT Act contending that the same is violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. The Federation was essentially aggrieved with Section 23 equating, what they term as 'clerical errors' on the same footing with the actual offence of sex determination. According to them the Act does not distinguish between criminal offences and the anomalies in paperwork like incomplete 'F'-Forms, clerical mistakes such as writing NA or incomplete address, no mentioning of the date, incomplete filling of Form 'F', indication for sonography not written, faded notice board and not legible, striking out details in the Form 'F' etc. Even the smallest anomaly in paperwork which is in fact an inadvertent and unintentional error has made the obstetricians and gynecologists vulnerable to the prosecution by the Authorities all over the country, it was contended.

Section 23(2) of the Act empowers the State Medical Council to suspend the registration of any doctor indefinitely, who is reported by the Appropriate Authority for necessary action, during the pendency of trial.

DECISION AND OBSERVATIONS

Regarding Form 'F' the Apex Court noted, in case the indications and the information are not furnished as provided in the Form 'F' it would amount that condition precedent to undertake the test/procedure is absent. There is no other barometer except Form 'F' to find out why the diagnostic test/procedure was performed. In case such an important information beside others is kept vague or missing from the Form, it would defeat the very purpose of the Act and the safeguards provided there under and it would become impossible to check violation of provisions of the Act. It is not the clerical job to fill the form, it is condition precedent for undertaking test/procedure.

Further, the Court noted that there is no other barometer or criteria to find out the violation of the provisions of the Act. Rule 9(4) also requires that every Genetic Clinic to fill Form 'F' wherein information with regard to details of the patient, referral notes with indication and case papers of the patient are required to be filled and preserved. Form 'F' lays down the

indicative list for conducting ultrasonography during pregnancy. Form 'F' being technical in nature gives the insight into the reasons for conducting ultrasonography and incomplete Form 'F' raises the presumption of doubt against the medical practitioner. In the absence of Form 'F', Appropriate Authorities will have no tool to supervise the usage of ultrasound machine and shall not be able to regulate the use of the technique which is the object of the Act.

Also, the non-filling of information cannot be termed to be clerical error, but in case it is kept vague that itself facilitates an offence. It would definitely a blatant and intentional violation of the provisions of the Act in order to prevent the mischief which is intended to by maintenance of record, filling up details of the forms is mandated by Sections 4 and 5. The wholesome social legislation would be defeated in case Form is not filled which is sine qua non to undertake tests/procedures if such condition does not exist, no such procedure can be performed and diluting the provisions would be against the gender justice. It is in order to create the equality that the provisions have been enacted not that unequals are being treated equally. The non-maintenance of form/not reflecting correct medical condition is offence, not mentioning it would also be an offence.

Thus, when form has not been filled up, obviously the act is dishonest, fraudulent and can be termed intentional also. Such case cannot be classified into clerical error.

After referring to ***Shreya Singhal* v. *Union of India***, the Apex Court noted that it is absolutely clear that the provisions in the Act in question cannot be termed as arbitrary or illegal or unreasonable. The provisions are not vague. A responsible doctor is supposed to know before undertaking such pre-natal diagnostic test etc. what is he undertaking and what his responsibilities are. If he cannot understand the form he is required to fill and the impact of medical findings and its consequences which is virtually the pre- requisite for undertaking a test, he is not fit to be a member of a noble medical profession. Such culpable negligence is not warranted from a doctor. It is crystal clear from the provisions of the Act which can be gathered by a person of ordinary intelligence and they can have fair notice of what is prohibited and what omission they should not make.

Considering the general public interest and declining sex ratio the Apex Court held the provision 23(1) of the Act as constitutionally valid.

Non maintenance of record is spring board for commission of offence of foeticide, not just a clerical error. In order to effectively implement the various provisions of the Act, the detailed forms in which records have to be maintained have been provided for by the Rules. These Rules are necessary for the implementation of the Act and improper maintenance of such record amounts to violation of provisions of Sections 5 and 6 of the Act, by virtue of proviso to Section 4(3) of the Act. In addition, any breach of the provisions of the Act or its Rules would attract cancellation or suspension of registration of Genetic Counselling Centre,

Genetic Laboratory or Genetic Clinic, by the Appropriate Authority as provided under Section 20 of the Act.

There is no substance in the submission that provision of Section 4(3) be read down. By virtue of the proviso to Section 4(3), a person conducting ultrasonography on a pregnant woman, is required to keep complete record of the same in the prescribed manner and any deficiency or inaccuracy in the same amounts to contravention of Section 5 or Section 6 of the Act, unless the contrary is proved by the person conducting the said ultrasonography. The aforementioned proviso to Section 4(3) reflects the importance of records in such cases, as they are often the only source to ensure that an establishment is not engaged in sex-determination.

Section 23 of the Act, which provides for penalties of offences, acts in aid of the other Sections of the Act is quite reasonable. It provides for punishment for any medical geneticist, gynecologist, registered medical practitioner or a person who owns a Genetic Counselling Centre, a Genetic Clinic or a Genetic Laboratory, and renders his professional or technical services to or at said place, whether on honorarium basis or otherwise and contravenes any provisions of the Act, or the Rules under it.

Therefore***, dilution of the provisions of the Act or the Rules would only defeat the purpose of the Act to prevent female foeticide, and relegate the right to life of the girl child under Article 21 of the Constitution, to a mere formality***.

In view of the above, no case is made out for striking down the proviso to Section 4(3), provisions of Sections 23(1), 23(2) or to read down Section 20 or 30 of the Act. Complete contents of Form 'F' are held to be mandatory.

3. *Ganesan Rep By Its Power Agent G. Rukmani Ganesan v. The Commissioner, The Tamil Nadu Hindu Religious And Charitable Endowments Board & Ors.(Civil Appeal No. 4582 of 2019)*

Decided on: 03.05.2019
Bench: 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice K.M. Joseph

(The suits, appeals and applications referred to in the Limitation Act are not the suits, appeals and applications which are to be filed before a statutory authority)

FACTS

An appeal against the Madras High Court judgment was filed which had held that in appeal proceedings before the Commissioner, Section 5 of the Limitation Act is fully applicable, and the Commissioner of Hindu Religious & charitable endowment Board has power to condone the delay in filing appeals under Section 69 of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959.

Following are the questions which arose for consideration in this appeal:-

1) Whether the Commissioner while hearing the appeal under Section 69 of Act, 1959, is a Court?
2) Whether applicability of Section 29(2) of Limitation Act is with regard to different limitation prescribed for any suit, appeal or application to be filed only in a Court or Section 29(2) can be pressed in service with regard to filing of a suit, appeal or application before statutory authorities and tribunals provided in Special or Local Laws?
3) Whether the Commissioner while hearing the appeal under Section 69 of Act 1959 is entitled to condone a delay in filing an appeal applying the provisions of Section 5 of the Limitation Act, 1963?
4) Whether the statutory scheme of Act 1959 indicate that Section 5 of Limitation Act is applicable to proceedings before its authorities?

DECISION AND OBSERVATIONS

Regarding the First question, the Court concluded that when an appeal is provided against the order of the Commissioner under Section 69 to the Court which is defined under Section 6(7), there is no question of treating the Commissioner as a Court under the statutory scheme of Act, 1959.

The 2nd and 3rd question which are whether the Commissioner while hearing appeal under Section 69 of the Act, 1959 is entitled to condone the delay in filing an appeal by applying the provision of Section 5 of the Limitation Act, 1963?

Also, whether on the strength of Section 29(2) of the Limitation Act, 1963 provisions of Sections 4 to 24 (inclusive of the Limitation Act) shall apply in the proceedings of appeal before Commissioner under Section 69 of the Act, 1959?

After discussing various judgments, the Apex court culled out the following ratio on these issues:

(1) The suits, appeals and applications referred to in the Limitation Act, 1963 are suits, appeals and applications which are to be filed in a Court.
(2) The suits, appeals and applications referred to in the Limitation Act are not the suits, appeals and applications which are to be filed before a statutory authority like Commissioner under Act, 1959.
(3) Operation of Section 29(2) of the Limitation Act is confined to the suits, appeals and applications referred to in a special or local law to be filed in Court and not before statutory authorities like Commissioner under Act, 1959.
(4) However, special or local law vide statutory scheme can make applicable any provision of the Limitation Act or exclude applicability of any provision of Limitation Act which can be decided only after looking into the scheme of particular, special or local law.

The answer to question no. 2 and 3 are:

(i) The applicability of Section 29(2) of the Limitation Act is with regard to different limitations prescribed for any suit, appeal or application when to be filed in a Court.
(ii) Section 29(2) cannot be pressed in service with regard to filing of suits, appeals and applications before the statutory authorities and tribunals provided in a special or local law. The Commissioner while hearing of the appeal under Section 69 of the Act, 1959 is not entitled to condone the delay in filing appeal, since, provision of Section 5 shall not be attracted by strength of Section 29(2) of the Act.

Regarding question no.4 the Apex Court held that Section 115[14] of the Act, 1959 cannot be read in a manner as to providing applicability of Section 5. There is no other provision in the scheme from which it can be inferred that Act, 1959 intended applicability of Section 5 of the Limitation Act to proceedings of appeal before the Commission. It is thus concluded that Section 5 of the Limitation Act is not applicable as per the scheme of Act, 1959.

The Apex Court set aside the judgment of the High Court.

[14] Section 115 deals with limitation. It only provides that in computing the period of limitation prescribed under Act, 1959 for any proceeding, suit, appeal or application for revision against any order or decree passed under this Act, the time requisite for obtaining a certified copy of such order or decree shall be excluded.

4. *The Maharashtra Public Service Commission through its Secretary v. Sandeep Shriram Warade and Others (Civil Appeal No. 4597 Of 2019)*

Decided on :- 03.05.2019

Bench – (1) Hon'ble Mr. Justice Arun Mishra
(2) Hon'ble Mr. Justice Navin Sinha

The essential qualifications for appointment to a post are for the employer to decide, and a Court, while exercising its power of judicial review, cannot decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.

Facts

The Maharashtra Administrative Tribunal (hereinafter referred to as "the Tribunal") in O.A. No.820 of 2013 held that experience of manufacturing or testing in a research and development laboratory could not be termed as experience for the purposes of the present recruitment. The said experience only entitled the candidate for a preference subject to possessing the basic eligibility and requisite experience in the manufacture and testing of drugs.

Reversing the conclusion of the Tribunal, the High Court in W.P. No.6637 of 2014 and analogous cases held that to deny opportunity to a candidate possessing research experience in synthesis and testing of drugs in a laboratory on the ground that such research experience cannot be linked with manufacturing, would be a perverse interpretation. A candidate having research experience in synthesis and testing of drugs in a laboratory needed to be preferred and could not be denied opportunity by misreading the eligibility conditions. Research work carried out in well reputed laboratories is for the purposes of manufacturing drugs. This order was followed by the High Court in W.P. No. 7960 of 2016 instituted before the High Court directly.

The appellants, in this case, were aggrieved by the orders of the High Court holding that candidates possessing the requisite years of experience in research and development of drugs and testing of the same are also eligible to be considered for appointment to the post of Assistant Commissioner (Drugs) and Drug Inspectors under separate advertisements dated 04.01.2012 and 31.03.2015.

Observations and Decision

Referring to the judgment rendered in *Secretary (Health), Department of Health & F.W. and Another v. Dr. Anita Puri and Others*[15], and also to the terms of the advertisement, the Hon'ble Court observed that The essential qualifications for appointment to a post are for the employer to decide. The employer may prescribe additional or desirable qualifications, including any grant of preference. It is the employer who is best suited to decide the

[15] 1996 (6) SCC 282.

requirements a candidate must possess according to the needs of the employer and the nature of work. The court cannot lay down the conditions of eligibility, much less can it delve into the issue with regard to desirable qualifications being at par with the essential eligibility by an interpretive re-writing of the advertisement. Questions of equivalence will also fall outside the domain of judicial review. If the language of the advertisement and the rules are clear, the Court cannot sit in judgment over the same. If there is an ambiguity in the advertisement or it is contrary to any rules or law the matter has to go back to the appointing authority after appropriate orders, to proceed in accordance with law. In no case can the Court, in the garb of judicial review, sit in the chair of the appointing authority to decide what is best for the employer and interpret the conditions of the advertisement contrary to the plain language of the same.

5. *Rakesh Tiwari, Advocate v. Alok Pandey, C.J.M. (2019 SCC OnLine SC 700)*

Decided on: - 10.05.2019

Bench :- 1. Hon'ble Mr. Justice Arun Mishra
2. Hon'ble Mr. Justice Navin Sinha

(Misbehaviour with a Presiding Officer of the Court by an advocate leads to Criminal Contempt for which *inter alia* the advocate can be prevented from appearing in the Court, though his licence cannot be suspended by the Court.)

Facts

Sri Rakesh Tripathi, Advocate, on 21st December, 2012 during lunch hour without taking permission from C.J.M., Allahabad entered into his chamber along with 2-3 colleagues and at the said point of time he started hurling filthy abuses to the CJM and the matter did not end there, as he also raised his hand to beat the Chief Judicial Magistrate and also threatened him of dire consequences. The contemnor also asked the C.J.M. as to why he has not passed an order for lodging F.I.R. when he had asked for the same. This act on the part of the contemnor was held by the Allahabad High Court to constitute criminal contempt within the meaning of Section 2(c) of Contempt of Courts Act, 1971, as this act has not only lowered the authority of the Court but also scandalised the Court and the same has also the tendency of interference with the due course of administration of justice.

The appellant, advocate, was convicted for his undesirable conduct by the High Court vide impugned judgment and order under the Contempt of Courts Act and was sentenced to simple imprisonment of six months and a fine of Rs. 2000/- and in case of non-payment of fine, to undergo simple imprisonment for a further period of 15 days. He was also directed not to enter the premises of the District Judgeship, Allahabad for a period of six months *w.e.f.* 15.7.2015 and the contemnor was to remain under constant watch of the District Judge, Allahabad, for a period of two years; and in case of any objectionable conduct, causing interference in peaceful and smooth functioning of the court, the District Judge was asked to report the matter to the High Court.

Observations and Conclusions

The High Court, in this case had observed that considering the increasing tendency of the advocates in making scurrilous allegations against the Presiding Officers of subordinate courts has to be curbed. The acts of abusing and misbehaving are on increase. The action of the advocate amounts to lowering the dignity and majesty of the court. A deliberate attempt to scandalise a judicial officer of subordinate court is bound to shake the confidence of the litigant public in the system and has to be tackled strictly. Damage is not only to the reputation of the Judge but also to the fair name of the judiciary. Judges cannot be tamed by such tactics into submission to secure a desired order. The foundation of the system is based

on independence and impartiality of the Judges as well as responsibility to impart justice. In case their confidence, impartiality and reputation are shaken the same is bound to adversely affect the independence of the judiciary.

The Hon'ble Supreme Court made observations regarding the role of an advocate and opined that an advocate is duty bound to act as per the higher status conferred upon him as an officer of the court. He plays a vital role in preservation of society and justice delivery system. Advocate has no business to threaten a Judge or hurl abuses for judicial order which he has passed. In case of complaint of the Judge, it was open to the advocate to approach concerned higher authorities but there is no licence to any member of the Bar to indulge in such undignified conduct to lower down the dignity of the Court. Such attempts deserve to be nipped at the earliest as there is no room to such attack by a member of noble profession.

Referring to the judgments rendered in ***Mr. 'G', A Senior Advocate of the Supreme Court***[16] and in ***Lalit Mohan Das v. Advocate General, Orissa***[17], the Hon'ble Court further observed that the role of a lawyer is indispensable in the justice delivery system. He has to follow the professional ethics and also to maintain high standards. He has to assist the court and also defend the interest of his client. He has to give due regard to his opponent and also to his counsel. What may be proper to others in the society, may be improper for him to do as he belongs to an intellectual class of the society and as a member of the noble profession, the expectations from him are accordingly higher. Advocates are held in high esteem in the society. The dignity of court is in fact dignity of the system of which an advocate being officer of the court. The act of the advocate in the present case is not only improper but requires gross condemnation.

The Hon'ble Court then, answered the question regarding the sentence that is to be imposed in such cases against an advocate and referring to the judgment of the Apex Court in ***Supreme Court Bar Association* v. *Union of India***[18], the Hon'ble Court held that though it is not permissible for a court to suspend the licence to practice but at the same time it is open to this Court or the High Court to debar an advocate from appearing in the court. This Court has laid down that though suspension of a lawyer is not permissible to be ordered but when he is convicted under the contempt of court, it is possible for this Court or the High Court to prevent the advocate to appear in the court. The Hon'ble Court also held that an advocate found guilty of contempt cannot have an unreserved right to appear in court and the court may refuse to hear him, as held in ***Pravin C. Shah* v. *K.A. Mohd. Ali***[19] and several other cases[20].

[16] AIR 1954 SC 557.
[17] AIR 1957 SC 250.
[18] (1998) 4 SCC 409.
[19] (2001) 8 SCC 650.
[20] *Bar Council of India* v. *High Court of Kerala* (2004) 6 SCC 311; *R K Anand* v. *Registrar, Delhi High Court* (2009) 8 SCC 106.

Making the aforementioned observations, the Hon'ble Court held that –

> "**15.** In the instant case, the advocate has acted contrary to the obligations. He has set a bad example before others while destroying the dignity of the court and the Judge. The action has the effect of weakening of confidence of the people in courts. The judiciary is one of the main pillars of democracy and is essential to peaceful and orderly development of society. The Judge has to deliver justice in a fearless and impartial manner. He cannot be intimidated in any manner or insulted by hurling abuses. Judges are not fearful saints. They have to be fearless preachers so as to preserve the independence of the judiciary which is absolutely necessary for survival of democracy."

6. *Pramod Kumar and Another v. Zalak Singh and Others (2019 SCC OnLine SC 696)*

Decided on: - 10.05.2019

Bench :- 1. Hon'ble Mr. Justice Ashok Bhushan
2. Hon'ble Mr. Justice Zalak Singh and Other

(The scope of and the object behind Order II Rule 2 of the Civil Procedure Code)

Facts

One Tikaram was the husband of respondent No. 4 and the father of respondent Nos. 1 to 3. He was holding 8.22 acres of land in Khasra No. 189 at Village Gondia in his name. On 21.01.1959, he sold the land to the extent of 3.20 acres out of the total 8.22 acres to the appellants and thereafter, on 11.02.1959, he sold the remaining portion of 4.82 acres of land, which was the balance out of 8.22 acres, also to the appellants. Tikaram passed away on 15.07.1959.

The respondents filed a suit (bearing Civil Suit No. 131 of 1963) for setting aside the Sale Deed dated 21.01.1959 and for other reliefs. The allegation made by the respondents in the suit was that the land was a joint family ancestral property and he had sold it for immoral purposes and in a manner prejudicial to the interest of joint family. He was addicted to drink and there was no necessity to sell the property.

On 31.01.1969, the Trial Court dismissed the said suit holding that Tikaram was the owner of the property due to the partition effected in the year 1957. Hence, he had the right to sell the suit land. The appellants were *bona fide* purchasers.

Aggrieved by the decree of the Trial Court, the respondents filed an appeal (bearing Civil Appeal NO. 22 of 1969) on 10.02.1971.

The respondents again filed the present suit (bearing Civil Suit No. 34 of 1971) challenging the Sale Deed dated 11.02.1959 and seeking other reliefs. It is the said suit which came to be dismissed both by the Trial Court and the First Appellate Court. The Trial Court answered the issues including whether the Suit is barred under Order II Rule 2 and also affected by constructive *res judicata.* It found that the suit is liable to be dismissed on the ground of Order II Rule 2 and constructive *res judicata*. The dismissal by the Appellate Court was essentially on the basis of the provisions of Order II Rule 2 of the CPC as also constructive *res judicata* on the score that the second alienation dated 21.02.1959 ought to have been the subject matter of the earlier suit. The Appellate Court, in fact, found that the Trial Court was right in answering the other points. It is to be noted that the judgment of the Trial Court in the first suit came to be reversed in the civil appeal and the same has become final.

The High Court, however, reversing the orders of both the courts found that Order II Rule 2 will not be a bar. For Order II Rule 2, the cause of action in the first suit and the cause of action in the second suit must be identical. In this case, there were two alienations by the Tikaram giving rise to two causes of action. It is also found that constructive *res judicata* will

not apply. Aggrieved by the same, the Appellants filed the present Appeal through Special Leave.

Observations and Decision

The Supreme Court observed that the case of the plaintiffs appears to be that the property is ancestral property. Their late father Tikaram was given to wasteful ways and addicted to drink and otherwise. He was given to selling properties. His well-wishers intervened and partition ensued. However, 8.22 acres falling in Kh. No. 189 was kept out of the partition deed. He decided to sell 8.22 acres without there being any legal necessity and without any benefit to the joint family. The first part of the transaction, which consisted of two parts, pertained to sale deed dated 21.01.1959 and that was the subject matter of the first suit. At the time of filing of the said first suit, late predecessor-in-interest of the plaintiff, had also executed another sale deed which constituted the remaining portion which consisted of the 8.22 acres as already noticed. The suits contained virtually identical averments in regard to both the transactions. The first suit was filed in 1963 and the second suit filed in the year 1971.

The Hon'ble Court held that :-

> ***"41.*** *We are of the view that in such circumstances, this is a case where the plaintiff ought to have included relief in the form of setting aside the second sale deed also. This is not a case where the second sale deed had not been executed when the plaintiff instituted the first suit. We are not, for a moment, declaring the effect of the sale deed having been executed subsequently to the institution of the suit as we do not have to pronounce on the effect of such a sale. We are only emphasizing that it was open to the respondent/plaintiff to seek relief in respect of the second sale executed by their predecessor-in-interest and what is more important in favour of the same parties (defendants) who are the appellants before us."*

Before coming to the conclusion, the Hon'ble Court referred to the pleadings of the two suits and discussed the scope of and the object behind Order II Rule 2 of the Civil Procedure Code. The Hon'ble Court referred to the judgment of the Privy Council in ***Mohammad Khalil Khan* v. *Mehbub Ali Mian***[21], wherein it had been held that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted and the correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. The Privy Council in that case had also summarised the principles as follows: -

"**(1)** The correct test in cases falling under O.2 R.2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

[21] AIR (36) 1949 Privy Council 78.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers….. to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

The Hon'ble Court also referred to the case of ***Union of India* v. *H.K. Dhruv***[22], wherein it had been held that in order to attract applicability of the bar enacted by Order 2 Rule 2 CPC, it is necessary that the cause of action on which the subsequent claim is founded should have arisen to the claimant when he sought for enforcement of the first claim before any court.

Referring to the several judgments[23] of the Supreme Court, the Hon'ble Court held that the Rule engrafts a laudable principle that discourages/prohibits vexing the defendant again and again by multiple suits except in a situation where one of the several reliefs, though available to a plaintiff, may not have been claimed for a good reason. A later suit for such relief is contemplated only with the leave of the court which leave, naturally, will be granted upon due satisfaction and for good and sufficient reasons." Thus, in respect of omission to include a part of the claim or relinquishing a part of the claim flowing from a cause of action, the result is that the plaintiff is totally barred from instituting a suit later in respect of the claim so omitted or relinquished. ***However, if different reliefs could be sought for in one suit arising out of a cause of action, if leave is obtained from the Court, then a second suit, for a different relief than one claimed in the earlier suit, can be prayed for***. There are three expressions which are found in Order II Rule 2. Firstly, there is reference to the word "***cause of action***", secondly the word "***claim is alluded to***" and finally reference is made to "***relief***".

The Hon'ble Court also held that Order II Rule 2(1) provides that a plaintiff is to include the whole of the claim, which he is entitled to make, in respect of the cause of action. However, it is open to him to relinquish any portion of the claim. Order II Rule 2 provides for the consequences of relinquishment of a part of a claim and also the consequences of omitting a part of the claim. It declares that if a plaintiff omits to sue or relinquishes intentionally any portion of his claim, he shall be barred from suing on that portion so omitted or relinquished. Order II Rule 2(3), however, deals with the effect of omission to sue for all or any of the reliefs in respect of the same cause of action. The consequences of such omission will be to

[22] (2005) 10 SCC 218.

[23] *Virgo Industries (Eng.) (P) Ltd.* v. *Venturetech Solutions (P) Ltd.,* (2013) 1 SCC 625; *Coffee Board* v. *Ramesh Exports Private Limited,* (2014) 6 SCC 424; *S. Nazeer Ahmed* v. *State Bank of Mysore,* (2007) 11 SCC 75.

precluded plaintiff from suing for any relief which is so omitted. The only exception is when he obtains leave of the Court.

The Hon'ble Court finally observed that :-

> ***"43.*** *It is undoubtedly true that the law does not compel a litigant to combine one or more causes of action in a suit. It is open to a plaintiff, if he so wishes, however to combine more than one cause of action against same parties in one suit. However, it is undoubtedly true that the embargo in Order II Rule 2 will arise only if the claim, which is omitted or relinquished and the reliefs which are omitted and not claimed, arise from one cause of action. If there is more than one cause of action, Order II Rule 2 will not apply. It is undoubtedly also true that Order II Rule 2 manifests a technical rule as it has the effect of posing an obstacle in the path of a litigant ventilating his grievance in the Courts. But as already noted, there is an equally important principle that no person shall be vexed twice on the same cause of action."*

7. *Girish Kumar v. State of Maharashtra and Others (2019 SCC OnLine SC 695)*

Decided on :- 10.05.2019

Bench:- 1. Hon'ble Mr. Justice L. Nageswara Rao
2. Hon'ble Mr. Justice M.R. Shah

(Whether an employee who has been assigned the deemed date of promotion as per Rule 5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 and as such has not actually worked at all on the promotional post, can it be said that he has *completed service for a continuous period of not less than three years in the feeder cadre*, which is the requirement under the relevant Recruitment Rules?)

Facts

That the appellant herein - Girish Kumar was appointed as Senior Assistant on 26.6.2001. Thereafter he was promoted to the post of Office Superintendent by order dated 12.10.2007, however, with effect from 7.10.2005. One Govind Jerale, appointed as Junior Assistant on 8.9.1994, was promoted to the post of Senior Assistant on 6.11.1999. Respondent No. 3 herein was appointed as Junior Assistant on 29.8.1994. He was suspended from service sometime in the year 1999. His suspension was revoked and he was reinstated on 17.7.2001. Thereafter he was exonerated in departmental enquiry on 15.6.2006. That thereafter he was promoted as Senior Assistant on 1.7.2006. However, in view of the fact that he was exonerated in departmental enquiry, considering Rule 5 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 (hereinafter referred to as the 'Seniority Rules, 1982'), Respondent No. 3 was granted 6.11.1999 as deemed date of promotion as Senior Assistant, i.e., the date on which his junior Govind Jerale was promoted as Senior Assistant. Thereafter, on 22.10.2007, respondent no. 3 was promoted as Office Superintendent. The Divisional Commissioner granted to respondent no. 3, 07.10.2005 as deemed date of promotion as Office Superintendent. As Respondent No. 3 was placed in the higher position in the seniority list above the appellant herein, he was consequently promoted as Section Officer by respondent no. 2, vide his order dated 1.2.2008.

Being aggrieved by the aforesaid order of promotion promoting respondent no. 3 herein to the post of Section Officer, the appellant initially preferred writ petition before the High Court. However, the said writ petition came to be disposed of by the High Court with liberty to the appellant to approach the Additional Divisional Commissioner, Aurangabad for redressal of his grievance. The appellant preferred appeal before the Additional Divisional Commissioner, Aurangabad on 05.11.2008. It was the case on behalf of the appellant that the eligibility criteria as per the Maharashtra Zilla Parishads District Services (Recruitment) Rules, 1967 (hereinafter referred to as the 'Recruitment Rules, 1967') for the post of Section Officer was 'continuous service of not less than three years' in the grade of Office Superintendent and respondent no. 3 never completed his continuous service of not less than three years on the post of Office Superintendent, he was not eligible for promotion to the

post of Section Officer. Vide order dated 20.05.2010, the Additional Divisional Commissioner, Aurangabad allowed the said appeal preferred by the appellant herein and quash and set aside the order of promotion of respondent no. 3 to the post of Section Officer.

Being aggrieved by the order passed by the Additional Divisional Commissioner, Aurangabad, respondent no. 3 preferred Writ Petition before the High Court. A learned Single Judge of the High Court allowed the said writ petition and set aside the order passed by the Additional Divisional Commissioner, Aurangabad and consequently confirmed the order of promotion of respondent no. 3 dated 1.2.2008.

Feeling aggrieved and dissatisfied with the judgment and order passed by the learned Single Judge, the appellant preferred Letters Patent Appeal before the Division Bench of the High Court. By the impugned judgment and order, the Division Bench of the High Court dismissed the said appeal and confirmed the judgment and order passed by the learned Single Judge. Hence, the appellant has preferred the present appeal.

Observations and Decision

The Hon'ble Court observed that as per Appendix IX to the Recruitment Rules, 1967, which are framed in exercise of the powers conferred under Section 274 of the Maharashtra Zilla Parishads and Panchayat Samities Act, 1961 for promotion to the post of Section Officer, no person shall be eligible for promotion unless he has completed service for a continuous period of not less than three years in District Service (Class III) (Ministerial) Grade II. Respondent no. 3 was promoted as Office Superintendent on 22.10.2007. However, he was granted deemed date of promotion under Rule 5 of the Seniority Rules, 1982 for promotion as Office Superintendent. He was promoted to the post of Section Officer on 1.2.2008. It was the case on behalf of the appellant that as respondent no. 3 was actually promoted as Office Superintendent on 22.10.2007 and therefore has not completed service for a continuous period of not less than three years in the District Service (Class III) (Ministerial) Grade II and therefore he was not eligible for promotion considering the relevant provisions of the Recruitment Rules, more particularly Appendix IX. However, it was the case on behalf of respondent no. 3 that once he was granted the deemed date of promotion under Rule 5 of the Seniority Rules, 1982, his date of promotion for all purposes shall be continued/counted from 7.10.2005, i.e., from the deemed date of promotion.

The Hon'ble Court pointed out that it is required to be noted that the Seniority Rules, 1982 and the Recruitment Rules, 1967 both are different rules and enacted under the different provisions and they operate in different fields. The Recruitment Rules, 1967 are enacted/framed in exercise of powers conferred by clause xxxix of sub-section 2 of Section 274 of the Maharashtra Zilla Parishads and Panchayat Samities Act, 1961. The said Rules shall apply to the recruitment to all posts in District Technical Service (Class III), District Service (Class III) and District Service (Class IV). On the other hand, the Seniority Rules, 1982 are framed/enacted in exercise of powers conferred by proviso to Article 309 of the Constitution of India. As per the Seniority Rules, 1982, the seniority of government servants

shall be regulated in accordance with the provisions of the Seniority Rules, 1982. The said Seniority Rules, 1982 are made applicable to the District Service also. Therefore, the Seniority Rules, 1982 shall govern the seniority only and not with respect to the recruitment. The recruitment shall be governed by the Recruitment Rules, 1967 only.

The Hon'ble Court further observed that in the present case, the High Court has considered Rule 5 of the Seniority Rules, 1982 and has not at all considered the Recruitment Rules, 1967. Respondent no. 3 might have been granted the deemed date of promotion to the post of Office Superintendent with effect from 07.10.2005. However, he was actually promoted as Office Superintendent on 22.10.2007. Therefore, in fact, he has rendered service as Office Superintendent only from 22.10.2007. As per Appendix IX to the Recruitment rules, 1967, the eligibility for appointment to the promotional post of Section Officer requires three years continuous service. The language used in Appendix IX is unambiguous, simple and plain.

The Hon'ble Court, therefore, held that ***on a fair reading of Appendix IX of the Recruitment Rules, 1967, to become eligible for the promotional post of Section Officer, a person ought to have rendered continuous service of not less than three years. "Continuous service" might have been defined under the Seniority Rules, 1982. However, the same shall be for the purpose of seniority and the Seniority Rules only. Therefore, if any employee is granted the deemed date of promotion, his seniority shall be considered accordingly from the deemed date of promotion. However, that shall be only for the purpose of inter se seniority only and the same shall not be applicable while considering the eligibility criteria under the Recruitment Rules. In the Recruitment Rules, "continuous service" is not defined. Therefore, one has to consider the ordinary dictionary meaning of "continuous" which means "uninterrupted or unbroken". The High Court has added the word "actual" which as such is not there in Appendix IX. While considering the relevant provisions and as per the rule of interpretation, when the language used is unambiguous, plain and simple, the provision is required to be read as it is and nothing is to be added. Therefore, when in Appendix IX, the eligibility criteria is that no person shall be eligible for promotion unless he has completed service for a continuous service of not less than three years means he has to render/complete service for a continuous period of uninterrupted/unbroken three years service.*** When respondent no. 3 has not completed three years of service for a continuous period of not less than three years in the feeder cadre in District Service (Class III) (Ministerial) Grade II, he was not eligible for promotion to the post of Section Officer.

The Hon'ble Court finally held that the High Court had committed a grave error in holding otherwise and, therefore, the Additional Divisional Commissioner, Aurangabad rightly allowed the appeal and rightly set aside the order of promotion of respondent no. 3 dated 1.2.2008 to the post of Section Officer.

8. *State of Madhya Pradesh v. Kalicharan and Others (2019 SCC OnLine SC 753)*

Decided on :- 31.05.2019

Bench :- 1. Hon'ble Mr. Justice M.R. Shah
2. Hon'ble Mr. Justice A.S. Bopanna

(Discussion on the issue of altering the conviction of the accused from Sections 302/149 to Section 304 Part II - Even in a case of a single blow, but on the vital part of the body, the case may fall under Section 302 of the IPC)

Facts

Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Madhya Pradesh, Judicature at Jabalpur, Bench at Gwalior whereby the High Court has partly allowed the said appeal preferred by the original accused and set aside the judgment and order of conviction and sentence passed by the learned Trial Court, whereby the learned Trial Court had convicted the respondent-original accused for commission of the offence under Sections 148, 302/149, 325/149, 323/149 of the IPC and altered the conviction of the accused-Ramavtar from Section 302/149 of the IPC to Section 304 Part II of the IPC and sentenced him to five years R.I. with fine of Rs. 5000/- and set aside his conviction for the offence under Sections 148 and 302/149 of the IPC; altered the conviction of the accused-Kalicharan to offences under Sections 323 and 325 of the IPC and reduced the sentence to the period already undergone; set aside the conviction of the accused-Amar Singh, Kedar, Abhilakh and Ramgopal under Sections 148, 302/149, 325/149 and 323/149 of the IPC and acquitted them from the charges levelled against them; set aside the conviction of the accused-Tejsingh, Gangaram and Vedari under Sections 148, 302/149 and 325/149 of the IPC and convicted them for commission of the offence under Section 323 of the IPC and reduced the sentence to the period already undergone by them, the State has preferred the present appeal.

Observations and Decision

Referring to the judgment of *Kanwarlal v. State of M.P.*[24], the Hon'ble Court upheld the order of acquittal for the offences under Sections 148, 302/149 and 325/149 of the IPC based on the facts and circumstances of the case and considering the fact that there was a free fight and the role attributed to the aforesaid accused.

However, as far as the issue of altering the conviction of the accused-Ramavtar from Sections 302/149 to Section 304 Part II of the IPC is concerned, the Hon'ble Court observed that that the fatal blow was caused by the said accused-Ramavtar. The deceased Kalyan sustained the injury on his head which was caused by the accused Ramavtar. The said injury caused by the accused Ramavtar was on the vital part of the body i.e. head and proved to be fatal. Merely because the accused Ramavtar caused the injury on the head by the blunt side of Farsa, the High Court is not justified in altering the conviction to Section 304 Part II of the IPC. As held

[24] (2002) 7 SCC 152.

by this Court in catena of decisions, even in a case of a single blow, but on the vital part of the body, the case may fall under Section 302 of the IPC and the accused can be held guilty for the offence under Section 302 of the IPC. However, in the facts and circumstances of the case, more particularly that it was a case of free fight, considering the fact that the weapon used by the accused Ramavtar was Farsa and he caused the injury on the vital part of the body i.e. head which proved to be fatal, in the facts and circumstances of the case, the Hon'ble Court was of the opinion that the High Court has committed a grave error in altering the conviction of the accused Ramavtar from Sections 302/149 of the IPC to Section 304 Part II of the IPC. In the facts and circumstances of the case and considering the evidence on record, more particularly, the medical evidence and the manner in which the incident took place, the Hon'ble Court held that the accused Ramavtar should have been held guilty for the offence under Section 304 Part I of the IPC and to that extent, the impugned judgment and order passed by the High Court deserved to be quashed and set aside and the conviction of the accused Ramavtar to be altered from Section 304 Part II to Section 304 Part I of the IPC.

9. *Sasikala Pushpa v. State of Tamil Nadu (Criminal Appeal No. 855 of 2019)*

Decided on – 07.05.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice S. Abdul Nazeer

(Mere incorrect statement in the vakalatnama would not amount to create a forged document)

Facts

These appeals arise out of the judgment dated 14.09.2016 passed by the Madurai Bench of Madras High Court dismissing anticipatory bail application filed by the appellants. By the same judgment, the Single Judge of the High Court directed the Registrar (Judicial) to lodge a complaint with the jurisdictional police station against the appellants with respect to the alleged forgery committed by them in signing the vakalatnama. Pursuant to the direction of the High Court, the Registrar (Judicial) lodged a complaint with Police Station on the basis of which, FIR for the offences punishable under Sections 193, 466, 468 and 471 IPC was registered against the appellants.

Decision and Observations

The Apex Court noted that it is fairly well settled that before lodging of the complaint, it is necessary that the court must be satisfied that it was expedient in the interest of justice to lodge the complaint. It is not necessary that the court must use the actual words of Section 340 Cr.P.C.; but the court should record a finding indicating its satisfaction that it is expedient in the interest of justice that an enquiry should be made. Observing that under Section 340 Cr.P.C., the prosecution is to be launched only if it is expedient in the interest of justice and not on mere allegations or to vindicate personal vendetta.

On this point the Apex Court referred to ***Iqbal Singh Marwah* v. *Meenakshi Marwah***[25], wherein it has been held that:

"In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(*b*), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(*b*). ***This expediency will normally be judged by the court by weighing not the magnitude of injury***

[25] (2005) 4 SCC 370.

suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice."

The Apex Court stated that a vakalatnama is only a document which authorizes an advocate to appear on behalf of the party and by and large, it has no bearing on the merits of the case.

The Apex Court then noted that the appellants have admitted their signatures in the vakalatnama. They only allege that it was mistakenly recorded that it has been signed on 18.08.2016 at Madurai in the presence of the advocate. Of course, the version in the vakalatnama is an incorrect statement. However, the High Court was not justified in terming the said mistake or error as fraud. ***Fraud implies intentionally deception aimed or achieving some wrongful gain or causing wrongful loss or injury to another. Intention being the mens rea is the essential ingredient to hold that a fraud has been played upon the court.***

Also, there is nothing on record to suggest that the appellants gained anything by playing fraud or practising deception. Therefore, the Court held that ***mere incorrect statement in the vakalatnama would not amount to create a forged document and it cannot be the reason for exercising the jurisdiction under Section 340 Cr.P.C.*** for issuance of direction to lodge the criminal complaint against the appellants.

The Apex Court also mentioned ***Amarsang Nathaji* v. *Hardik Harshadbhai Patel***[26], wherein it was held that before proceeding under Section 340 Cr.P.C., the court has to be satisfied about the deliberate falsehood on a matter of substance and there must be a reasonable foundation for the charge. Observing that some inaccuracy in the statement or mere false statement may not invite a prosecution, it was held as under:—

> *"6. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. v. Union of India*[27] *). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case."*

[26] (2017) 1 SCC 113
[27] (1992) 3 SCC 178

10. Nand Kishore Prasad v. Dr. Mohib Hamidi and Others

Decided on:- 10.05.2019

Bench :- 1. Hon'ble Mr. Justice Dhananjaya Y. Chandrachud
2. Hon'ble Mr. Justice Hemant Gupta

(The principles governing Medical Negligence vis-à-vis Consumer Complaints and the award of compensation therefor.)

Facts

Sanjay Kumar aged about 15 years, son of the Appellant complained of abdominal pain, fever and haemorrhage in both eyes. Initially, the Appellant had taken his son to a physician Dr. Arun Tiwari on 08.11.1995 who advised some tests and medicines. He was advised to consult with the specialist as well. After examining the blood report, Dr. Arun Tiwari referred the patient to the Kurji Holy Family Hospital-original Opposite Party No. 1 on 10.11.1995. He was taken to the Hospital at about 8.00 PM. The recorded history of the patient is as under:

> "A 15 years old male patient is admitted in 3A-7 with the complaints of fever, pain abdomen and hemorrhage from both eyes since 5 days."

The patient was operated upon on 11.11.1995 when the platelets count was 35000 per cubic millimeter (cu.mm) at about 11.15 AM. Before the surgery, the patient was transfused with two units of blood and after the surgery another two units of blood were transfused. Since the patient was bleeding and in spite of packing of leakages, the relatives of the patient took discharge from the Kurji Holy Family Hospital at about 2.00 PM on 13.11.1995. On the same date, the patient was admitted to Patna Medical College and Hospital (PMCH) where the patient died on 16.11.1995.

In consumer complaint under the Consumer Protection Act, 1986[3], the Appellant produced an affidavit of Dr. Hare Ram Singh, then posted in Jharkhand State Assembly at Russian Hostel, Dhurwa, P.S. Jaganathpur, District Ranchi. Dr. Hare Ram Singh opined that Bleeding Time (BT) was 3′ 00′ against normal value of 2-4 seconds and Clotting Time (CT) was 5′ 00″ against normal value of 3-6 seconds. The affidavit further states that there was a second test which shows that the platelets decreased excessively and there were very few plasma cells present. There was another test conducted before surgery, showing platelets count as 35000 per cu. mm. Dr. Hare Ram Singh was of the opinion that to operate the patient with excessive low platelets count was the greatest blunder and clear case of extreme negligence of doctors.

Learned SCDRC found that the patient was haemophilic and not peritonitis as diagnosed by the Respondents. However, since the platelets count was 35000 per cu.mm against normal range of 1.5 lakhs to 4 lakhs per cu. mm, the Operating Surgeon was medically negligent in operating patient when the platelets count was so low. Thus, the opposite party was found

negligent in carrying out surgery. The SCDRC awarded a sum of Rs. 4,00,000/- as compensation to be paid by the Kurji Holy Family Hospital-Opposite Party No. 1 and Rs. 2,00,000/- by the Opposite Party No. 3-Operating Surgeon with 6 percent simple interest, apart from Rs. 32,000/- as expenditure incurred in medical treatment and the litigation costs of Rs. 25,000/-. In appeal by the Operating Surgeon, the amount of compensation awarded against Operating Surgeon was set aside by NCDRC.

The NCDRC though held the Opposite Party No. 3 wee bit negligent but, it found that the amount of compensation awarded by the SCDRC and paid by the Kurji Holy Family Hospital is just a proper compensation. The Operating Surgeon was warned to be careful in future. Aggrieved by the same, the present appeal has been filed.

Observations and Decision

The Hon'ble Court observed that at the time of admission, the recorded history of the patient is complaint of pain in abdomen, fever and haemorrhage in both eyes for the past five days. However, there is no evidence of critical condition of the patient to be operated upon even with low platelet count. The surgery to remove round worms is not proved to be of immediate necessity to save life of a patient who had critical platelet count. In the absence of any evidence that the surgery was the only life saving option available at that time, the action to operate upon the patient cannot be said to be prudent decision.

The Hon'ble Court referred to the recent case of ***Arun Kumar Manglik* v. *Chirayu Medical Health and Medicare Private Ltd***.[28] wherein it had been held –

> ***"53.*** *In the practice of medicine, there could be varying approaches to treatment. There can be a genuine difference of opinion. However, while adopting a course of treatment, the medical professional must ensure that it is not unreasonable. The threshold to prove unreasonableness is set with due regard to the risks associated with medical treatment and the conditions under which medical professionals function. This is to avoid a situation where doctors resort to 'defensive medicine' to avoid claims of negligence, often to the detriment of the patient. Hence, in a specific case where unreasonableness in professional conduct has been proven with regard to the circumstances of that case, a professional cannot escape liability for medical evidence merely by relying on a body of professional opinion."*

Referring to the case of ***Kusum Sharma* v. *Batra Hospital and Medical Research Centre***[29], the Hon'ble Court held that the doctors in complicated cases have to take chance even if the rate of survival is low. The professional should be held liable for his act or omission, if negligent; is to make life safer and to eliminate the possibility of recurrence of negligence in future. But, in the absence of any evidence that the surgery was the only option even with low blood platelets, the finding of negligence of the operating surgeon cannot be ignored.

[28] 2019 SCC OnLine SC 197.
[29] (2010) 3 SCC 480

Thus, the Hon'ble Court held that the present case was a case of unreasonable decision of the Operating Surgeon to operate and not a case of "bit negligent" so as to absolve the surgeon from the allegation of medical negligence. Consequently, the finding of NCDRC to that extent was set aside.

Regarding the amount of compensation to be awarded the Hon'ble Court referred to the cases of ***V. Krishnakumar* v. *State of Tamil Nadu***[30] and also the cases of ***Malay Kumar Ganguly v. Sukumar Mukherjee***[31] and ***Balram Prasad v Kunal Saha and Others***[32] which laid down the principle of awarding compensation that can be safely relied on, according to which indisputably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of *restitutio in integrum*. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. An application of this principle is that the aggrieved person should get that sum of money, which would put him in the same position if he had not sustained the wrong. It must necessarily result in compensating the aggrieved person for the financial loss suffered due to the event, the pain and suffering undergone and the liability that he/she would have to incur due to the disability caused by the event. Referring to the case of ***National Insurance Company Limited* v. *Pranay Sethi***[33] with respect to "just compensation", the Hon'ble Court held that as just compensation has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. Compensation can be calculated on the twin criteria of age and income and based on this, the compensation of Rs. 6,00,000/- that had been awarded by the SCDRC was held to be correct.

[30] (2015) 9 SCC 388.
[31] (2009) 9 SCC 221.
[32] (2014) 1 SCC 384.
[33] (2017) 16 SCC 680.

11. Union of India v. Mubarak (Criminal Appeal No. 865 of 2019)

Decided on – 07.05.2019

Bench – (1) Hon'ble Mr. Justice A.M.Khanwilkar

(2) Hon'ble Mr. Justice Ajay Rastogi

(Necessary ingredients of Section 43D(2)(b) of the UAP Act, 1967)

Facts

A case was initially registered on the written complaint of one Dhanapal, brother of the deceased who was a spokesperson of Hindu Front at Coimbatore and was brutally hacked to death by a gang of unknown persons . Due to the above murder, violence broke out in Coimbatore when the body of the deceased was taken for cremation. As the violence spread out to neighbouring directions of Tirupur, about 237 cases came to be registered in respect of the incidence of stone pelting, hurling of petrol bomb on Mosque, setting fire to shops, attack on police vehicles and buses, attack on shops belonging to different sect of the society. For days together, the harmony, public peace and tranquillity got affected. DGP, Tamil Nadu, considering the gravity of the offence transferred the case to (Special Investigation Division) CB CID, Coimbatore. During the course of investigation, an alteration report was filed by SID CB CID to invoke Section 120B and Section 153A IPC and Section 16 and 18 of UAP Act, 1967.The Central Government in exercise of the powers conferred under Section 6 read with Section 8 of the NIA Act entrusted the investigation to the National Investigation Agency. The case was taken over by the NIA under Section 302, 153A, 120B of IPC read with Section 16 and 18 of the UAP Act, 1967. During the course of investigation, four accused persons were arrested out of which the accused respondent(A-4) was arrested on 25th December, 2017.

A report under Section 43(D)(2) of the UAP Act, 1967 was submitted by the Special Public Prosecutor before the Special Court under NIA assigning specific reasons for seeking extension of judicial detention of the accused respondent for a further period of 90 days enabling him to complete the investigation. A counter statement was filed by the accused respondent on the same date opposing the application filed by the Special Public Prosecutor through his counsel. The Special Court(NIA) after hearing the parties recorded its

satisfaction for detention of the accused respondent for a further period of 90 days which was the subject matter of challenge in appeal preferred at the instance of the accused respondent under Section 21 of the NIA Act before the High Court of Madras, which on appraisal of the record, arrived at the conclusion that the specific reasons which has been assigned by the Special Public Prosecutor in his report seeking detention of the respondent for a further period of 90 days does not meet the requirement of law as contemplated under Section 43D(2)(b) of the UAP Act, 1967 and accordingly set aside the order of the Special Court and in consequence thereof, granted statutory bail in default to the accused respondent under its order dated 12th September, 2018 which is a subject matter of challenge in appeal.

Observations and Decision

The Apex Court mentioned Section 43D(2)(b) of the UAP Act, 1967 and emphasized on the necessary ingredients of the proviso to Section 43D(2)(b)[34] of the UAP Act, 1967 which has to be fulfilled for its proper application. These are as under:—

A. It has not been possible to complete the investigation within the period of 90 days.

B. A report to be submitted by the Public Prosecutor.

C. Said report indicating the progress of investigation and the specific reasons for detention of the accused beyond the period of 90 days.

D. Satisfaction of the Court in respect of the report of the Public Prosecutor.

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[34] "43D. **Modified application of certain provisions of the Code.**
(1)- - - xxx
(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-
(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and
(b) after the proviso, the following provisos shall be inserted, namely:—
Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:
Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."

The Apex Court then referred to the decision in ***State of Maharashtra v. Surendra Pundlik Gadling***[35] wherein the scope of the above mentioned section has been examined.

The Apex Court took note of the specific reasons which has been assigned by the Special Public Prosecutor in his report of which reference has been made.[36] The Apex Court was

[35] 2019 SCC OnLine SC 188

[36] The extract of the report submitted by the Public Prosecutor indicating the progress of the investigation and the specific reasons required for detention of the accused respondent for a further period of 90 days as envisaged under Section 43D of the UAP Act are stated as under: –

8. It is further submitted that, during the course of investigation more than 350 witnesses have been examined, more than 250 suspects were interrogated, more than 2500 Call Data Records were obtained, 25 Tower Dump data were collected, and more than 50 CCTV footages from the path travelled by the deceased were collected. The collected data and CCTV footages are huge volumes and the analyzing of all the above is under active process for the purpose of investigation.

9. It is further submitted that in pursuance of warrant issued by this Hon'ble Court vide dated 16.03.2018, search for evidence at the residences of accused who were involved in this case has been conducted on 18.03.2018. During the search conducted by NIA, huge amount of incriminating articles such as mobile phones, DVDs/CDs, Memory Cards/SD cards and documents etc. have been seized for the purpose of investigation and the same was produced before this Hon'ble Court for safe custody without delay.

10. It is further submitted that the seized incriminating electronic gadgets such as mobile phones, DVDs/CDs, Memory Cards/SD cards and Hard Discs containing CCTV footages has been forwarded to the Director, CDAC, Thiruvananthapuram for examination/analysis through this Hon'ble Court on the request of CIO and the same needs to be analysed by the experts of CDAC, Thiruvananthapuram. The report is yet to be received. The accused persons may be required for further police custody from judicial custody for the purpose of investigation as envisaged in Section 43 D (2) (b) of UA(P) Act 1967 to verify any facts obtained from the forensic experts.

11. xxxx

12. It is further submitted that the NIA is conducting investigation on the social media and email communication used by the accused and associates and the process of sending requests to the United States of America (USA) under Mutual Legal Assistance Treaty (MLAT) between Republic of India and USA to get the details of social media accounts and communications between accused and their associates in India and abroad is under progress.

13. It is further submitted that, the confessions/interrogation of accused Syed Abu Thahir (A-1), Sadham @ Sadham Hussain (A-2), Subair (A-3) and Mubarak (A-4) reveals that after committing the occurrence, they have moved to Karnataka, Andhra Pradesh and Telangana and have concealed themselves from the clutches of law. It is suspected that they would have got assistance and shelter from some organization which should be brought out further. Further one more vehicle involved in this crime is yet to be recovered.

14. The witnesses in this case are at high risk of being eliminated since they have come forward to speak the truth. The agency wishes to secure an order of protection under Section 17 of the NIA Act, 2008 for which an application will be filed in the near future. The NIA also wishes to complete the investigation without any wastage of time. However, the completion of investigation requires at least three months owing to the large amount of evidence to be collected and also the spread of evidence between 5 states namely Kerala, Tamil Nadu, Andhra Pradesh, Karnataka and Telangana.

15. It is further submitted that, the NIA as an investigating force, is required to take steps to unravel the larger conspiracy including the clandestine terror activities of the accused, their association with other

satisfied that the specific reasons assigned by the Public Prosecutor fulfil the mandate and requirement of Section 43D(2)(b) of the UAP Act, 1967 and that was considered by the Special Court in detail who after recording its satisfaction, granted detention of the accused respondent for a further period of 90 days under its Order dated 22nd March, 2018.

organizations, their possible locations in India and abroad and the sources of funding etc. Besides, requisitions were sent to the concerned service providers to get the CDR's of all the mobile phones recovered and the other numbers used by the accused with a view to analyze the same for establishing the linkages between the accused/suspects and field verification needs to be done. It is not possible to complete the investigation within the said period of ninety days.

16. It is further submitted that the investigation is proceeding in the right direction. Since the accused are hard-core ideologists, detailed further interrogation is inevitable to collect more evidence and for unravelling the larger conspiracy behind the crime. There may be imminent threat to the security of the nation if the accused are not interrogated in detail, more evidence is not collected and detailed investigation is not done to identify and secure other members of the group.

12. *State Represented by Inspector of Police Central Bureau of Investigation v. M. Subrahmanyam (Criminal Appeal No. 853 of 2019)*

Decided on – 07.05.2019

Bench – (1) Hon'ble Mr. Justice Arun Mishra
(2) Hon'ble Mr. Justice Navin Sinha

(Substantive justice must always prevail over procedural or technical justice- If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused.)

Facts

The Inspector of Police, Central Bureau of Investigation, Vishakhapatnam, is aggrieved by order dated 06.08.2018 of the High Court, dismissing the application under Section 482, Cr.P.C. by the prosecution to bring on record the order passed by the Superintendent of Police, CBI, Visakhapatnam, under Section 17 of the Prevention of Corruption Act, 1988 authorising Sri V.K.C. Reddy, the then Deputy Superintendent of Police, CBI, Visakhapatnam, to investigate against the respondent, an Income Tax Officer, Visakhapatnam, pursuant to an F.I.R. lodged under Sections 13(2) read with 13(1)(c) of the Act on allegation for possessing moveable and immoveable properties disproportionate to the known sources of income.

Decision and Observations

The Apex court noted that the truth and veracity of the authorisation order not being in issue, the failure to file it along with the charge-sheet was an omission constituting a procedural lapse only. The rejection of the first application on 11.03.2008 not having been ordered on merits, but for failure to furnish a satisfactory explanation for the delay, Section 362 Cr.P.C has no relevance on facts. The Apex Court was therefore, of the opinion that there was no impediment in the appellant seeking to bring the same on record subsequently under Section 173(2)(5)(a) of the Code. The consequences of disallowing the procedural lapse were substantive in nature.

The Apex Court then referred to ***Bihar State Electricity Board* v. *Bhowra Kankanee Collieries Ltd.,***[37] in which the Court has opined:

> "6. Undoubtedly, there is some negligence but when a substantive matter is dismissed on the ground of failure to comply with procedural directions, there is always some element of negligence involved in it because a vigilant litigant would not miss complying with procedural direction….. The question is whether the degree of negligence is so high as to bang the door of court to a suitor seeking justice. In other words, should an investigation of facts for rendering justice be peremptorily thwarted by some procedural lacuna?"

[37] 1984 Supp SCC 597

Therefore, in this case the Apex Court was of the opinion that the failure to bring the authorisation on record, as observed, was more a matter of procedure, which is but a handmaid of justice. ***Substantive justice must always prevail over procedural or technical justice. To hold that failure to explain delay in a procedural matter would operate as res judicata will be a travesty of justice considering that the present is a matter relating to corruption in public life by holder of a public post. The rights of an accused are undoubtedly important, but so is the rule of law and societal interest in ensuring that an alleged offender be subjected to the laws of the land in the larger public interest. To put the rights of an accused at a higher pedestal and to make the rule of law and societal interest in prevention of crime, subservient to the same cannot be considered as dispensation of justice. A balance therefore has to be struck. A procedural lapse cannot be placed at par with what is or may be substantive violation of the law.***

A mention was also made of the judgment in ***Central Bureau of Investigation v. R.S. Pai,***[38] wherein it was observed on the point of Section 173(2)(5)(a), Cr.P.C:

"From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently…….Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. ***If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused.*** Hence, the impugned order passed by the Special Court cannot be sustained."

Therefore, the prosecution was permitted to bring the order of authorisation for investigation on record.

[38] (2002) 5 SCC 82.

13. Sasikala Pushpa v. State of Tamil Nadu (Criminal Appeal No. 855 of 2019)

Decided on – 07.05.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice S. Abdul Nazeer

(Mere incorrect statement in the vakalatnama would not amount to create a forged document)

Facts

These appeals arise out of the judgment dated 14.09.2016 passed by the Madurai Bench of Madras High Court dismissing anticipatory bail application filed by the appellants. By the same judgment, the Single Judge of the High Court directed the Registrar (Judicial) to lodge a complaint with the jurisdictional police station against the appellants with respect to the alleged forgery committed by them in signing the vakalatnama. Pursuant to the direction of the High Court, the Registrar (Judicial) lodged a complaint with Police Station on the basis of which, FIR for the offences punishable under Sections 193, 466, 468 and 471 IPC was registered against the appellants.

Decision and Observations

The Apex Court noted that it is fairly well settled that before lodging of the complaint, it is necessary that the court must be satisfied that it was expedient in the interest of justice to lodge the complaint. It is not necessary that the court must use the actual words of Section 340 Cr.P.C.; but the court should record a finding indicating its satisfaction that it is expedient in the interest of justice that an enquiry should be made. Observing that under Section 340 Cr.P.C., the prosecution is to be launched only if it is expedient in the interest of justice and not on mere allegations or to vindicate personal vendetta.

On this point the Apex Court referred to *Iqbal Singh Marwah v. Meenakshi Marwah*[39], wherein it has been held that:

[39] (2005) 4 SCC 370

"In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(*b*), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(*b*). ***This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice.***"

The Apex Court stated that a vakalatnama is only a document which authorizes an advocate to appear on behalf of the party and by and large, it has no bearing on the merits of the case.

The Apex Court then noted that the appellants have admitted their signatures in the vakalatnama. They only allege that it was mistakenly recorded that it has been signed on 18.08.2016 at Madurai in the presence of the advocate. Of course, the version in the vakalatnama is an incorrect statement. However, the High Court was not justified in terming the said mistake or error as fraud. ***Fraud implies intentionally deception aimed or achieving some wrongful gain or causing wrongful loss or injury to another. Intention being the mens rea is the essential ingredient to hold that a fraud has been played upon the court.***

Also, there is nothing on record to suggest that the appellants gained anything by playing fraud or practising deception. Therefore, the Court held that ***mere incorrect statement in the vakalatnama would not amount to create a forged document and it cannot be the reason for exercising the jurisdiction under Section 340 Cr.P.C.*** for issuance of direction to lodge the criminal complaint against the appellants.

The Apex Court also mentioned ***Amarsang Nathaji v. Hardik Harshadbhai Patel***[40], wherein it was held that before proceeding under Section 340 Cr.P.C., the court has to be satisfied about the deliberate falsehood on a matter of substance and there must be a reasonable foundation for the charge. Observing that some inaccuracy in the statement or mere false statement may not invite a prosecution, it was held as under:—

[40] (2017) 1 SCC 113

"*6.* The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See ***K.T.M.S. Mohd. v. Union of India***[41]). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case."

[41] (1992) 3 SCC 178

14. Hemareddi (D) Through LRs. v. Ramachandra Yallappa Hosmani (Civil Appeal No. 4103 of 2008)

Decided on – 07.05.2019

Bench – (1) Hon'ble Mr. Justice Ashok Bhushan

(2) Hon'ble Mr. Justice K.M. Joseph

(consequences of abatement qua a party which is not limited to the deceased party alone but affects all the other parties and the litigation itself.)

Facts

It was the appellants case that one Govindareddi, the propositus died in 1946. He left behind him two sons and a daughter. The plaintiffs were the children of one of the sons. The second defendant was the wife of the other son Basavareddi. The suit properties were the properties of the joint family of Govindareddi and his sons it was claimed. The plaintiffs have filed another suit against the second defendant for declaration that she has no right in the property. Injunction was also sought. Injunction was ordered against her. On the ill advice of some advisors, it was their case that she has created a false document of adoption dated 27.04.1991 adopting the first defendant. Defendants 3 and 4 are alleged to have given to the first defendant on adoption to the second defendant. The trial Court dismissed the suit and therefore upheld the adoption. Against the said judgment as noted, both the plaintiffs preferred first appeal before the High Court. It is while so that during the pendency of the appeal the second plaintiff/second appellant died. The LRs of the second appellant were not brought on record. The appeal, therefore, abated qua the second appellant. The High Court took the view that having regard to the decree which has been passed the appeal would abate not only qua the second appellant/plaintiff but as a whole and accordingly it was so ordered. This appeal by special leave is directed against the order of the High Court.

Decision and Observations

The Apex Court noted that Procedure is the hand maiden of justice, the technicalities of law should not be allowed to prevail over the demands of justice and obstacles in the path of the Court considering a case on merit should not ordinarily become insuperable. On the other hand, if the so called procedural requirement is drawn from a wholesome principle of substantive law to advance the cause of justice, the same may not be overlooked.

The Court then mentioned Order XXII, Rule 3 C.P.C. [42] and stated that there can be no doubt that Order XXII Rule 3 is applicable also to appeals filed under Order 41. Order XXII Rule 3 declares that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone *inter alia* the Court on an application can substitute the legal representatives of the deceased plaintiff and proceed with the suit. Sub-rule (2) provides that if it is not so done, the suit shall abate as far as the deceased plaintiff is concerned. Order XXII Rule (3) therefore is applicable when either a suit or an appeal is filed by more than one plaintiffs or appellants as the case may be. This is no doubt apart from it applying when there is a sole plaintiff or sole appellant. In such a situation, on the death of one of the plaintiffs or appellants and the right to sue does not survive to the remaining plaintiff/plaintiffs or appellant/appellants alone, then the LRs of the deceased party can come on record. Should he not do so, ordinarily, the proceeding will abate as far as the deceased party is concerned.

But here in this case the question was with regard to the consequences of abatement qua a party which is not limited to the deceased party alone but it affects all the other parties and the litigation itself. In other words, a suit or an appeal as the case may be, would suffer an untimely demise by the proceeding abating as a whole.

In the present case, the appeal having abated in regard to the late brother, the decree of the trial Court has become final qua the deceased brother of the appellant. The effect of the same is that the adoption is found legal. The result of the appellant being allowed to proceed further and succeed in the appeal would be the passing of a decree by the High Court. The said decree would be to the effect that the adoption is invalid. The suit which was jointly filed by the appellant and his late brother would have to be decreed whereas the suit filed by the appellant and his late brother stands dismissed by the trial Court. Both the decrees cannot stand together. There would be irreconcilable conflict. The defendants are common.

[42] 3. Procedure in case of death of one of several plaintiffs or of sole plaintiff
(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff

They would be faced with two decrees regarding the same subject matter which are irrevocably conflicting.

The Apex Court referred to ***State of Punjab* v. *Nathu Ram***[43] wherein during pendency of the appeal, one of the brothers died. No application was filed to bring on record his LRs within the time limit. The High Court dismissed the appeal and reasoned that it abated against the person who has died and the appeal abated as a whole. The Court said:

"The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. ***The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."***

The Apex Court then referred to its Constitution Bench decision in ***Sardar Amarjit Singh Kalra (Dead) by LRS.* v. *Pramod Gupta (Smt.) (Dead) by LRS***[44]. In the said judgment the matter arose under the Land Acquisition Act. The facts set out indicate *inter alia* that a joint appeal was filed by a number of proprietors. However, the court found that they had distinct and independent claims. The Court highlighted the need to apply laws of procedure in a manner so that substantial justice is facilitated and held as follows:

[43] AIR 1962 SC 89
[44] (2003) 3 SCC 272

(*1*) "Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-a-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

However, in the present case the Apex Court concluded that the right which was set up by the appellant along with his late brother was joint. They were members of the joint Hindu family consisting of their late father and which consisted of late Govindareddi, their father Shriram Reddy and Basavareddi, who was none other than the husband of the second defendant. This is not a case where their claims were distinct claims. This is not the situation which was present in the case dealt with by the Constitution Bench under the land acquisition case.

Also, the decree, which the appellant, if successful in the appeal, would obtain, would be absolutely contrary to the decree which has also attained finality between his late brother and the defendants. They are mutually irreconcilable, totally inconsistent.

15. Arulmighu Nellukadai Mariamman Tirukkoil v. Tamilarasi (Dead) By LRs (Civil Appeal No. 4666 of 2019)

Decided on – 07.05.2019

Bench – (1) Hon'ble Mr. Justice Abhay Manohar Sapre

(2) Hon'ble Mr. Justice Dinesh Maheshwari

(HC has no jurisdiction to frame substantial question of law in a second appeal at the time of judgment except as provided by section 100(5) of C.P.C.)

Facts

By Judgment and decree dated 11.10.2007, the District Munsif, Nagapattinam decreed the suit. The defendant (original respondent) felt aggrieved and filed first appeal (AS No. 30/2008) before the Subordinate Judge. By judgment and decree dated 08.12.2008, the first Appellate Court dismissed the appeal and affirmed the judgment and decree passed by the District Munsif. The defendant felt aggrieved and filed second appeal in the High Court. By impugned judgment, the High Court allowed the appeal filed by the defendant and while setting aside the order impugned in the second appeal dismissed the suit filed by the appellant(plaintiff), which has given rise to filing of the present appeal by way of special leave.

Observations and Decision

The Apex Court noted that the High Court framed two substantial questions of law for the first time in the impugned judgment itself. In other words, what was required to be done by the High Court at the time of admission of the appeal to formulate a question of law after hearing the appellant as provided under Section 100(4) of the CPC, but the High Court did it in the impugned judgment. Similarly, the High Court could have taken recourse to the powers conferred by proviso to Section 100(5) of the CPC for framing any additional question of law at the time of final hearing of the appeal by assigning reasons for framing additional question, if it considered that any such question was involved. It was, however, not done. Instead, the High Court framed the questions for the first time while delivering the impugned judgment.

The Apex Court then quoted extensively from ***Surat Singh (Dead) v. Siri Bhagwan***,[45] which is reproduced below:

> "21. Sub-section (1) of Section 100 says that the second appeal would be entertained by the High Court only if the High Court is "satisfied" that the case involves a "substantial question of law". Sub-section (3) makes it obligatory upon the appellant to precisely state in memo of appeal the "substantial question of law" involved in the appeal. Sub-section (4) provides that where the High Court is satisfied that any substantial question of law is involved in the case, it shall formulate that question. In other words, once the High Court is satisfied after hearing the appellant or his counsel, as the case may be, that the appeal involves a substantial question of law, it has to formulate that question and then direct issuance of notice to the respondent of the memo of appeal along with the question of law framed by the High Court. Sub-section (5) provides that the appeal shall be heard only on the question formulated by the High Court under sub-section (4). In other words, the jurisdiction of the High Court to decide the second appeal is confined only to the question framed by the High Court under sub-section(4). The respondent, however, at the time of hearing of the appeal is given a right under sub-section (5) to raise an objection that the question framed by the High Court under sub-section (4) does not involve in the appeal. The reason for giving this right to the respondent for raising such objection at the time of hearing is because the High Court frames the question at the admission stage which is prior to issuance of the notice of appeal to the respondent. In other words, the question is framed behind the back of respondent and, therefore, sub-section(5) enables him to raise such objection at the time of hearing that the question framed does not arise in the appeal. The proviso to sub-section (5), however, also recognizes the power of the High Court to hear the appeal on any other substantial question of law which was not initially framed by the High Court under sub-section (4). However, this power can be exercised by the High Court only after assigning the reasons for framing such additional question of law at the time of hearing of the appeal.

[45] (2018) 4 SCC 562

22. Adverting to the facts of this case at hand, we are at a loss to understand as to how the High Court while passing a final judgment in its concluding para could frame the substantial question of law for the first time and simultaneously answered the said question in appellant's favour. Obviously, the learned Judge must have done it by taking recourse to sub-section (4) of Section 100 of the Code.

23. Here is the case where the High Court was under a legal obligation to frame the substantial question at the time of admission of the appeal after hearing the appellant or/and his counsel under sub-section (4) of Section 100 of the Code, but the High Court did it while passing the final judgment in its concluding para.

24. Such novel procedure adopted by the High Court, in our considered opinion, is wholly contrary to the scheme of Section 100 of the Code and renders the impugned judgment legally unsustainable.

25. In our considered opinion, the High Court had no jurisdiction to frame the substantial question at the time of writing of its final judgment in the appeal except to the extent permitted under sub-section (5). The procedure adopted by the High Court, apart from it being against the scheme of Section 100 of the Code, also resulted in causing prejudice to the respondents because the respondents could not object to the framing of substantial question of law. Indeed, the respondents could not come to know on which question of law, the appeal was admitted for final hearing.

26. In other words, since the High Court failed to frame any substantial question of law under sub-section(4) of Section 100 at the time of admission of the appeal, the respondents could not come to know on which question of law, the appeal was admitted for hearing.

27. It cannot be disputed that sub-section (5) gives the respondents a right to know on which substantial question of law, the appeal was admitted for final hearing. Sub-section (5) enables the respondents to raise an objection at the time of final hearing that the question of law framed at the instance of the appellant does not really arise in the case.

28. Yet, the other reason is that the respondents are only required to reply while opposing the second appeal to the question formulated by the High Court under sub-

section (4) and not beyond that. If the question of law is not framed under sub-section (4) at the time of admission or before the final hearing of the appeal, there remains nothing for the respondent to oppose the second appeal at the time of hearing. In this situation, the High Court will have no jurisdiction to decide such second appeal finally for want of any substantial question(s) of law.

29. The scheme of Section 100 is that once the High Court is satisfied that the appeal involves a substantial question of law, such question shall have to be framed under subsection(4) of Section 100. It is the framing of the question which empowers the High Court to finally decide the appeal in accordance with the procedure prescribed under sub-section (5). Both the requirements prescribed in subsections (4) and (5) are, therefore, mandatory and have to be followed in the manner prescribed therein. Indeed, as mentioned supra, the jurisdiction to decide the second appeal finally arises only after the substantial question of law is framed under sub-section (4). There may be a case and indeed there are cases where even after framing a substantial question of law, the same can be answered against the appellant. It is, however, done only after hearing the respondents under sub-section (5).

30. If, however, the High Court is satisfied after hearing the appellant at the time of admission that the appeal does not involve any substantial question of law, then such appeal is liable to be dismissed in limine without any notice to the respondents after recording a finding in the dismissal order that the appeal does not involve any substantial question of law within the meaning of sub-section (4). It is needless to say that for passing such order in limine, the High Court is required to assign the reasons in support of its conclusion.

31. It is, however, of no significance, whether the respondent has appeared at the time of final hearing of the appeal or not. The High Court, in any case, has to proceed in accordance with the procedure prescribed under Section 100 while disposing of the appeal, whether in limine or at the final hearing stage.

32. It is a settled principle of rule of interpretation that whenever a statute requires a particular act to be done in a particular manner then such act has to be done in that

manner only and in no other manner. (See-Interpretation of Statutes by G.P. Singh, IXth Edition page 347 and ***Baru Ram v.Parsanni (Smt.)***[46]).

33. The aforesaid principle applies to the case at hand because, as discussed above, the High Court failed to follow the procedure prescribed under Section 100 of the Code while allowing the second appeal and thus committed a jurisdictional error calling for interference by this Court in the impugned judgment.

34. While construing Section 100, this Court in the case of ***Santosh Hazari v.Purushottam Tiwari (Deceased) by L.Rs.,***[47] succinctly explained the scope, the jurisdiction and what constitutes a substantial questions of law under Section 100 of the Code.

35. It is, therefore, the duty of the High Court to always keep in mind the law laid down in *Santosh Hazari* while formulating the question and deciding the second appeal."

Therefore, the Apex Court remanded the case to the High Court for deciding the second appeal afresh in accordance with law and directed the High Court to frame proper substantial question(s) of law after hearing the appellant .

[46] AIR 1959 SC 93
[47] (2001) 3 SCC 179

16. Lal Bahadur Gautam v. State of U.P. (Civil Appeal No(s). 4794 of 2019)

Decided on-08.05.2019

Bench – (1) Hon'ble Mr. Justice Arun Mishra

(2) Hon'ble Mr. Justice Navin Sinha

(Lawyer not merely a mouthpiece of his client)

Facts

The appellant, a lecturer in a private unaided college affiliated to the Chaudhary Charan Singh University (hereinafter referred to as 'the CCS University'), Meerut under the Uttar Pradesh State Universities Act, 1973 assailed his termination dated 24.04.2017 as being contrary to the provisions of the Uttar Pradesh State Universities Act, 1973. The respondent college terminated the services of the appellant on 04.06.2015 by a non-speaking order with immediate effect. The appellant approached the Vice-Chancellor who after hearing the college, held that prior approval not having been obtained under Section 35(2) of the Act read with Rule No. 16.06 of the University Regulations, the termination was bad and set it aside. But, because there were serious allegations of financial misappropriation, liberty was granted to the management to hold departmental proceedings. The management accepted the order and initiated departmental proceedings culminating in a fresh order of termination dated 24.04.2017.

Decision and Observations

The Apex Court noted that the college being affiliated to the University was bound by the provisions of the Act with its attendant consequences for non-compliance. The college having accepted the order of the Vice-Chancellor and acted upon the same by holding departmental proceedings cannot urge that it is bound by one part of the order and not the other. It cannot have the benefit of the order without complying with its obligations under the order. A bare reading of the statutory provision makes it manifest that prior approval of the Vice-Chancellor was mandatory before termination of the appellant. If the management of the college opined otherwise, it ought to have challenged the order of the Vice-Chancellor dated 16.07.2016, if such a challenge was maintainable. Having allowed the order to attain finality, it is not open for the college management to now urge that it was not bound to follow the procedure. The order of termination dated 24.04.2017 being in teeth of Section

35(2) of the Act is patently unsustainable. Therefore, the appellant is held entitled to reinstatement.

However, the Apex Court was critical of the fact that reliance was placed by respondent management upon a judgment based on an expressly repealed Act by the present Act, akin to relying on an overruled judgment. This has only resulted in a waste of judicial time of the Court, coupled with an onerous duty on the judges to do the necessary research.

The Apex Court opined that as a responsible officer of the Court and an important adjunct of the administration of justice, the lawyer undoubtedly owes a duty to the Court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client as observed in *State of Punjab* v. *Brijeshwar Singh Chahal*.[48]

The Apex Court also referred to ***D.P. Chadha* v. *Triyugi Narain Mishra***[49] with regard to the duty of a counsel and the high degree of fairness and probity required. The Court observed:

"A mere error of judgment or expression of a reasonable opinion or taking a stand on a doubtful or debatable issue of law is not a misconduct; the term takes its colour from the underlying intention. But at the same time misconduct is not necessarily something involving moral turpitude. It is a relative term to be construed by reference to the subject-matter and the context wherein the term is called upon to be employed. A lawyer in discharging his professional assignment has a duty to his client, a duty to his opponent, a duty to the court, a duty to the society at large and a duty to himself. It needs a high degree of probity and poise to strike a balance and arrive at the place of righteous stand, more so, when there are conflicting claims. While discharging duty to the court, a lawyer should never knowingly be a party to any deception, design or fraud. While placing the law before the court a lawyer is at liberty to put forth a proposition and canvass the same to the best of his wits and ability so as to persuade an exposition which would serve the interest of his client so long as the issue is capable of that resolution by adopting a process of reasoning. However, a point of law well settled or admitting of no controversy must not be dragged into doubt solely with a view to confuse or mislead the Judge and thereby gaining an undue

[48] (2016) 6 SCC 1
[49] (2001) 2 SCC 221

advantage to the client to which he may not be entitled. Such conduct of an advocate becomes worse when a view of the law canvassed by him is not only unsupportable in law but if accepted would damage the interest of the client and confer an illegitimate advantage on the opponent. In such a situation the wrong of the intention and impropriety of the conduct is more than apparent. Professional misconduct is grave when it consists of betraying the confidence of a client and is gravest when it is a deliberate attempt at misleading the court or an attempt at practicing deception or fraud on the court. The client places his faith and fortune in the hands of the counsel for the purpose of that case; the court places its confidence in the counsel in case after case and day after day. A client dissatisfied with his counsel may change him but the same is not with the court. And so the bondage of trust between the court and the counsel admits of no breaking."

That a higher responsibility goes upon a lawyer representing an institution was noticed in ***State of Rajasthan* v. *Surendra Mohnot***[50] :

"As far as the counsel for the State is concerned, it can be decidedly stated that he has a high responsibility. A counsel who represents the State is required to state the facts in a correct and honest manner. He has to discharge his duty with immense responsibility and each of his action has to be sensible. He is expected to have higher standard of conduct. He has a special duty towards the court in rendering assistance. It is because he has access to the public records and is also obliged to protect the public interest. That apart, he has a moral responsibility to the court. When these values corrode, one can say "things fall apart". He should always remind himself that an advocate, while not being insensible to ambition and achievement, should feel the sense of ethicality and nobility of the legal profession in his bones. We hope, that there would be response towards duty; the hallowed and honoured duty."

[50] (2014) 14 SCC 77

17. Rajesh v. State of Haryana(Criminal Appeal No. 813 Of 2019)

Decided on – 1.05.2019

Bench – (1) Hon'ble Mr. Justice L. Nageswara Rao

(2) Hon'ble Mr. Justice M. R. Shah

(Even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial where the stage of giving opportunity to the complainant to file a protest petition has gone)

Facts

All the accused named in the FIR were arrested. The Investigating Officer conducted the investigation and found ten persons involved in the said incident. However, the Investigating Officer found that the appellants herein (six in numbers) were not present at the site of incident. That the Investigating Officer submitted his report under Section 173(2) of the CrPC against four accused only. That, thereafter the Investigating Agency conducted further investigation. The trial proceeded further against the remaining accused against whom the challan/charge-sheet was filed. The witnesses were examined who deposed that these appellants were also present at the time of incident. Thereafter the original informant P.W.1 submitted the application before the learned Magistrate under Section 319 of the CrPC to summon the appellants herein to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. The High Court confirmed the order of the Trial Court, by which the appellants herein were summoned to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. Therefore, the Appellants preferred an appeal.

Observations and Decision

The Apex Court relied extensively on ***Hardeep Singh v. State of Punjab***[51], from which it emerged that (i) the Court can exercise the power under Section 319 of the CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross- examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by

[51] (2014) 3 SCC 92

cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 of the CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

The Apex Court then referred to ***S. Mohammed Ispahani v. Yogendra Chandak***,[52] to hold that 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 the 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 of the CrPC and even those persons named in the 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.

The appellants in the present case were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. Nothing is on record to show that whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, P.W.1 and P.W.2 have specifically stated against the appellants and the specific role is attributed to the accused-appellants . Thus, the statement of P.W.1 and P.W.2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in the case of *Hardeep Singh*, the persons against whom no charge-sheet is filed can be summoned to face the trial.

[52] *(2017) 16 SCC 226*

18. State By Karnataka Lokayukta Police Station, Bengaluru v. M. R. Hiremath (Criminal Appeal No.819 of 2019)

Decided on – 1.05.2019

Bench – (1) Hon'ble Mr. Justice D.Y.Chandrachud
(2) Hon'ble Mr. Justice Hemant Gupta

(Failure to produce a certificate under Section 65B of the Evidence Act at the stage when the charge-sheet was filed, not fatal to the prosecution.)

Facts

The case of the prosecution is that on 6 November 2012, the complainant attempted to meet the respondent (accused no.1) by whom the file was to be placed before the Denotification Committee. It is alleged that though the complainant was not allowed to meet the respondent, he met his driver through whom he got to know that such cases were being 'mediated' by the second accused, an advocate purporting to act as the agent of the respondent.

A complaint was lodged with the Lokayukta Police on 8 November 2012 apprehending that a bribe would be asked for by the second accused. The police handed over a spy camera together with the instructions to be followed. It is alleged that a meeting of the second accused was arranged with a representative of the complainant. On 12 and 13 November 2012, a meeting took place with the second accused who is stated to have informed the representatives of the complainant of the amount which will be charged for the settlement of the deal.

The prosecution alleges that on 15 November 2012 the complainant met the respondent at about 7.30 pm near the BDA office. The conversation between the complainant and the respondent was recorded on the spy camera in the course of which, it has been alleged, there was some discussion in regard to the amount to be exchanged for the completion of the work. On 16 November 2012, a complaint was lodged before the Lokayukta and a first information report was registered. Subsequently, it is alleged that a trap was set up and the second accused was apprehended while receiving an amount of Rupees five lakhs on behalf of the respondent towards an initial payment of the alleged bribe. A charge sheet was filed after investigation. Charges were framed for offences punishable under Sections 7, 8, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988.

The respondent instituted a petition under Section 482 of the CrPC which has resulted in the impugned order of the Single Judge. The Single Judge has quashed the proceedings against the respondent on the ground that (i) in the absence of a certificate under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that the second accused who was the subject of the trap proceedings was not shown to have named the respondent as being instrumental in the episode.

Decision and Observations

The Apex Court referred to ***Anvar P.V. v. P.K. Basheer***[53] wherein it was held that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. Also, in ***Union of India and Others v. CDR Ravindra V Desai***[54] the Court emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect.

Therefore, the Apex Court held that ***the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.***

[53] (2014) 10 SCC 473
[54] (2018) 16 SCC 272

19. *Mangathai Ammal (Died) through LRs and Others v. Rajeswari (Civil Appeal No. 4805 Of 2019)*

Decided on – 09.05.2019

Bench – (1) Hon'ble Mr. Justice L. Nageswara Rao

(2) Hon'ble Mr. Justice M. R. Shah

(Payment of part sale consideration cannot be the sole criteria to hold the sale/transaction as benami)

Facts

Original plaintiffs instituted the suit before the learned Trial Court for partition of the suit properties and claiming 3/4th share with the pleadings that the suit properties were ancestral properties and that the Narayanasamy Mudaliar has purchased the suit properties in the name of his wife-defendant no.1 out of the funds derived through selling his share of the property acquired through ancestral nucleus to some other person and that the suit properties were in absolute possession and enjoyment of the Joint Family Property since the date of purchase. Trial Court and the High Court have held that the transactions/Sale Deeds in favour of defendant no.1 were benami transactions. The aforesaid findings recorded by the Trial Court confirmed by the High Court and the consequent relief of partition granted in favour of the plaintiffs is the subject matter of the present appeal.

Observations and Decision

The Apex Court referred to the decision in ***P. Leelavathi v. V. Shankarnarayana Rao***[55] wherein the Court held as under:

"This Court ultimately concluded after considering its earlier judgment in the case of ***Valliammal v. Subramaniam***[56] that while considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guide:

(1) the source from which the purchase money came;

(2) the nature and possession of the property, after the purchase;

[55](2019) 6 SCALE 112
[56] (2004) 7 SCC 233

(3) motive, if any, for giving the transaction a benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title deeds after the sale; and

*(6) the conduct of the parties concerned in dealing with the property after the sale. (**Jaydayal Poddar v. Bibi Hazra**)*[57]

The Apex Court noted that the trial Court and the High Court erred in shifting the burden on the defendants to prove that the sale transactions were not benami transactions. When the plaintiffs' claim, though not specifically pleaded in the plaint, that the Sale Deeds in respect of suit properties, which are in the name of defendant no.1, were benami transactions, the plaintiffs have failed to prove, by adducing cogent evidence, the intention of the Narayanasamy Mudaliar to purchase the suit properties in the name of defendant no.1 – his wife.

The Apex Court held that ***the payment of part sale consideration cannot be the sole criteria to hold the sale/transaction as benami. While considering a particular transaction as benami, the intention of the person who contributed the purchase money is determinative of the nature of transaction. The intention of the person, who contributed the purchase money, has to be decided on the basis of the surrounding circumstances; the relationship of the parties; the motives governing their action in bringing about the transaction and their subsequent conduct etc.***

The Apex Court noted that in the present case Narayanasamy Mudaliar, who contributed part sale consideration by purchasing property, might have contributed being the husband and therefore by mere contributing the part sale consideration, it cannot be inferred that Sale Deed in favour of the defendant no.1-wife was benami transaction and for and at behalf of the joint family.

[57] (1974) 1 SCC 3

20. Sai Babu v. M/S Clariya Steels Pvt. Ltd.(Civil Appeal No. 4956 Of 2019)

Decided on – 01.05.2019

Bench – (1) Hon'ble Mr. Justice Rohinton Fali Nariman

(2) Hon'ble Mr. Justice Vineet Saran

(No recall application would lie in cases covered by section 32(3) of the Arbitration and Conciliation Act, 1996)

Facts

The sole arbitrator who was appointed in this case terminated proceedings under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996. However, later he allowed an application to recall the order of termination of proceedings. A revision filed against the aforesaid order was dismissed by the High Court.

Order

The Apex Court referred to its decision in *SREI Infrastructure Finance Limited v. Tuff Drilling Private Limited*[58] wherein a distinction was made by this Court between the mandate terminating under section 32 and proceedings coming to an end under section 25. The Court has held:

"Section 32 contains a heading "Termination of Proceedings". Sub-section (1) provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the Arbitral Tribunal under sub-section (2). Sub-section (2) enumerates the circumstances when the Arbitral Tribunal shall issue an order for the termination of the arbitral proceedings. The situation as contemplated under Sections 32(2)(a) and 32(2)(b) are not attracted in the facts of this case. Whether termination of proceedings in the present case can be treated to be covered by Section 32(2)(c) is the question to be considered. Clause (c) contemplates two grounds for termination i.e. (i) the Arbitral Tribunal finds that the continuation of the proceedings has for any other reason become unnecessary, or (ii) impossible. The eventuality as contemplated under Section 32 shall arise only when the claim is not terminated under Section 25(a) and proceeds further. The words "unnecessary" or "impossible" as used in clause (c) of Section 32(2), cannot be said to be covering a situation where proceedings are terminated in default of the claimant. The words "unnecessary" or "impossible" has been used in different contexts than to one of default as contemplated under Section 25(a). Sub-section (3) of Section 32 further provides that the mandate of the Arbitral Tribunal shall terminate with the termination of the arbitral proceedings subject to Section 33 and sub-section (4) of Section 34. Section 33 is the power of the Arbitral Tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature or to give an interpretation of a specific point or part of the award. Section 34(4) reserves the power of the court to adjourn the proceedings in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in

[58](2018) 11 SCC 470

the opinion of the Arbitral Tribunal will eliminate the grounds for setting aside the arbitral award. On the termination of proceedings under Sections 32(2) and 33(1), Section 33(3) further contemplates termination of the mandate of the Arbitral Tribunal, whereas the aforesaid words are missing in Section 25. ***When the legislature has used the phrase "the mandate of the Arbitral Tribunal shall terminate" in Section 32(3), non-use of such phrase in Section 25(a) has to be treated with a purpose and object. The purpose and object can only be that if the claimant shows sufficient cause, the proceedings can be recommenced."***

Therefore, it was clearly held that that no recall application would, therefore, lie in cases covered by section 32(3). The Apex Court set aside the Judgment of the High Court.

21. Bhivchandra Shankar More v. Balu Gangaram More (Civil Appeal No. 4669 Of 2019)

Decided on – 07.05.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice R. Subhash Reddy

(Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.)

Facts

The suit for partition was filed by respondents No.1 to 13 in the year 2007. It was decreed ex-parte on 04.07.2008. The appellant and respondents No.14 and 15 filed application under Order IX Rule 13 CPC on 15.10.2008 and the said application was dismissed on merits by the order dated 06.08.2010. Challenging the said order, the appellant and respondents No.14 and 15 preferred an appeal on 03.09.2010. About three years after its filing i.e. on 11.06.2013, the said appeal was withdrawn and on the next day i.e. on 12.06.2013, the appellant and respondents No.14 and 15 filed appeal challenging the decree passed in Regular Civil Suit No.35 of 2007 along with an application to condone the delay of four years, ten months and eight days. The said application for condonation of delay was allowed by the Additional District Judge.

The court noted that the appellant and respondents No.14 and 15 did not get an opportunity to contest the suit on merits. The District Judge observed that the appellant and respondents No.14 and 15 have spent their time in wrong proceedings viz. application filed under Order IX Rule 13 CPC and the appeal thereon and therefore, it will be just and proper to condone the delay in preferring the appeal challenging the ex- parte decree passed in the partition suit. The District Court accordingly set aside the order of the trial court and allowed the application for condonation of delay in filing the appeal against the ex-parte decree.

Being aggrieved by the order condoning the delay and entertaining the appeal, respondents No.1 to 8 filed writ petition before the High Court. The High Court allowed the writ petition by holding that the application filed under Order IX Rule 13 CPC cannot be said to be wrong proceedings and hence, the time spent in pursuing the remedy by filing application under

Order IX Rule 13 CPC cannot be excluded for calculating the limitation. The High Court relied upon its own judgment in ***Jotiba Limbaji Kanashenavar v. Ramappa Jotiba Kanashenavar***[59] and held that having elected to pursue the remedy by filing an application under Order IX Rule 13 CPC and having not pursued the remedy of appeal which was open to him at that time and having failed in the application filed under Order IX Rule 13 CPC, the appellant-defendants cannot fall back upon the remedy of filing appeal and seek condonation of delay.

The High court pointed out that two remedies have to be pursued simultaneously and cannot be converted into consecutive remedies and on those findings, allowed the writ petition which is the subject matter challenge.

Observations and Decision

The Apex Court noted that the following points arose for consideration:-

(i) Whether the time spent in the proceedings taken to set aside the ex-parte decree constitute "sufficient cause" within the meaning of Section 5 of the Indian Limitation Act, 1908 so as to condone the delay in preferring an appeal against the ex-parte decree on merits?

(ii) When an application filed under Order IX Rule 13 CPC has been dismissed on merits, whether regular appeal under Section 96(2) CPC is barred?

A conjoint reading of Order IX Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:- (i) either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits.

It is to be pointed out that the scope of Order IX Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is

[59] 1937 Vol.XL Bom. Law Reporter 957

satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex- parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. ***Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.***

The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In ***Bhanu Kumar Jain v. Archana Kumar and Another***[60], the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. The Court observed that the right of appeal is a statutory right and that the litigant cannot be deprived of such right. It is a fairly well settled law, the Apex Court noted that "***sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bonafide could be imputable to the appellant.*** The Apex Court relied on ***B. Madhuri Goud v. B. Damodar Reddy***[61].

[60] (2005) 1 SCC 787
"The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhury v. Lt.-Col. Suraj Jit Choudhary (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar and Others (2002) 5 SCC 161 and Shyam Sundar Sarma v. Pannalal Jaiswal and Others (2005) 1 SCC 436."

[61] (2012) 12 SCC 693

22. Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari (Criminal Appeal No. 838 Of 2019)

Decided on – 06.05.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice R. Subhash Reddy

(The detention of a minor by a person who is not entitled to his legal custody is equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child.)

Facts

In a writ petition, the Bombay High Court held that the first respondent- father of the child being the surviving parent and in the interest of welfare of the child, the custody of the child must be handed over to the first respondent-father and issued writ of habeas corpus directing the appellants to handover the custody of the minor child to respondent -father of the child. The High Court took into account that respondent No.1 was hospitalised for a serious ailment and in those circumstances, the appellants have looked after the child and in the interest and welfare of the child, it is just and proper that the custody of the child is handed over back to the first respondent. However, the High Court observed that the efforts put in by the appellants in taking care of the child, has to be recognized and so the High Court granted appellants No.2 and 3 access to the child. The appellants contend that the writ of habeas corpus cannot be issued when efficacious alternative remedy is available to respondent No. 1 under Hindu Minority and Guardianship Act, 1956.

Observations and Decision

The Apex Court noted that the writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. ***The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child***. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction.

There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

In the present case, the father of the minor child was the natural guardian as per Section 6 of the Hindu Minority and Guardianship Act, and is having the legal right to claim the custody of the child. The entitlement of father to the custody of child is not disputed and the child being a minor aged 1 1/2 years cannot express its intelligent preferences. On the other hand, the appellants are the sisters and brother of the deceased mother of the minor child who do not have any authority of law to have the custody of the minor child. Therefore, the father was justified in invoking the jurisdiction of the court under Article 226.

Regarding welfare of the child, the Apex Court noted that the child is only 1 1/2 years old and the child was with the father for about four months after her birth. If no custody is granted to the first respondent, the court would be depriving both the child and the father of each other's love and affection to which they are entitled. As the child is in tender age i.e. 1 1/2 years, her choice cannot be ascertained at this stage. With the passage of time, she might develop more bonding with the appellants and after some time, she may be reluctant to go to

her father in which case, the first respondent might be completely deprived of her child's love and affection.

Keeping in view the welfare of the child and the right of the father to have her custody and after consideration of all the facts and circumstances of the case, the Apex Court found that the High Court was right in holding that the welfare of the child will be best served by handing over the custody of the child to the first respondent.

23. Beemaneni Maha Lakshmi v. Gangumalla Appa Rao (Since Dead) By Lrs. (Civil Appeal Nos. 4537-4538 Of 2017)

Decided on – 09.05.2019

Bench – (1) Hon'ble Mr. Justice L. Nageswara Rao

(2) Hon'ble Mr. Justice M. R. Shah

(Plea on behalf of vendor on hardship cannot be permitted to be raised when no such plea was raised/taken in the written statement.)

Facts

Trial Court decreed the suit by directing the defendant to execute a sale deed in favour of the plaintiff. While decreeing the suit, the trial Court specifically observed and held that it was the defendant who committed the breach of contract. On appreciation of evidence, the trial Court also found that the plaintiff was always ready and willing to perform his part of the contract and it was the defendant who committed the breach of contract and therefore the plaintiff is entitled for the relief of specific performance. The defendant preferred appeal before the High Court. The High Court has dismissed the appeal preferred by the appellant herein – the original defendant and has confirmed the judgment and decree of specific performance of the agreement to sell dated 30.12.1985 passed by the learned trial Court. The appellant-original defendant challenged the judgment and order of the High Court in the present appeal.

Observations and Decision

The Apex Court noted that as such there are concurrent findings of fact by both, the learned trial Court as well as the High Court that it was the appellant – vendor who did not perform her part of the contract. The learned trial Court also observed and held that as the respondent – vendee deposited into Court the amount payable by him as per Ex. A1, which was as per the order of the trial Court, and therefore his failure to "demonstrate" that he was having sufficient money with him to pay the balance sale consideration under Ex. A1 by the date of his evidence is not much of consequence and the contention of the appellant – vendor that the respondent – vendee was not ready and willing to perform his part of the contract cannot be believed or accepted. The aforesaid finding has been confirmed by the High Court.

The Apex Court noted that so far as the submission on behalf of the appellant that if the decree for specific performance of the contract is passed after number of years, it would cause undue hardship to the defendant – vendor is concerned, it is required to be noted that in the written statement the defendant has not pleaded any hardship to be caused if the decree of specific performance of the contract is passed against the defendant – vendor. At this stage, the decision of this Court in the case of ***A. Maria Angelena v. A.G. Balkis Bee***,[62] is required to be referred to. In the aforesaid case, the vendor sought to raise the plea of hardship for the first time before this Court and this Court did not permit the vendor to raise such a plea of hardship by observing that as no plea as to hardship if relief for specific performance is granted was raised by the defendant – vendor in written statement nor any issue was framed that the plaintiff – purchaser could be compensated in terms of the money in lieu of decree for specific performance, such plea cannot be entertained for the first time in appeal by way of SLP, more so, when there are concurrent findings that the plaintiff was ready and willing to perform his part of the contract has been recorded by the lower courts. Therefore, ***the plea raised on behalf of the vendor on hardship cannot be permitted to be raised now, more particularly when no such plea was raised/taken in the written statement.***

[62] AIR 2002 SC 2385

24. Birla Corporation Limited v. Adventz Investments And Holdings Limited (Criminal Appeal No. 875 Of 2019)

Decided on – 09.05.2019

Bench – (1) Hon'ble Ms. Justice R. Banumathi

(2) Hon'ble Mr. Justice R. Subhash Reddy

(Information Contained In a Document Is A 'Corporeal Property' And Can Be Subject Matter Of Theft. However, when a bona fide dispute exists between the parties as to whether there is oppression and mismanagement, there is no question of "wrongful gain" to the respondents or "wrongful loss" to the appellant.)

Facts

The allegations in the complaint in brief are as under:- The complaint contains a list of fifty-four documents with their brief description given in the Schedule of the complaint. Document No.1 is an Internal Audit Report of Chanderia unit of the appellant Company for the period ending November, 2009. According to the appellant-complainant, keeping in mind the confidential nature of the report, only six copies were made. Out of which, five sets were sent to officers of the Company individually named and one was retained by the Auditor. The Internal Audit Report produced by the respondents is the copy of one of the original five sets which was sent to one Bachh Raj Nahar-Executive Director and Chief Executive Officer of the Company. It is alleged that respondents No.1 to 16 have stolen/misappropriated documents No.2 to 28 from the appellant's premises and that after photocopying the documents, they were kept back in the appellant's premises. It is alleged that documents No.29 to 54 have been stolen/misappropriated from the appellant's premises and that after photocopying the documents, they were not returned in the appellant's premises and the originals are still in the possession of the respondents.

Before making the complaint, the complainant-appellant had conducted an internal enquiry to find out how these documents reached the respondents.

The appellant-complainant alleges that respondents No.1 to 9 and 12 to 16 gained access to the Internal Audit Report and other documents unauthorizedly and illegally with the aid of respondent No.10-Birla Buildings Limited and respondent No.11-S. Chakrabarty, CEO who are in-charge of upkeep of the building in which the office of the appellant-complainant is situated. Appellant alleged that without the consent of the appellant Company, the respondents/accused have dishonestly stolen/misappropriated the documents and thus committed theft and conspiracy to commit theft. It is also averred that the respondents/accused dishonestly received or retained the stolen property knowing and having reason to believe the same to be stolen property and as such committed the offence punishable under Section 411 IPC. It is alleged that the respondents/accused thus dishonestly committed theft of the documents No.1 to 54 belonging to the appellant

Company and misappropriated them by converting the same for their own use and thus committed the offences punishable under Sections 379, 403 IPC read with Section 120-B IPC.

The High Court held that since originals of documents No.1 to 28 are still in the custody of the complainant, taking away the information contained in such documents cannot be considered to be "movable property" and the temporary removal of the documents for taking away the contents thereon by itself cannot be the subject of the offence of theft or dishonest misappropriation of property as well as dishonest receiving of the stolen property. On those findings, the High Court held that the complaint would not survive in respect of the documents No.1 to 28. Insofar as documents No.29 to 54 are concerned, the High Court held that as the originals of those documents are missing, the complaint discloses ingredients of the offence of theft. The High Court held that insofar as documents No.29 to 54 are concerned, the complainant can proceed against the respondents and accordingly remitted the matter to the trial court.

Decision and Observations

The following questions arise for consideration in these appeals:-

- Whether the High Court was right in quashing the criminal proceedings qua documents No.1 to 28 on the ground that mere information contained in the documents cannot be considered as "moveable property" and cannot be the subject of the offence of theft or receipt of stolen property?
- Whether filing of the documents in question in the petition before the Company Law Board to substantiate their case of oppression and mismanagement and document No.1 in the civil suits challenging revocation of the trust deeds would amount to theft justifying taking cognizance of the offences?
- Whether there is dishonest moving of documents causing wrongful loss to the appellants and wrongful gain to the respondents?
- Whether filing of documents in the judicial proceedings can be termed as an act of theft causing wrongful gain to oneself and wrongful loss to the opponent so as to attract the ingredients of Section 378 IPC?

Production of copies of documents in the Company Petition – whether would amount to theft:

Insofar as documents No.1 to 28 are concerned, the point falling for consideration is whether the temporary removal of the documents and filing of photocopies and use of the information/contents of the documents can be the subject matter of theft.

One of the foremost components of theft is that the subject matter of the theft needs to be a "moveable property". "Moveable property" is defined in Section 22 IPC which includes a corporeal property of every description. It is beyond doubt that a document is a "moveable property" within the meaning of Section 22 IPC which can be the subject matter of theft. A

"document" is a "corporeal property". A thing is "corporeal" if it has a body, material and a physical presence. As per Section 29 IPC, "Document" denotes "any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used, or which may be used as evidence of that matter". The first Explanation to Section 29 IPC provides that it is immaterial by what means or upon what substance these are formed. This definition would include within its ambit photocopy of a document. As per Explanation No.2 of Section 29 IPC, letters, figures or marks shall be deemed to be expressed by such letters, figures or marks within the meaning of the Section. Such letters, figures or marks thus have a material and physical presence. Therefore, it can also be inferred that the said information would be deemed to fall within the purview of "Document" – a corporeal property.

Information contained in a document, if replicated, can be the subject of theft and can result in wrongful loss, even though the original document was only temporarily removed from its lawful custody for the purpose of extracting the information contained therein. In the case of ***K.N. Mehra vs. State of Rajasthan*** AIR 1957 SC 369, this Court held that gain or losscontemplated need not be a total acquisition or a total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary keeping out of property from person legally entitled.

Therefore, the Apex Court noted that the documents and the replication of the documents and the contents thereon have physical presence and therefore, are certainly "corporeal property" and the same can be the subject matter of theft.

However, in the facts and circumstances of the case in hand, the Apex Court was of the view that taking away of the documents temporarily and using them in the pending litigations between the parties would not amount to theft.

The Apex Court then had to look into the question whether there is "dishonest intention" on the part of the respondents in causing "wrongful loss" to the appellant Company and getting "wrongful gain" for themselves in using the documents in the litigation.

The Apex Court noted that the Respondents No.1 to 5 are the shareholders of the appellant-Company and they have produced the photocopies of the documents No.1 to 54 in the CLB proceedings which were filed by them on the ground of oppression and mismanagement. Merely because the respondents have produced the copies of the documents in the CLB proceedings, it cannot be said that the respondents have removed the documents with "dishonest" intention. Copies of documents are produced in support of thecase of respondents No.1 to 5 and to enable the Court to arrive at the truth in a judicial proceeding involving alleged oppression and mismanagement in the affairs of the appellant Company by respondent No.17. A person can be said to have "dishonest intention" if in taking the property it is the intention to wrongful gain by unlawful means or to cause wrongful loss by unlawful means. As discussed earlier, the complaint does not allege that there was any

wrongful gain to the respondents or wrongful loss to the appellant-Company so as to constitute ingredients of theft under Section 378 IPC. The complaint only alleges that the copies of the document were used in the CLB proceedings by respondents No.1 to 5. There is no allegation of "wrongful gain" to the respondents or "wrongful loss" to the appellant.

Also, ***when a bona fide dispute exists between the parties as to whether there is oppression and mismanagement, there is no question of "wrongful gain" to the respondents or "wrongful loss" to the appellant.*** In using the documents, when there is no dishonest intention to cause "wrongful loss" to the complainant and "wrongful gain" to the respondents, it cannot be said that the ingredients of theft are made out.

25. State Bank Of India v. M/S. Jah Developers Pvt. Ltd. (Civil Appeal No. 4776 Of 2019)

Decided on – 08.05.2019

Bench – (1) Hon'ble Mr. Justice R. F. Nariman

(2) Hon'ble Mr. Justice Vineet Saran

(Whether, when a person is declared to be a wilful defaulter under the Circulars of the Reserve Bank of India, such person is entitled to be represented by a lawyer of his choice before such declaration is made.)

ISSUE

Whether, when a person is declared to be a wilful defaulter under the Circulars of the Reserve Bank of India, such person is entitled to be represented by a lawyer of his choice before such declaration is made.

DECISION AND OBSERVATIONS

The Apex Court had to decide whether the in- house committees can be said to be tribunals for the purpose of Section 30 of the Advocates Act. This would necessarily mean that all "tribunals" must be legally authorised to take evidence by statute or subordinate legislation or otherwise, the judicial power of the State vesting in such tribunal. The Court relied on various judgments including ***Associated Cement Companies Ltd. v. P.N. Sharma and Anr.,***[63]wherein the majority judgment, held that the basic test is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function, can be said to be satisfied on the facts of the case.

Applying the aforesaid tests to the facts of the present case, it cannot be possibly said that either in-house committee appointed under the Revised Circular dated 01.07.2015 is vested with the judicial power of the State. The impugned judgment's conclusion that such Circulars have statutory force, as a result of which the State's judicial power has been vested in the two committees, is wholly incorrect. First and foremost, the State's judicial power, as understood by several judgments of this Court, is the power to decide a lis between the parties after gathering evidence and applying the law, as a result of which, a binding

[63] [1965] 2 SCR 366

decision is then reached. This is far from the present case as the in-house committees are not vested with any judicial power at all, their powers being administrative powers given to in-house committees to gather facts and then arrive at a result. Secondly, it cannot be said that the Circulars in any manner vests the State's judicial power in such in-house committees. On this ground, therefore, the view of Delhi High Court is not correct, and no lawyer has any right under Section 30 of the Advocates Act to appear before the in-house committees so mentioned. Further, the said committees are also not persons legally authorised to take evidence by statute or subordinate legislation, and on this score also, no lawyer would have any right under Section 30 of the Advocates Act to appear before the same.

26. *Rafiq Qureshi v. Narcotic Control Bureau Eastern Zonal Unit(Criminal Appeal No.567 Of 2019)*

Decided on – 07.05.2019

Bench – (1) Hon'ble Mr. Justice Ashok Bhushan

(2) Hon'ble Mr. Justice K.M. Joseph

(Quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment.)

FACTS

The Additional District & Sessions Judge had convicted the appellant and sentenced him under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 to suffer rigorous imprisonment for a term of eighteen years and to pay fine of Rs.2 lakh, and in default to suffer imprisonment for twelve months. High Court while maintaining the conviction has reduced the sentence to sixteen years rigorous imprisonment with fine of Rs. 2 lakh and in default of payment of such fine, appellant was to undergo simple imprisonment for six months. Aggrieved against the judgment of the High Court this appeal has been filed.

Decision and Observations

The main issues which have arisen in the present appeal pertain to interpretation of Section 32B of the Narcotic Drugs and Psychotropic Substances Act, 1985.

The issues are as to: -

i) whether in absence of any of the factors enumerated in Section 32B[64] from clauses (a) to (f) whether the trial court could have awarded punishment higher than the minimum term of imprisonment.
ii) Whether the trial court could not take any other factor into consideration apart from factors mentioned in clauses (a) to (f) while imposing punishment higher than the minimum term of imprisonment?

[64] "32B. Factors to be taken into account for imposing higher than the minimum punishment.- Where a minimum term of imprisonment or amount of fine is prescribed for any offence committed under this Act, the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment or amount of fine, namely: -
(a) the use or threat of use of violence or arms by the offender;
(b) the fact that the offender holds a public office and that he has taken advantage of that office in committing the offence;
(c) the fact that the minors are affected by the offence or the minors are used for the commission of an offence;
(d) the fact that the offence is committed in an educational institution or social service facility or in the immediate vicinity of such institution or faculty or in other place to which school children and students resort for educational, sports and social activities.;
(e) the fact that the offender belongs to organised international or any other criminal group which is involved in the commission of the offences; and
(f) the fact that the offender is involved in other illegal activities facilitated by commission of the offence."

The Narcotic Drugs and Psychotropic Substances Act, 1985 enumerates different offences and provides for punishment. In the present case, conviction has been recorded under Section 21(c). Section 32B is a provision which is brought in the statute to rationalise the sentencing structure. Section 32B from clauses (a) to (f) enumerates various factors for imposing a punishment higher than the minimum term of imprisonment.

Section 32B uses the phrase "the court may, in addition to such factors as it may deem fit, take into account the following factors for imposing a punishment higher than the minimum term of imprisonment". The above statutory scheme clearly indicates the following:

(a) the court may where minimum term of punishment is prescribed take into consideration "such factors as it may deem fit" for imposing a punishment higher than the minimum term of imprisonment or fine;

(b) in addition, take into account the factors for imposing a punishment higher than the minimum as enumerated in clause (a) to (f).

The statutory scheme indicates that the decision to impose a punishment higher than the minimum is not confined or limited to the factors enumerated in clauses (a) to (f). The Court's discretion to consider such factors as it may deem fit is not taken away or tinkered. In a case a person is found in possession of a manufactured drug whose quantity is equivalent to commercial quantity, the punishment as per Section 21(c) has to be not less than ten years which may extend to twenty years. But suppose the quantity of manufactured drug is 20 time of the commercial quantity, it may be a relevant factor to impose punishment higher than minimum. Thus***, quantity of substance with which an accused is charged is a relevant factor, which can be taken into consideration while fixing quantum of the punishment***. Clauses (a) to (f) as enumerated in Section 32B do not enumerate any factor regarding quantity of substance as a factor for determining the punishment. In the event the Court takes into consideration the magnitude of quantity with regard to which an accused is convicted the said factor is relevant factor and the Court cannot be said to have committed an error when taking into consideration any such factor, higher than the minimum term of punishment is awarded.

The specific words used in Section 32B that Court may, in addition to such factors as it may deem fit clearly indicates that Court's discretion to take such factor as it may deem fit is not fettered by factors which are enumerated in clauses (a) to (f) of Section 32B.

The High Court held that since the appellant was found in possession of Narcotic Drugs as per the analysis report to 609.6 gm. which is much higher than the commercial quantity, punishment higher than the minimum is justified. However, looking to all the facts and circumstances of the present case including the fact that it was found by the High Court that the appellant was only a carrier, the Apex Court noted that the ends of justice will be sub-served in reducing the sentence from 16 years to 12 years.

27. M/s Gati Limited v. T. Nagarajan Piramiajee (Criminal Appeal No. 870 Of 2019)

Decided on – 06.05.2019

Bench – (1) Hon'ble Mr. Justice N.V. Ramana

(2) Hon'ble Mr. Justice Mohan M. Shantanagoudar

(Successive bail application to be placed before the same judge who heard the first one.)

Facts

The FIR was registered against the accused for the offences punishable under Sections 420, 465, 467, 468 and 472 of the Indian Penal Code. He filed an application for anticipatory bail before the High Court. The application came to be dismissed by the High Court. Prior to the disposal of the said application by the High Court, the accused had approached this Court questioning the order of the High Court directing alteration of sections in the FIR, and the same had been dismissed by this Court with the specific direction that the accused was at liberty to surrender before the Trial Court and to obtain regular bail. Thereafter, after a lapse of merely 13 days, i.e. on 31.05.2018, the accused filed a second application for anticipatory bail before the High Court, that too without any change in circumstance. The High Court by the impugned order granted anticipatory bail to the accused.

Decision and Observations

The Apex Court noted that the High Court has not assigned any valid reason or shown any change of circumstance since the rejection of the first application for anticipatory bail, for granting anticipatory bail to the accused.

Also, the first application for anticipatory bail was rejected by a certain Judge, but the second application for anticipatory bail was heard by another learned Judge, though the Judge who had heard the first application was available.

This Court in the case of ***Shahzad Hasan Khan v. Ishtiaq Hasan Khan***,[65] in a similar matter concerning filing of successive applications for anticipatory bail, made the following observations:

[65] (1987) 2 SCC 684

"The convention that subsequent bail application should be placed before the same Judge who may have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and the confidence of the other side being put in issue and there would be wastage of courts' time. Judicial discipline requires that such matters must be placed before the same Judge, if he is available for orders..."

The Court then referred to ***State of Maharashtra v. Captain Buddhikota Subha Rao***,[66] ***Vikramjit Singh v. State of Madhya Pradesh,***[67] ***M. Jagan Mohan Rao v. P.V. Mohan Rao***,[68]***Jagmohan Bahl and Another v. State (NCT of Delhi)***[69] and held that the well settled principle of law enunciated in the decisions cited supra has not been followed, inasmuch as the second application for anticipatory bail was heard by a different Judge in spite of the availability of the Judge who had disposed of the first application.

[66] 1989 Supp (2) SCC 605
[67] 1992 Supp (3) SCC 62
[68] (2010) 15 SCC 491
[69] (2014) 16 SCC 501

28. B K Pavitra v. Union of India(Civil Appeal No. 2368 of 2011)

Decided on – 10.05.2019

Bench – (1) Hon'ble Mr. Justice U.U. Lalit

(2) Hon'ble Mr. Justice D.Y. Chandrachud

(Reservations are not an exception to the rule of equality of opportunity. They are rather the true fulfilment of effective and substantive equality by accounting for the structural conditions into which people are born.)

Facts

The principal challenge in this batch of cases is to the validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act 2018. The enactment provides, among other things, for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes promoted under the reservation policy of the State of Karnataka. The law protects consequential seniority from 24 April 1978.

The Reservation Act 2018 was preceded in time by the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of the Reservation (to the Posts in the Civil Services of the State) Act 20024 . The constitutional validity of the Reservation Act 2002 was challenged in ***B K Pavitra v Union of India***.[70] A two judge Bench of this Court held Sections 3 and 4 of the Reservation Act 2002 to be ultra vires Articles 14 and 16 of the Constitution on the ground that an exercise for determining "inadequacy of representation", "backwardness" and the impact on "overall efficiency" had not preceded the enactment of the law. Such an exercise was held to be mandated by the decision of a Constitution Bench of this Court in ***M Nagaraj v Union of India***[71]. In the absence of the State of Karnataka having collected quantifiable data on the above three parameters, the Reservation Act 2002 was held to be invalid. The legislature in the State of Karnataka enacted the Reservation Act 2018 after this Court invalidated the Reservation Act 2002 in *B K Pavitra I*. The grievance of the petitioners is that the state legislature has virtually re-enacted the earlier legislation without curing its defects. On the other hand, the State government has asserted that an exercise for collecting "quantifiable data" was in fact carried out, consistent with the parameters required

[70](2017) 4 SCC 620, (hereinafter, B.K. Pavitra 1)
[71] (2006) 8 SCC 212,(hereinafter, Nagraj)

by the decision in *Nagaraj*. The petitioners question both the process and the outcome of the exercise carried out by the state for collecting quantifiable data.

Decision and Observations

Curative legislation is constitutionally permissible. It is not an encroachment on judicial power. In the present case, state legislature of Karnataka, by enacting the Reservation Act 2018, has not nullified the judicial decision in B K Pavitra I, but taken care to remedy the underlying cause which led to a declaration of invalidity in the first place. Such a law is valid because it removes the basis of the decision.

The legislature has the power to validate a law which is found to be invalid by curing the infirmity. These principles were elucidated in the decision of this Court in **Shri Prithvi Cotton Mills Ltd v Broach Borough Municipality**[72] The judgment makes a distinction between a law which simply declares that a decision of the court will not bind (which is impermissible for the legislature) and a law which fundamentally alters the basis of an earlier legislation so that the decision would not have been given in the altered circumstances. This distinction is elaborated in the following extract:

"4. ... Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal."

In ***State of T N v Arooran Sugars Ltd***[73], a Constitution Bench of the Court recognized the power of the legislature to enact a law retrospectively to cure a defect found by the Court. It

[72] (1969) 2 SCC 283
[73] (1997) 1 SCC 326

was held that in doing so, the legislature did not nullify a writ or encroach upon judicial power. The legislature in remedying a deficiency in the law acted within the scope of its authority.

A declaration by a court that a law is constitutionally invalid does not fetter the authority of the legislature to remedy the basis on which the declaration was issued by curing the grounds for invalidity. While curing the defect, it is essential to understand the reasons underlying the declaration of invalidity. The reasons constitute the basis of the declaration. The legislature cannot simply override the declaration of invalidity without remedying the basis on which the law was held to be ultra vires. A law may have been held to be invalid on the ground that the legislature which enacted the law had no legislative competence on the subject matter of the legislation. Obviously, in such a case, a legislature which has been held to lack legislative competence cannot arrogate to itself competence over a subject matter over which it has been held to lack legislative competence. However, a legislature which has the legislative competence to enact a law on the subject can certainly step in and enact a legislation on a field over which it possesses legislative competence.

Apart from legislative competence, a law may have been declared invalid on the ground that there was a breach of the fundamental rights contained in Part III of the Constitution. In that situation, if the legislature proceeds to enact a new law on the subject, the issue in essence is whether the re-enacted law has taken care to remove the infractions of the fundamental rights on the basis of which the earlier law was held to be invalid. The true test therefore is whether the legislature has acted within the bounds of its authority to remedy the basis on which the earlier law was held to suffer from a constitutional infirmity.

Is the basis of B K Pavitra I cured in enacting the Reservation Act 2018

The decision of the Constitution Bench in Nagaraj mandates that before the State can take recourse to the enabling power contained in Clauses (4A) and (4B) of Article 16, it must demonstrate the existence of "compelling reasons" on three facets: (i) backwardness; (ii) inadequacy of representation; and (iii) overall administrative efficiency. In *Jarnail Singh v Lachhmi Narain Gupta*[74] , the Constitution Bench clarified that the first of the above factors

[74] 2018 (10) SCC 396

"backwardness" has no application in the case of reservations for the SCs and STs. Nagaraj to that extent was held to be contrary to the decision of the larger Bench in *Indra Sawhney*.

The Ratna Prabha Committee report was commissioned to : (i) collect information on cadre wise representation of SC and ST employees in all government departments; (ii) collect information on backwardness of SCs and STs; and (iii) study the effect on the administration due to the promotion of SCs and STs.

Before dealing with the merits of the attack on the Ratna Prabha Committee report, the Apex Court found it necessary to set down the parameters on which judicial review can be exercised. Essentially, the exercise which the petitioners require this Court to undertake is to scrutinize the underlying collection of data by the State on two facets laid out in *Nagaraj*, as now clarified by *Jarnail Singh*: (i) the adequacy of representation; and (ii) impact on efficiency in administration.

Clause (4) of Article 16 contains an enabling provision to empower the State to make reservations in appointments or posts in favour of any backward class of citizens "which, in the opinion of the State, is not adequately represented in the services under the State". Clause (4A) contains an enabling provision that allows the state to provide for reservations in promotion with consequential seniority in posts or classes of posts in services under the State in favour of SCs and STs. Clause (4A) also uses the expression "which, in the opinion of the State, are not adequately represented in the services under the State".

The Apex Court referred to the decision in *Indra Sawhney*, which while construing the nature of the satisfaction which has to be arrived at by the State, presents two mutually complementary and reinforcing principles. The first principle is that the executive arm of the state is aware of prevailing conditions. The second is that the opinion of the government on the adequacy of representation of the SCs and STs in the public services of the state is a matter which forms a part of the subjective satisfaction of the state. Therefore, the Apex Court noted that that in *Barium Chemicals Ltd*, ***which emphasises that when an authority is vested with the power to form an opinion, it is not open for the court to substitute its own opinion for that of the authority, nor can the opinion of the authority be challenged on grounds of propriety or sufficiency.***

Now coming back to the Ratna Prabha Committee, the methodology which was adopted by the Ratna Prabha Committee has not been demonstrated to be alien to conventional social science methodologies. The Apex Court was unable to find that the Committee has based its conclusions on any extraneous or irrelevant material. In adopting recourse to sampling methodologies, the Committee cannot be held to have acted arbitrarily. If, as we have held above, sampling is a valid methodology for collection of data, the necessary consequence is that the exercise cannot be invalidated only on the ground that data pertaining to a particular department or of some entities was not analysed. The data which was collected pertained to thirty one departments which are representative in character. The State has analysed the data which is both relevant and representative, before drawing its conclusions. As we have noted earlier, there are limitations on the power of judicial review in entering upon a factual arena involving the gathering, collation and analysis of data. ***The Apex Court was of the view that once an opinion has been formed by the State government on the basis of the report submitted by an expert committee which collected, collated and analysed relevant data, it is impossible for the Court to hold that the compelling reasons which Nagaraj requires the State to demonstrate have not been established.*** Even if there were to be some errors in data collection, that will not justify the invalidation of a law which the competent legislature was within its power to enact. After the decision in *B K Pavitra I,* the Ratna Prabha Committee was correctly appointed to carry out the required exercise. Once that exercise has been carried out, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.

Substantive versus formal equality

The Apex Court on this point held: "For equality to be truly effective or substantive, the principle must recognise existing inequalities in society to overcome them. ***Reservations are thus not an exception to the rule of equality of opportunity. They are rather the true fulfilment of effective and substantive equality by accounting for the structural conditions into which people are born***. If Article 16(1) merely postulates the principle of formal equality of opportunity, then Article 16(4) (by enabling reservations due to existing inequalities) becomes an exception to the strict rule of formal equality in Article 16 (1). However, if Article 16 (1) itself sets out the principle of substantive equality (including the recognition of existing inequalities) then Article 16 (4) becomes the enunciation of one particular facet of the rule of substantive equality set out in Article 16 (1)."