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FROM THE DESK OF CHIEF EDITOR

Wrong must not win by technicalities. Justice is the only thing that allowed human race to stop living as animals and to start living as human beings. Justice is an essential commodity. It should never be rationed. It must continue to flow continuously. Justice according to Law may not be the best kind of Justice. There is gap between Justice and Law. This gap is to be filled by Judges. Judges apply the law to different situations. It is the human mind which moulds the relief to do justice in a given situation. Therefore, Judges play a significant role in filling up the gap between Law and Justice. I wish to share one such situation which arose in a court in Rome. A man of 35 years lured teenagers into the world of sex with cash with which they used to "buy new clothes and the latest mobile phones". The court found the man guilty and gave two years jail sentence. Probably, the judge would have stopped after having awarded two years jail sentence. He did not do so. The judge favoured a remedy that would help young girl to understand the real damage that she had suffered to her dignity as a woman. The judge ordered that books be given to the girl in question which would bring home the definite message about the dignity of woman. The idea of giving books was to change the mindset of the young / teen-aged girl. The reading of the book / books would bring a sea change in the very attitude which needed to be changed. The Judicial Fraternity needs to be innovative and different though within the parameters of Law. A Judge needs to focus as to how best she can do justice which must be wholesome. Justice is rendered by human beings. The Law needs to be punctuated with humanistic approach. The young judicial minds need to be positive in their thinking. They must think positive. Act positive. Do positive. Humane approach would humanize justice. You have a long journey to cover. You must continue your endeavour to fill the gap between Law and Justice. More the effort. The better is the result. No rigidity in doing justice. Justice must flow naturally. Judges must remove the obstacles. No hurdles in doing Justice.

Balram K. Gupta

LATEST CASES: CIVIL

“The healing art of harmonious construction, not the tempting game of hair-splitting, promotes the rhythm of the rule of law.”

V.R. Krishna Iyer, J. in *Fatehchand Himmatlal v. State of Maharashtra*, (1977) 2 SCC 670

Muddasani Venkata Narsaiah (D) Th. Lrs. vs. Muddasani Sarojana : 2016 (4) SCALE 635 – Wherein Hon’ble Supreme Court held - that unless there is serious cloud over the title of the plaintiff, there is no need to file suit for declaration of title. The suit for possession is maintainable.

Kulwinder Pal Singh vs. State of Punjab: (2016) 6 SCC 532 – Held – Article 14 of the Constitution does not envisage negative equality and if the State committed the mistake earlier, it cannot be forced to perpetuate the same mistake - Appointment to an additional post or to existing vacancies would deprive candidates who were not eligible for appointment to the post on the date of submission of the applications mentioned in the advertisement but became eligible for appointment thereafter. The High Court rightly held that the candidates much more than the vacancies advertised have already been permitted to join and thus the Appellants cannot claim any legal right in respect of the posts of reserved category remaining unfilled.

Anurag Kumar Singh vs. State of Uttarakhand : MANU/SC/1174/2016 : DoD 05.10.2016 (SC) – Held – that the selection pursuant to an advertisement can be only for clear vacancies and anticipated vacancies but not for future vacancies. The High Court directed that selection should be confined to only 38 posts of Assistant Prosecuting Officers. A further direction was given by the High Court to the Second Respondent to commence the process of selection for the additional 36 vacancies. Hence, the present appeal filed by the Appellants who would have been selected and appointed as Assistant Prosecuting Officers if the selection was for 74 posts. Held, while dismissing the appeal : No additional posts were created. The Rules refer to the recruitment year. It is a well-accepted principle of service law that only the number of vacancies that are advertised can be filled up. If the advertisement gives liberty to the Government to vary the number of posts, such power cannot be exercised for filling up future vacancies.

A.Ayyasamy vs. A. Paramasivam: MANU /SC/1179/2016 :DoD 04.10.2016 (SC) – Held – mere allegation of fraud simplicitor may not

be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application u/s 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration Clause or the validity of the arbitration Clause itself.

Union of India vs. M/s Meghmani Organics Ltd.: MANU/SC/1283/2016: DoD 07.10.2016 (SC) – Held – that in the garb of unclaimed confidentiality, the Designated Authority (DA) under the Customs Tariff Act cannot shirk from its responsibility to act fairly in its quasi-judicial role and refuse to indicate reasons for its findings. The DA will do well to remember not to treat any information as confidential unless a claim of confidentiality has been made by any of the parties supplying the information. In cases where it is not possible to accept a claim of confidentiality, Rule 7 hardly leaves any option with the DA but to ignore such confidential information if it is of the view that the information is really not confidential and still the concerned party does not agree to its being made public. In such a situation the information cannot be made public but has to be simply ignored and treated as non est.

Narender @ Kala vs. Sunita : Crl. Misc. No.M-33576 of 2013 (O&M) (P&H) : DoD 20.09.2016 – Held – acquittal of the petitioner and his family members in dowry demand case is no ground to deny maintenance to the wife and the child. The petitioner cannot be

absolved of his liability to maintain the wife and the child on this score. The case in hand is required to be decided on the preponderance of probabilities and no strict standard of proof is required to be proved.

A. Satyanarayana Reddy vs. Presiding Officer, Labour Court : MANU/SC/1154/2016: DoD 30.09.2016 (SC) – the Petitioners are officers of the two Companies and are mature enough to weigh the pros and cons of the options which were available to them. They could have waited and pursued their claim for revision of pay scale without opting for VRS. However, they in their wisdom thought that in the fact situation VRS was a better option available and chose the same. After having applied for VRS and taken the money it is not open to them to contend that they exercised the option under any kind of compulsion. In view of the fact that nearly ninety-nine per cent of employees have availed of the VRS Scheme and have left the Companies (FCI and HFC), the writ petition no longer survives and has become infructuous. The claim relating to lay-off compensation is not covered in the VRS. Claim pertaining to lay-off compensation having not been part of the VRS, the Labour Court has jurisdiction to adjudicate under Section 33C (2) of the Industrial Disputes Act, 1947.

State of Himachal Pradesh vs. Rajesh Chander Sood : 2016 (9) SCALE 178 – Held – the legal position is that identity of the government company remains distinct from the Government. The government company is not identified with the Union. Merely because the entire shareholding is owned by the Central Government will not make the incorporated company as Central Government. It is also equally well settled that the employees of the government company are not civil servants and so are not entitled to the protection afforded by Article 311 of the Constitution. Since employees of government companies are not government servants, they have absolutely no legal right to claim that government should pay their salary or that the additional expenditure incurred on account of revision of their pay scale should be met by the government. Being employees of the companies it is the responsibility of the companies to pay them salary and if the company is sustaining losses continuously over a period and does not have the financial capacity to revise or enhance the pay scale, the petitioners cannot claim any legal right to ask for a direction to the Central Government to meet the additional expenditure which may

be incurred on account of revision of pay scales.

Subraya M.N. vs. Vittala M.N. : (2016) 8 SCC 705 – there is no provision of law requiring family settlements to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If, however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it requires registration and without registration it is inadmissible in view of Sections 17 and 49 of the Registration Act and cannot therefore be produced and proved under section 91 of the Evidence Act. But the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct of the parties.

Asikali Akbarali Gilani vs. Nasirhusain Maheebubhai Chauhan : MANU/SC/1285/2016 : DoD 07.10.2016 – Municipality, being a trustee, must ensure that public streets are not encroached upon – on a plain reading of this provision, it is evident that the Municipality is obliged to restore the public property as it had originally existed, if such direction is issued by the Collector. The direction given by the High Court to take possession of the concerned property and remove illegal occupants therefrom and to demolish the unauthorized structure is not in derogation of the said provision; and particularly when the Collector is expected to exercise that power by following due process.

Narendra vs. K. Meena: MANU/SC/1180/2016 : DoD 06.10.2016 – the Respondent wife wanted the Appellant to get separated from his family. The evidence shows that the family was virtually maintained from the income of the Appellant husband. It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family - In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the family would be torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'.

LATEST CASES : CRIMINAL

“The heinousness of the crime is a relevant factor in the choice of the sentence, circumstances of the crime, especially social pressures which induce the crime which we may epitomise as “a just sentence in an unjust society” are another consideration.”

V.R. Krishna Iyer, J. in *Shiv Mohan Singh v. State (Delhi Admn.)*, (1977) 2 SCC 238

Hiral P. Harsora vs. Kusum Narottamdas Harsoar : MANU/SC/1269/2016 – DoD 06.10.2016 – Held – we are inclined to read down the provisions of Section 2(q) of the Domestic Violence Act and to hold that the provisions of "Respondent" in Section 2(q) of the DV Act is not to be read in isolation but has to be read as a part of the scheme of the DV Act, and particularly along with the definitions of "aggrieved person", "domestic relationship" and "shared household" in Clauses (a), (f) and (s) of Section 2 of the DV Act - In other words, in our view, the complaint against the daughter-in-law, daughters or sisters would be maintainable under the provisions of the DV Act, where they are co-respondent/s in a complaint against an adult male person, who is or has been in a domestic relationship with the complainant and such co-respondent/s. It must, of course, be held that a complaint under the DV Act would not be maintainable against daughter-in-law, sister-in-law or sister of the complainant, if no complaint is filed against an adult male person of the family.

High Court on its own Motion vs. The State of Maharashtra : MANU/MH/1886/2016 : DoD 19.09.2016 – High Court of Bombay – if a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

Mohammad Sulaiman (Pakistani National) vs. Union of India: MANU/DE/2543/2016: DoD 16.09.2016 – Transplantation of Human Organs and Tissues Act, 1994 – the

Authorization Committee as well as the Appellate Authority had held that they could not rule out the possibility of a commercial transaction between the two. The petitioner has not been able to establish any link or connection or any affection or attachment or special reason as to why the Donor has consented to donate the liver tissue to the Recipient. **Though it may be a hard case from the point of view of the petitioner no.1 but the statute has to be strictly complied with to ensure that there is no trafficking or commercial angle involved in the transplantation of human organs or tissue.**

Vivek Batra vs. Union of India: MANU/SC/1311/2016: DOD 18.10.2016 – Sanction for prosecution by the authority concerned – Held – sanction cannot be held invalid only for the reason that in the administrative notings different authorities have opined differently before the competent authority took the decision in the matter. **Further Held** - Sub-section (2) of Section 19 of the Act provides that where for any reason whatsoever any doubt arises as to whether the previous sanction, as required under sub-section (1) should be given by the Central Government or the State Government or any authority, such sanction shall be given by that Government or authority which could have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

Kamta Yadav vs. State of Bihar: MANU/SC/1181/2016: DOD 06.10.2016 - Evidence of the Interested Witnesses – Held – the Trial Court convicted the Appellants Accused persons under Section 302 read with Section 149 of Code, 1860. The High Court upheld the conviction. While dismissing the appeal, it was held that there were six eye witnesses and three of them were injured eye witnesses, which was a weighty factor to show the actual presence of witnesses at the scene of occurrence. Moreover, the credibility and trustworthiness of all these eye witnesses could not be shaken by the Accused persons. The conviction can be based on their testimonies even if they were related to the deceased. The only requirement is to examine their depositions with greater caution and deeper scrutiny is

needed, which exercise was done by both the Courts below. In fact, when the Accused were confronted with the factual and legal position, they could not even provide any answer to the same. The Accused could not point out as to how non-examination of independent persons acted to the prejudice of them.

Bhagwan Jagannath Markad vs. State of Maharashtra: MANU/SC/1171/2016: DOD 04.10.2016–Criminal Trial–Held—it is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt. **Further Held** - while appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. **Also Held** – Where there is exaggeration or embellishment not affecting credibility, the court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behavior of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible.

Saddik @ Lalo Gulam Hussein Shaikh vs. State of Gujarat : MANU/SC/1288/2016 : DOD 03.10.2016–Law relating of unlawful assembly–Held—mere presence in an unlawful assembly without sharing the common object, the same will not render a person liable for an offence u/s 149 IPC – **Further Held**—Once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding, it would not be open to the Court to see as to who actually did the offensive act or require the

prosecution to prove which of the members did which of the offensive acts. **Further held** - once it is established that the unlawful assembly had a common object, it is not necessary that all the persons forming the unlawful assembly must be shown to have committed some overt act.

Jose @ Pappachan vs. Sub-Inspector of Police, Koyilandy: MANU/SC/1162/2016 DOD 03.10.2016 –Held—it is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.

Hazari Paswan vs. State (NCT of Delhi): MANU/DE/2070/2016: DoD 04.08.2016 – Delhi High Court – With reference to a trial under POCSO Act – Held – the Presiding Officer is expected to remain sensitive particularly when a child of tender age is under examination. While conducting trial, Court is not required to sit as a silent spectator but to take active part within the boundaries of law, to bring on record the relevant facts for the purpose of eliciting truth.

Krishna Bhattacharjee vs. Sarthi Chaudhary: 2016 (1) RCR (Cri.) 152 (SC)–with reference to Domestic Violence Act - Held – wife does not cease to be 'aggrieved person' because of decree of judicial separation. Once the decree of divorce is passed, status of parties becomes different but that is not so when there is a decree of judicial separation. There is a distinction between decree for divorce and decree of judicial separation. In the former there is severance of status and parties do not remain as husband and wife. Whereas in the later, the relationship between husband and wife continues and has not snapped.

NOTIFICATIONS

THE BUREAU OF INDIAN STANDARDS ACT, 2016, NO. 11 OF 2016

- The following Act of Parliament received the assent of the President on the 21st March, 2016.
- It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
- The main features of the Act:
 - It replaces the 30 years old enactment of Bureau of Indian Standards Act.
 - Establishes the Bureau of Indian Standards (BIS) as the National Standards Body of India.
 - To include goods, services and systems, besides articles and processes under the standardization regime.
 - The Bureau to perform its functions through a Governing Council, which will consist of President and other members.
 - Apart from various other introductions into the legislation, the most important are the penal provisions.
 - Section 11 of the Act prohibits the publication, reproduction or record of any Indian standards or part thereof without authorization of the Bureau and violation of the same has been made penal u/s 29 of the Act.
 - There is a prohibition against import, sale, distribution and storage or exhibition for sale of any goods or articles except under certification from the bureau and violation thereof has been made punishable u/s 29 of the Act.
 - Where an offence under this Act has been committed by a Company, every Director, Manager, Secretary or other officer of the company who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, or authorized representative of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, irrespective of the fact that the offence has been committed with or without the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or

- other officer of the company, or authorized representative of the company.
- Offences under the Act have been made cognizable by a court not inferior to that of Metropolitan Magistrate or Judicial Magistrate first class specially empowered under the Act.
- Section 32 creates a bar against cognizance by the court unless complaint is made to the court by— (a) or under the authority of the Bureau; or (b) any police officer, not below the rank of deputy superintendent of police or equivalent; or (c) any authority notified under sub-section (2) of section 16; or (d) any officer empowered under the authority of the Government; or (e) any consumer; or (f) any association.
- Compounding of offences punishable under the Act, has been provided u/s 33 of the Act wherein detailed procedure for compounding has been provided.
- Appellate provisions are contained in Section 34 of the Act.
- Section 36 of the Act provides immunity to Government and Officer of the Government or member, officer or employees of the bureau from prosecution or other legal proceedings for any act done by them in good faith under the Act.

ROLE OF A MAGISTRATE IN A CRIMINAL INVESTIGATION

An article by Bharat Chugh, Civil Judge in Delhi Judicial Service.

Magistrates play an important role in a criminal investigation. This paper makes a case for a more proactive and responsive magistracy. It highlights areas in which magistrates, as the protectors of rights of people, can make meaningful interventions during investigation, with a view to protect liberty and also to ensure an effective investigation. This is an attempt to analyze the relevant statutory provisions and case law on the subject. It also draws comparative insights from the conception and role of a Magistrate in the French Justice System. Hence, it would be good education for the Magistrates to refer and read this paper.

EVENTS OF THE MONTH

1. Refresher-cum-Orientation Course for Civil Judges of Punjab and Haryana was organized on October 01, 2016 to sensitize them with regard to the Important Provisions of NDPS Act. This Refresher Course was sub-divided in four sessions which were taken by Ms. Harpreet Kaur Jeewan, Director (Administration), CJA, Ms. Mandeep Pannu, ADJ-cum-Faculty and Sh. Pradeep Mehta (two sessions), Faculty, CJA. 57 different Civil Judges from the States of Punjab and Haryana participated in this programme. The programme was also attended by the Trainee Judicial Officers of Haryana undergoing Induction Training at CJA.

2. HMJ Rajesh Bindal, President, BOG, CJA took special session with TJOs (Punjab) on October 14, 2016 covering Judgment Writing, Zimni Orders and Interlocutory Orders.

3. Refresher-cum-Orientation Course for ADJs of Punjab and Haryana was organized to sensitize them about Electronic and Digital Evidence on October 15, 2016. This one day Refresher Course was sub-divided into four different sessions. The first two sessions covered the different aspects relating to Electronic Evidence. The two remaining sessions covered Cyber Forensic, Discipline of Cyber Forensic and different aspects of Email. This programme was structured and executed by Mr. Neeraj Aarora, Practicing Cyber Lawyer and Forensic Examiner from New Delhi.

4. Three days Police Training (October 24-27, 2016) was organized for the directly selected Additional District and Sessions Judge at Chandigarh Judicial Academy. This three day training was conducted for the first time at the Academy itself. Different aspects

were covered: Sh. Suresh Batra, Assistant Legal Advisor, Enforcement Directorate, Chandigarh: Assessment of Property in Disproportionate Assets, Dr. Mukesh Kumar Thakkar, Professor, Department of Forensic Science, Punjabi University, Patiala : Scientific Aids to Investigation and Collection of Evidence from Scene of Crime, Sh. Vikram Goyal, AGM, Reserve Bank of India : Features of Fake Currency Notes, Dr. L.S. Rana, Asstt. Director (Retd.) FSL (Pb.) Faculty from NCB, Chandigarh : NDPS Act – Some Important Learning Points an Experience Sharing, Sh. Yash Pal Chand Jain, Handwriting, Finger Prints and Document Expert : Forensic Examination of Question Documents with Special Emphasis on Forgery Techniques of Examination etc. and Important Evidence in Disputes, Sh. Praveen Kumar, IG, Cyber Lab, Mohali : Cyber Crime – Nature of Problems their Investigation, Collection and Presentation of Evidence, Sh. B.P. Singh, CFSL, Chandigarh: Arms – Various Types – Functioning and Detailed Overview of Weapons and Making of Comparison of Bullets Fired, Sh. B.P. Singh, CFSL, Chandigarh : Nature and Forensic Examination of Injuries Caused with Firearms, Dr. Krishan Viz, HOD, Forensic : Human Body– Anatomical Parts and Types of Various Injuries and Difference Between Strangulation and Hanging. Mr. Pradeep Mehta, Faculty and Co-ordinator of the programme took three different sessions covering Exercise on homicidal cases providing insight into the complete investigation process starting from registration of FIR to submission of final report and Investigation of cases under PC Act with special emphasis on laying vigilance traps.

FORTHCOMING EVENTS

1. Chandigarh Judicial Academy is pleased to announce that it would be holding five day Programme for 30-35 Judges from Sri Lanka from December 10-14, 2016. Sri Lankan Judges delegation will be headed by an Hon'ble Judge of Supreme Court of Sri Lanka. The delegation would include about 15 High Court Judges of Sri Lanka.

2. The State Legal Services Authority, UT, Chandigarh will be holding a Seminar-cum-Workshop on Mediation : Challenges and Way Ahead and Art of Making Referrals to Mediation on 05.11.2016 in the Auditorium of

Chandigarh Judicial Academy. The Trainee Judicial Officers (Haryana) undergoing Institutional Training at CJA will also be attending and participating in this Seminar.

3. Sh. Praveen K. Sinha, IG, Cyber Police, Punjab will be in discussion and inter-action through Video Conferencing with Civil Judges, Punjab on 05.11.2016 on different issues relating to Cyber Crime.

4. There would be Refresher-cum-Orientation Course for Civil Judges of Punjab and Haryana on 19.11.2016.