JANUARY 2022

CJA e-NEWSLETTER

Monthly Newsletter of
Chandigarh Judicial Academy of Punjab & Haryana High Court
For circulation among the stakeholders in Judicial Education

VOLUME : 07
ISSUE : 01

In this Issue:

FROM THE DESK OF CHIEF EDITOR

MY BOOK : MY JOURNEY WITH LAW & JUSTICE

My journey has moved from Professor of Law to Senior Advocate to Judicial Educator. Legal education for 22 years, legal profession also for 22 years and judicial education for 10 years. It is a journey of continuity. Not three different innings. I have never been out of crease. Therefore, I was never stumped. In cricket, different players excel as batsmen, bowlers and fielders. Only some are three-in-one. They play their roles in continuity. Always, one at a time. From legal education to legal profession, this blending equipped me to play the role as a judicial educator. Thus, it is a meaningful utilization of each role in continuity. Coupled with this, I have been a Rotarian since the year 1977. The founder of Rotary Paul Harris was a lawyer. Many Rotary International Presidents have been lawyers, judges and legal academics. During all these years, I have connected Rotary with Judiciary. Through my writings, talks and memorial lectures. Rotary values have been part of my journey throughout. Normally, one is a professor or an advocate or a judge. Those who graduate from a lawyer to a judge, they combine both together. The experience gained as a lawyer equips him to be a judge. We also have service judges. They are shaped in the laboratory of court-rooms. I have enjoyed my long innings of almost 55 years in playing the different roles in continuity. This journey is three-in-one.

In sharing this journey of mine in the Book, I have kept one thing in mind. Every journey is filtered with roughs and toughs of life. There is no journey minus stumbling blocks. Hurdles and difficulties. I am no exception. I faced them. I encountered them. I surmounted them too. In sharing this journey, I have not touched them. This is intentional. Personal perspectives and prejudices step in. The negativity in mind takes charge of you. Therefore, I have not dealt

with them. The sharing of a journey with a positive mind, it tastes better. Its flavor lingers. One enjoys reading it. With passage of time, it does not perish. It is living.

The Book has four parts. The first part covers the different roles that I played. This is autobiographical. The remaining three parts cover my experiences in the different roles that I played. These three parts are my selective writings captioned as **Shaping the Judges**, **Leaves from their Lives and Judicial Review and the Constitution**. These are essays and life sketches. The essays cover my experience of different roles. During these different decades, I met the best of minds: the academicians, lawyers and judges. They influenced me and my thinking. They helped me in chartering my journey. As an academic, I had never thought that I would ever switch over to the profession. I had thought, I would superannuate as a professor. Circumstances conspired. I accepted the challenge of the legal profession. Sailed through smoothly. Once again, it had never crossed my mind that I would ever cross over to judicial education. I was offered the Directorship of National Judicial Academy because of my mixing of academic and professional career. When I got this opportunity, my son told me, Papa, these are your harvesting years and you are running away. Justice A.K.Sikri was my Chief Justice. He told me that time comes when you have to give back to the society. Therefore, I accepted the challenge of judicial education. Judicial education is not the exclusive domain of the academics. The first three directors of NJA were pure academicians. I was the first one with this combination. Before my term came to an end at NJA, the Executive Council of NJA decided to revisit the rules for the appointment of Director. It was felt that pure academicians are not suitable to play the role as judicial educators. Consequently, the experience as a lawyer and a judge with a strong academic base became the parameter for this responsible position. I have enjoyed recording my journey with a hope that those who would read it, would also enjoy it.

Balram K. Gupta

Justice Seems To Be Done Only When Judicial Proceedings Are Opened For Public Viewership*

"Justice seems to be done only when judicial proceedings are opened for public viewership," said Supreme Court Judge, Justice D. Y. Chandrachud on Saturday.

He added that unless judicial proceedings are open for public viewership, it would not be possible for the public to understand the nature of work undertaken by the Courts.

Justice Chandrachud was speaking at a virtual book release event for the book titled "My Journey with Law and Justice" authored by Professor (Dr.) Balram K Gupta

A judge is to be judged not only by the number of judgments delivered and the disposal rate but also by her conduct within the walls of the Courtroom. When a judge begins to hear a case, she must do so with an open mind, unbridled by her prejudices. Not only is it imperative that justice is done but it should also seem to be done. Justice seems to be done only when judicial proceedings are opened for public viewership. This not only provides legitimacy to the judicial institution but also furthers the democratic principle of accountability," Justice Chandrachud remarked.

He also said that while data on the disposal rate and judgments of cases is easily available in the public domain, however, the behaviour of a Judge in the Courtroom is not easily ascertainable due to the lack of transparency of judicial proceedings.

Unless this important indicator of performance evaluation is publicly available, it would be difficult to evaluate the performance of a judge and would pose challenges to judicial accountability. As Dalai Lama once said, a lack of transparency results in distrust and a deep sense of insecurity," he said.

He added "Though legal journalism is on the rise and reporting of judicial proceedings has gained traction, it has its limitations. Unless judicial proceedings are open for public viewership, it would not be possible for the public to understand the nature of work undertaken by the Courts. Streaming of judicial proceedings is also a mode of education for law students, the young and the old of the Bar."

Remarking so, Justice Chandrachud referred to the recent hearings concluded by the Kenyan Supreme Court in the case titled Attorney General v. David Ndii also known as BBI case, wherein the Court was deciding on the implied limits on the power to amend the Constitution.

While we all know that the decision of the thirteen-Judge Bench in Kesavananda Bharthi, is still considered as one of the most path breaking judgments delivered by the Supreme Court, I often wonder what a great learning experience it would have been for young students and lawyers to have followed the arguments by legal luminaries such as Mr.Palkivala and Mr.Seervai. I thus feel that all Courts across the Country must open their proceedings for public viewership," he said.

He therefore congratulated Prof. Balram for his book, adding that he highly recommends it to be included as a course reading in law schools.

He said that Prof. Balram is a "jack of all trades and the master of all."

Justice Chandrachud said "His autobiography, written in short and comprehendible sentences in 'Lord Denning's style' would help law students and lawyers navigate through their career choices, given that the author has a very wide experiences."

---

* Live Law : Nupur Thapliyal; January, 30 2022

LATEST CASES: CIVIL

"*Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review. The scope of judicial review of governmental policy is now well defined. The courts do not and cannot act as an appellate authority examining the correctness, stability and appropriateness of a policy, nor are the courts advisers to the executives on matters of policy which the executives are entitled to formulate*."

- *M.R. Shah, J. in Small Scale Industrial Manufactures Assn. v. Union of India, (2021) 8 SCC 511, para 72*

Arunachala Gounder (Dead) By Lrs. Vs Ponnusamy And Ors.:2022 SCC OnLine SC 72 -**1) Whether a sole daughter could inherit her father's separate property dying intestate (prior to enactment of Hindu Succession Act, 1956)?-HELD-**Yes**.**

Observing that Right of a widow or daughter to inherit the self-acquired property or share received in partition of a coparcenary property of a Hindu male dying intestate is well recognized not only under the old customary Hindu Law but also by various judicial pronouncements, it was **held** :*"If a property of a male Hindu dying intestate is a self acquired property or obtained in partition of a co-parcenery or a family property, the same would devolve by inheritance and not by survivorship, and a daughter of such a male Hindu would be entitled to inherit such property in preference to other collaterals."*

2)What would be the order of succession after the death of such daughter, (death having occurred after enactment of 1956 Act)?-Observing that Section14(I) of the Hindu Succession Act, 1956 converted all limited estates owned by women into absolute estates and the succession of these properties in the absence of a will or testament would take place in consonance with Section 15 of the Hindu Succession Act, 1956, it was held: "*Thus, if a female Hindu dies intestate without leaving any issue, then the property inherited by her from her father or mother would go to the heirs of her father whereas the property inherited from her husband or father-in-law would go to the heirs of the husband. In case, a female Hindu dies leaving behind her husband or any issue, then Section 15(1)(a) comes into operation and the properties left behind including the properties which she inherited from her parents would devolve simultaneously upon her husband and her issues as provided in Section 15(1)(a) of the Act."*

Shenbagam & Ors. Vs KK Rathinavel: 2022 SCC OnLine SC 71: Conduct of a plaintiff very crucial in a suit for specific performance and the same has to be assessed by the Courts.-

The Hon'ble Supreme Court observed thus while allowing an appeal filed against Madras High Court judgment that had confirmed the decree for specific performance. The bench, referring to the Trial Court judgment, noticed that the trial court failed to frame an issue on whether the plaintiff was ready and willing to perform his obligations under the contract and instead assessed whether he is entitled to the relief of specific performance. The court added that the plaintiff must prove that he is ready and willing to perform the contract. "*The burden lies on the plaintiff. The respondent has not led any evidence that he was ready or willing to perform his*

obligations under the agreement", the court noted. **HELD**: "True *enough, generally speaking, time is not of the essence in an agreement for the sale of immoveable property. In deciding whether to grant the remedy of specific performance, specifically in suits relating to sale of immovable property, the courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would undoubtedly have escalated. Given the blemished conduct of the respondent-plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. However, we order a refund of the consideration together with interest at 6% per annum."*

Renaissance Hotel Holdings Inc. Vs B. Vijaya Sai-2022 SCC OnLine SC 61– Rule of Interpretation of provisions of statute: the textual interpretation should be matched with the contextual one.- Hon'ble Supreme Court while considering an appeal against a Karnataka High Court judgment interpreting Section 29 and 30 of the Trade Marks Act,1999, held that while interpreting the provisions of a statute, the textual interpretation should be matched with the contextual one. In this case, the appellant-plaintiff filed a suit claiming a decree of permanent injunction to restrain the defendants from using the trade mark "SAI RENAISSANCE" or any other trade mark identical with their trade mark "RENAISSANCE". The trial court partly decreed the suit by restraining the - defendants from using the trademark "SAI RENAISSANCE" or any other trade mark which incorporates the plaintiff's trade mark "RENAISSANCE" or is deceptively similar thereto. The High Court, allowing defendant's appeal, observed that there was no infringement of trade mark, and set aside the Trial Court judgment.

Hon'ble SC while reversing the finding of the High Court **Held:** " *It is thus trite law that while interpreting the provisions of a statute, it is necessary that the textual interpretation should be matched with the contextual one. The Act must be looked at as a whole and it must be discovered what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.*" **Further held**: "*One of the purposes for which the said Act has been enacted is prohibiting the use of someone else's trade mark as a part of the corporate name or the name of business concern. If the entire scheme of the Act is construed as a whole, it provides for the rights conferred by registration and the right to sue for infringement of the registered trade mark by its proprietor. The legislative scheme as enacted under the said statute elaborately provides for the eventualities in which a proprietor of the registered trade mark can bring an action for infringement of the trade mark and the limits on effect of the registered trade mark. By picking up a part of the provisions in sub-section (4) of Section 29 of the said Act and a part of the provision in sub-section (1) of Section 30 of the said Act and giving it a textual meaning without considering the context in which the said*

provisions have to be construed, in our view, would not be permissible. We are at pains to say that the High Court fell in error in doing so.'

Ms.Sarita Singh v. M/s Shree Infosoft Private Limited:2022 SCC OnLine SC 6 -Deputation involves a tripartite consensual agreement between the lending employer, borrowing employer and the employee. –The controversy in the present case turns upon the construction of clause II (5) in the offer of appointment which formed the basis of the contract of employment. The Bench noted that the respondent as a claimant and plaintiff had to discharge the initial burden of establishing that the appellant was sent on deputation overseas, and that significantly, while the terms and conditions of employment have been reduced to writing, there is no valid evidence on the basis of which it can be deduced that the appellant was sent on deputation overseas. The Bench recorded that "*On the contrary, it is the contention of the appellant that she was sent overseas for a business meeting."* Referring to three-judge Bench in **Umapati Choudhary v. State of Bihar,(1999) 4 SCC 659** and two-judge Bench in **Union of India v. S N Maity, (2015) 4 SCC 164**it was observed: "*Thus, a deputation involves a tripartite consensual agreement between the lending employer, borrowing employer and the employee. Specific rights and obligations would bind the parties and govern their conduct. A transient business visit without any written agreement detailing terms of deputation will not qualify as a deputation unless the respondent were to lead cogent evidence to indicate that the appellant was seconded to work overseas on deputation. This aspect of the case has completely been ignored by all the three courts below. The claim was not substantiated having regard to the plain terms of the contract.*"

Thus Hon'ble Apex Court allowed the appeal and set aside the impugned judgment of the High Court. Moreover, the Court expressed that "*The appellant has been subjected to needless harassment and drawn into a vortex of litigation. She had concerns about the conditions at the workplace. When she complained and resigned, she has been met with a reprisal of being embroiled in a suit for recovery. Courts must send a strong message that such things shall not come to pass and will not be tolerated by the legal system. Hence, the appellant shall be entitled to the costs of the litigation quantified in the amount of Rs 1 lakh which shall be deposited in the Registry of this court within a period of one month from the date of this order*."

G.T. Girish Vs Y. Subba Raju (D)- 2022 SCC OnLine SC 60 -Subordinate Legislation In The Form Of Statutory Rules Is A 'Law' Under Section 23 Of The Indian Contract Act.-The Hon'ble Apex Court while considering an appeal that arose from a specific performance suit in which the defendant pointed out that Bangalore Rules of Allotment, 1972 Rule 18(2) had an embargo against alienation for a period of ten years and therefore claimed the contract is not lawful, held: "*What is contemplated under Section 23 of the Indian Contract Act is law, in all its forms, being immunised from encroachment and infringement by a contract, being enforced. Not only would a Statutory Rule be law within the meaning of Article 13 of the Constitution of India but it would also be law under Section 23 of the Indian Contract Act.*" The court found that the contract was unenforceable for reason that it clearly, both expressly

and impliedly, would defeat the object of the Rules,which are statutory in nature.

Doctrine Of Lis Pendens- Section 52 Of Transfer Of Property Act, .**HELD**: *"93. It is further important to notice that when a transaction is done, lispendens or pending a case, the transaction is, as such, not annulled. The transaction is, in other words, not invalidated. In fact, as between the transferor and the transferee, it does not lie in the mouth of the transferor to set up the plea of lispendens to defeat the disposition of property. Equally, the Principle of Lis Pendens is, not to be confounded with the aspect of good faith or bonafides. In other words, the transferee or the beneficiary of the property, which is disposed of by a party, cannot set up the case that he acted bonafide or in good faith."*The Court further held*: "It would appear that the High Court has, in arriving at the finding that the transfer in favour of the appellant is hit by lispendens, taken into consideration the Doctrine of Notice/Constructive Notice. We have already observed that the Doctrine of Notice and Constructive Notice would be inapposite and inapplicable. Neither the fact that the transferee had no notice nor the fact that the transferee acted bonafide, in entering into the transaction, are relevant for applying Section 52 to a transaction. This is unlike the requirement of Section 19(1)(b) of the Specific Relief Act where under these requirements are relevant."*

The Court thus, allowed the appeals setting aside the High Court judgment.

Seethakathi Trust Madras v Krishnaveni -2022 SCC OnLine SC 45 - Whether decree for specific performance obtained without impleading the subsequent bonafide purchasers is valid?–HELD-No

The respondent in this case filed a suit for specific performance of the agreement dated 10.04.1961. The suit was dismissed by the trial court. In the second appeal, the High Court of Madras in terms of its judgment dated 07.07.1970 decreed the specific performance. Controversy over the decree for specific performance arose in subsequent suit for trespass of the land and for execution proceedings. The trial court dismissed the suit opining that the respondent was aware of subsequent purchasers and yet chose not to implead them as party to the suit for specific performance. The High Court in its impugned judgment set aside the judgment of the lower courts on the ground that they did not properly appreciate the evidence particularly with respect to the execution proceedings. Hence present appeal. The Hon'ble Supreme Court noting that the respondent's manager had acknowledged that the respondent had knowledge of the transaction with respect to the same land between third parties and yet chose not to implead the purchasers to the suit, held: "*the respondent was fully aware of the prior registered transaction in respect of the same property originally in favour of nirajadevi. This is as per the deposition of her manager. In such a scenario it is not possible for us to accept that a decree could have been obtained behind the back of a bona fide purchaser, more so when the transaction had taken place prior to the institution of the suit for specific performance*." Accordingly, the Apex Court set aside the impugned judgment of the High Court.

In Re: Cognizance For Extension Of Limitation - Suo Motu Writ Petition (C) No. 3 Of 2020 Dt. 10.01.2022-Extention of limitation Perid–HELD- Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:

I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any

general or special laws in respect of all judicial or quasi judicial proceedings.
II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.
III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.
IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the
Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

Court on its own motion Vs. Union of India and others- CM-2-CWPIL-2022 in/and CWP-PIL-77-2021 (O&M) dt 20.01.2022 -**Directions–** This Court on 28.04.2021 had issued total 12 directions in a suo-motu proceeding in view of grave situation arising out of Covid-19 pandemic. To avoid any ambiguity or confusion, the following directions are re-imposed with immediate effect and shall be operative till 28.02.2022:-
i) that all the interim orders/directions issued or protection granted including any order requiring any compliance by the parties to such proceedings, passed by this Court or any other
Court subordinate to it or any Family Court or Labour Court or any Tribunal or any other Judicial or Quasi Judicial forum, over which this Court has power of superintendence, which are subsisting today shall stand extended till 28.02.2022; provided that the Court concern shall not automatically continue the interim directions and would be free to continue, modify or recall, as the case may be, the interim orders in case it is of the opinion that the direction contained above is being misused or abused and for that purpose may take up the matter on the date fixed. In all other cases, the interim direction, as contained above, shall continue to be extended uptill 28.02.2022.
ii) that it is further directed that the interim orders or directions of this Court or any Court subordinate to this Court, which are not of a limited duration and are meant to operate till further orders, shall continue to remain in force until modified/altered/vacated by specific order of the Court concerned in a particular case;
iii) that the time for filing of written-statement or return in any Suit or proceeding pending before any Civil Court or any other forum, unless specifically directed, shall stand extended till
28.02.2022. It is however clarified that this will not preclude the parties from filing such written-statement or return before
28.02.2022;
iv) that it is further directed that the orders of eviction, dispossession, demolition, etc. passed by this Court or any Court subordinate to it or any Tribunal or Judicial or Quasi Judicial forum, which have so far remained unexecuted, shall remain in abeyance till 28.02.2022;
v) that interim protection given in the anticipatory bail applications by the High Court or Court of Sessions for a limited period, which is likely to expire from now up to 28.02.2022, shall stand extended till 28.02.2022. However, any party aggrieved by the conduct of the accused on such interim protection, may move the Court seisin over the matter for discontinuation of such interim protection, if any prejudice is caused to him/her, in which event, the Court concerned shall be entitled to take independent view of the matter;

vi) that all the interim bails granted under Section 439, Cr.P.C. by the High Court or Courts of Sessions, limited by time-frame specifying an expiry date from now up to 28.02.2022, shall stand extended till 28.02.2022, subject to the accused not abusing such liberty or else it may be cancelled at the instance of the State or the complainant, on application with adequate proof of the abuse of the liberty so granted by the Court concerned;

vii) that parole granted to a person by order passed by a Court exercising the criminal jurisdiction and limited by time-frame specifying an expiry date from now up to 28.02.2022, shall stand extended till 28.02.2022, subject to the condition specified in Point No.(vi) above;

viii) that the State Governments, Union Territory, Chandigarh, or any of its Departments or any Municipal Corporation / Council / Board or any Gram Panchayat or any other local body or any other agency and instrumentality of the State shall not take any action for eviction and demolition in respect of any property, over which any citizen or person or party or any Body

Corporate, has physical or symbolic possession as on today till

28.02.2022;

ix) that it is further directed that any Bank or Financial Institution shall not take action for auction in respect of any property of any citizen or person or party or any Body corporate till 28.02.2022; subject to the clarification issued by this Court vide 4 of 6 orders dated 20.08.2021 and 23.09.2021 restricting its applicability.

x) that if the Government of Punjab, Haryana, Union Territory, Chandigarh, and/or any of its Departments and/or functionaries, Central Government and/or its departments or functionaries or any Public Sector Undertakings or any Public or Private Companies or any Firm or any individual or person is/are, by the order of this Court or any Court subordinate to it or the

Tribunals, required to do a particular thing or carry out certain direction in a particular manner, in a time frame, which is going to expire at any time from now up to 28.02.2022, the time for compliance of such order shall stand extended up to 28.02.2022, unless specifically directed otherwise by the Court concerned; subject to the fact that the aforesaid prohibition shall not apply to the orders/directions, which were required to be complied with and are meant for the benefit of the litigant or public at large.

xi) that in order to dispel any ambiguity, it is clarified that:-

(a) those interim orders / directions, which are not for a limited duration and are to operate until further orders, shall by this order remain unaffected;

(b) that, in case extension of interim order(s) as per the present order passed by this Court, causes any undue hardship and prejudice of any extreme nature, to any of the parties to such proceeding(s), such parties would be at liberty to seek appropriate relief by moving appropriate application(s) before the Competent Court(s), Tribunal, Judicial or Quasi-Judicial Forum, and these directions shall not be taken as a bar for such Courts/Forums to consider such application(s) filed by the aggrieved party, on its own merit, after due notice and providing opportunity of hearing to the other side;

(c) that the directions enumerated above shall not preclude the States or Union Territory, Chandigarh or Central Government from moving appropriate application for vacation/modification of such order in any particular case for reason of overriding public interest;

(d) that all Courts, Tribunals, Judicial and Quasi-judicial authorities are directed to abide by these directions, and the parties seeking relief(s) covered by these directions can file hard copy or soft copy of this order before the competent court/forum, which shall be given due weightage.

Karuna Sharma
Civil Judge (Jr.Divn.)/JMIC
-cum-Faculty Member, CJA

LATEST CASES: CRIMINAL

"*There can be no doubt that for "public order" to be disturbed, there must in turn be public disorder. Mere contravention of law such as indulging in cheating or criminal breach of trust certainly affects "law and order" but before it can be said to affect "public order", it must affect the community or the public at large*."

- *R.F. Nariman, J. in Banka Sneha Sheela v. State of Telangana, (2021) 9 SCC 415, para 14*

Bhagwani Vs. State of Madhya Pradesh: 2022 SCC OnLine SC 52:Object and purpose of Section 235 (2) CrPC?-HELD- Hearing Criminal Appeals preferred against the judgment of the High Court of Madhya Pradesh by which the conviction and sentence of the appellant by the Trial Court under Sections 363, 366A, 364, 346, 376D, 376A, 302, 201 of Indian Penal Code, 1860 and Section 5(g)(m) read with Section 6 of The Protection of Children from Sexual Offences Act, 2012 were upheld, the Hon'ble Supreme Court has held that "It is travesty of justice as the Appellant was not given a fair opportunity to defend himself. This is a classic case indicating the disturbing tendency of Trial Courts adjudicating criminal cases involving rape and murder in haste. It is trite law that an accused is entitled for a fair trial which is guaranteed under Article 21 of the Constitution of India."

The Hon'ble Court further held that in respect of the order of conviction and sentence being passed on the same day, the object and purpose of Section 235 (2) CrPC is that the accused must be given an opportunity to make a representation against the sentence to be imposed on him. A bifurcated hearing for convicting and sentencing is necessary to provide an effective opportunity to the accused.

Geeta Devi Vs. State of Uttar Pradesh &Ors.:2022 SCC OnLine SC 57:Discussion and/or re-appreciation of the entire evidence on record by the first appellate court?-HELD- Hearing a Criminal Appeal preferred against the judgment by which the High Court has dismissed the appeal preferred by the victim of the offence, which was filed against the judgment and order passed by the learned Special Court, acquitting the respondent accused under Sections 354, 504, 506 of the IPC, Section 3(1)(x) and 3(1)(xi) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, the Hon'ble Supreme Court, discussing law laid down in various decisions, has held that the High Court has not at all discussed and/or re-appreciated the entire evidence on record. In fact, the High Court has only made the general observations on the deposition of the witnesses examined. However, there is no re-appreciation of entire evidence on record in detail, which ought to have been done by the High Court, being a first appellate court.

Ishwarji Nagaji Mali Vs. State of Gujarat and anr.: 2022 SCC OnLine SC 55: Adverting to the relevant material/evidence collected during the course of the investigation for considering grant of bail?-HELD-Hearing a Criminal Appeal preferred against the order passed by the High Court of Gujarat at Ahmedabad in Criminal Miscellaneous Application No. 9390 of 2021, by which the High Court has directed to release respondent no.2 (accused) on bail in connection with FIR registered at C.R. No. I - 11195008201056 of 2020 with Bhildi Police Station for the offences punishable under Sections 302, 120(B), 114, 304A of the IPC and under Sections 177, 184 & 134 of the Motor Vehicles Act, the Hon'ble Supreme Court referred to its few decisions on grant of bail and held that the High Court has not at all adverted to the relevant material/evidence collected during the course of the investigation, which are the part of the charge-sheet.

Meera v. State: 2022 SCC OnLine SC 31: Woman meting out cruelty to another woman deserves no leniency.-HELD- In a case where a woman committed suicide in her matrimonial home after being subjected to cruelty at the hands of her husband, mother-in-law, father-in-law and sister-in-law for want of jewels, the bench observed

that when an offence has been committed by a woman by meting out cruelty to another woman, i.e., the daughter-in-law, it becomes a more serious offence and hence, the mother-in-law did not deserve any leniency.

The Court also observed that,

"If a lady, i.e., the mother-in-law herein does not protect another lady, the other lady, i.e., daughter-in-law would become vulnerable."

In the present case, even the husband of the victim was staying abroad. The victim was staying all alone with her in-laws. In such circumstances, the Court noticed that it was the duty of the appellant, being the mother-in-law and her family to take care of her daughter-in-law, rather than harassing and/or torturing and/or meting out cruelty to her daughter-in-law regarding jewels or on other issues.

Finding the mother-in-law to be guilty for the offence under Section 498A of IPC, the Court further noticed that just because the incident is of the year 2006 and a long time has passed in concluding the trial and/or deciding the appeal by the High Court, is no ground not to impose the punishment and/or to impose the sentence already undergone.

However, considering the fact that the incident is of the year 2006 and at present the appellant was 80 years old, as a mitigating circumstance, the Court reduced the sentence from one year R.I. to three months R.I.

Gulab v. State of Uttar Pradesh: 2021 SCC OnLine SC 1211: Examination of a ballistic expert is not an inflexible rule in every case involving use of a lethal weapon-HELD- In a case where deceased had sustained a gun-shot injury with a point of entry and exit, the 3-judge bench has held that the non-recovery of the weapon of offences or the failure to produce a report by a ballistic expert would not discredit the case of the prosecution which has relied on the eyewitness

The Court relied on the following rulings wherein it was held that examination of a ballistic expert is not an inflexible rule in every case involving use of a lethal weapon and that surrounding circumstances in the prosecution case are sufficient to prove a death caused by a lethal weapon, without a ballistic examination of the recovered weapon.

***Gurucharan Singh v. State of Punjab*, (1963) 3 SCR 585** :"It has, however, been argued that in every case where an accused person is charged with having committed the offence of murder by a lethal weapon, it is the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which, and in the manner in which, they have been alleged to have been caused; and in support of this proposition, reliance has been placed on the decision of this Court in Mohinder Singh v. State [(1950) SCR 821] . In that case, this Court has held that where the prosecution case was that the accused shot the deceased with a gun, but it appeared likely that the injuries on the deceased were inflicted by a rifle and there was no evidence of a duly qualified expert to prove that the injuries were caused by a gun, and the nature of the injuries was also such that the shots must have been fired by more than one person and not by one person only, and there was no evidence to show that another person also shot, and the oral evidence was such which was not disinterested, the failure to examine an expert would be a serious infirmity in the prosecution case. It would be noticed that these observations were made in a case where the prosecution evidence suffered from serious infirmities and in determining the effect of these observations, it would not be fair or reasonable to forget the facts in respect of which they came to be made. **These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly**

consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case."

***State of Punjab v. Jugraj Singh,* (2002) 3 SCC 234**: "18. In the instant case the investigating officer has categorically stated that guns seized were not in a working condition and he, in his discretion, found that no purpose would be served by sending the same to the ballistic expert for his opinion. No further question was put to the investigating officer in cross-examination to find out whether despite the guns being defective the fire pin was in order or not. In the presence of convincing evidence of two eyewitnesses and other attending circumstances we do not find that the non-examination of the expert in this case has, in any way, affected the creditworthiness of the version put forth by the eyewitnesses."

Ram Ratan v. State of Madhya Pradesh : 2021 SCC OnLine SC 1279: To constitute a charge under Section 397 IPC, is it necessary to prove that the offender has put the weapon/firearm to "use"?-HELD- The 3-judge bench has elaborated on the question as to whether to be charged under Section 397 IPC, it is necessary to prove that the offender has put the weapon to "use".

The law laid down by the Bench can be summarized as follows:

- the use of the weapon to constitute the offence under Section 397 IPC does not require that the 'offender' should actually fire from the firearm or actually stab if it is a knife or a dagger but the mere exhibition of the same, brandishing or holding it openly to threaten and create fear or apprehension in the mind of the victim is sufficient.
- if the charge of committing the offence is alleged against all the accused and only one among the 'offenders' had used the firearm or deadly weapon, only such of the 'offender' who has used the firearm or deadly weapon alone would be liable to be charged under Section 397 IPC.
- in the teeth of the offence under Section 397 IPC being applicable to the offender alone, the vicariability of the same will also have to be noted if the charge against the accused under Sections 34, 149 IPC and such other provisions of law, which may become relevant, is also invoked along with Section 397 IPC. In such event, it will have to be looked at differently in the totality of the facts, evidence and circumstances involved in that case and the provisions invoked in that particular case to frame a charge against the accused. In the instant case, the charge under Section 34 IPC was not framed against the appellant nor was such an allegation raised and proved against the appellant.
- benefit of the interpretation raised on the scope of Section 397 IPC to hold the aggressor alone as being guilty, will be available to the appellant if there is no specific allegation against him.

Parvati Devi v. State of Bihar: 2021 SCC OnLine SC 1285: Wife goes missing from matrimonial home; body found a week later: Circumstances unerringly point to husband's guilt despite slipshod investigation-HELD- Despite a slipshod investigation in a case the SC has upheld the conviction of a man guilty of killing his wife within a few months of the marriage on her failing to satisfy the demands of dowry. The deceased Fulwa Devi had gone missing from her matrimonial home and her

body was found on the bank of river Barakar after a week.

Recovery of the body from the banks of the river clearly indicates that Fulwa Devi had died under abnormal circumstances that could only be explained by her husband and in-laws, as she was residing at her matrimonial home when she suddenly disappeared and no plausible explanation was offered for her disappearance.

Hence, despite the shoddy investigation conducted by the prosecution, the Court was of the view that the circumstances set out in Section 304B of the IPC have been established in the light of the abovementioned facts.

"The circumstances put together, unerringly point to his guilt in extinguishing the life of his wife within a few months of the marriage on her failing to satisfy the demands of dowry."

Hence, the appellant who is presently on bail, was directed to surrender before the Trial Court/Superintendent of Jail within four weeks to undergo the remaining period of his sentence.

The Court however acquitted Fulwa Devi's mother-in-law as, from the evidence on record only certain omnibus allegations have been made against her with respect to dowry demands, however, the prosecution was not able to indicate any specific allegations, nor point to any specific evidence or testimony against her. She was, hence, directed to be released forthwith, if not required to be detained in any other case.

Dilbagh Khan vs. State of Punjab: CRM-M-19936 of 2021 (O&M) dt. 03.09.2021: Value of Custodial interrogation-HELD- custodial interrogation is very much necessary for complete and effective investigation and if the same is denied to the investigating agency, that would leave many loose ends, gaps and lacuna in the investigation, adversely affecting the same, which is un-called for.

Lovepreet Singh @ Luvi vs State of Punjab: CRM-M-20639-2021(O&M) dt. 01.09.2021: Pre-Arrest bail -HELD- Considering the grave and serious allegations against the petitioner, he being specifically named in the FIR, the quantity of contraband recovered from his co-accused, the custodial interrogation of the petitioner is necessary for complete and effective investigation. In case custodial interrogation of the petitioner is denied to the investigating agency that would leave many loose ends and gaps in the investigation affecting the investigation being carried out adversely, which is not called for, since the investigation would be curtailed to a great extent and the investigating agency would not be able to reach the bottom of the things to find out the material facts and then to act against the persons running the drug racket in order to curb the alarming extent of drug abuse and drug addiction amongst the people of the State.

Suresh Chand vs Ajit Singh Dahiya and others: CRM-M-48159-2021 dt 17.12.2021: Sentencing -HELD- It is apparent that the observations of the Hon'ble Supreme Court are either not in the knowledge of, or are not being diligently followed by the trial Judges who are deciding the original trial and on account of the same, parties are having to litigate for several rounds, even after the case has been finally adjudicated upon, on merits. **In view of the above, this Court reiterates that the Court of first instance while awarding multiple sentences of imprisonment in a trial, must specify, in clear terms, as to whether the said sentences would run concurrently or consecutively and in case, they were to run consecutively, the order (sequence) in which the same would run.**

Amrinder Singh Shergill
Additional District & Sessions Judge
-cum-Faculty Member, CJA

LATEST CASES: FAMILY LAW

" An open court system ensures that Judges act in accordance with law and with probity."
— Dr D.Y. Chandrachud, J. in Chief Election Commr. of India v. M.R. Vijayabhaskar, (2021) 9 SCC 770, para 21

Smriti Madan Kansagra v. Perry Kansagra : 2021 SCC OnLine SC 887 - **SC stresses on importance of mirror orders in inter jurisdictional child custody matters- HELD-** Mirror orders are passed to safeguard the interest of the child who is in transit from one jurisdiction to another. The primary jurisdiction is exercised by the court where the child has been ordinarily residing for a substantial period of time and has conducted an elaborate enquiry on the issue of custody. The court may direct the parties to obtain a "mirror order" from the court where the custody of the child is being shifted. Such an order is ancillary or auxiliary in character, and supportive of the order passed by the court which has exercised primary jurisdiction over the custody of the child. In international family law, it is necessary that jurisdiction is exercised by only one court at a time. These orders are passed keeping in mind the principle of comity of courts and public policy.

The judgment of the court which had exercised primary jurisdiction of the custody of the minor child is however not a matter of binding obligation to be followed by the court where the child is being transferred, which has passed the mirror order. The judgment of the court exercising primary jurisdiction would however have great persuasive value.

The said explanation came in a 2:1 verdict, where Indu Malhotra, J, writing the majority judgment for herself and UU Lalit, J, transferred the custody of an 11-year-old child to his father, an Indian-origin business tycoon living in Kenya, from his mother with whom he has been living since birth.

The decision was taken based on an overall consideration of the holistic growth of the child determined on the basis of his preferences as mandated by Section 17(3), the best educational opportunities which would be available to him, adaptation to the culture of the country of which he is a national, and where he is likely to spend his adult life, learning the local language of that country, exposure to other cultures which would be beneficial for him in his future life. However, to safeguard the rights and interest of the mother, the Court directed the father to obtain a **mirror order** from the concerned court in Nairobi, which would reflect the directions contained in this Judgment.

Disagreeing with Justice Malhotra's opinion, Justice Gupta held that the child should be given liberty to choose his destination after he comes out of age.

Sushil Kumar Tiwari v. State of I.P.: 2021 SCC OnLine All 882, decided on 6-12-2021 – When can a High Court invoke its power in granting writ of habeas corpus in child custody matters? - HELD- while examining the scope of the writ of habeas corpus, expressed that,

The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

Maintainability of Habeas Corpus Petition

The question of maintainability of habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in *Tejaswini Gaud v. Shekhar Jagdish Prasad Tewari,* (2019) 7 SCC 42 and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

High Court stated that the exercise of extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdiction fact where the applicant establishes a prima facie case that the detention is unlawful. Only where the above-mentioned jurisdictional fact is established the applicant would become entitled to the writ as of right. Further, the Bench added that the role of the High Court in examining cases of custody of a minor, in a petition for a writ of habeas corpus, would have to be on the touchstone of the principle

of *parens patriae jurisdiction* and the paramount consideration to be the welfare of the child. In the present matter, petitioner 2 was of the age of 6 years and under the exclusive care and custody of his mother since the time he was an infant of about 2 years of age.

Reshu v. State of U.P., Habeas Corpus WP No. 9 of 2020, decided on 22-10-2021 – What is more significant: Competing rights of guardianship or Welfare of minor? All HC decides-HELD- Writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown as held in *Mohammad Ikram Hussain v. State of U.P.*, AIR 1964 SC 1625 and *Kanu Sanyal v. District Magistrate*, (1973) 2 SCC 674.

Jurisdiction

The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, be seen to be dependent on the jurisdictional fact where the applicant establishes a *prima facie* case that the detention is unlawful.

Object and Scope of Writ of Habeas Corpus

In the case of *Syed Saleemuddin v. Dr Rukhsana*, (2001) 5 SCC 247, it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed.

In the decision of *Walker v. Walker & Harrison*, 1981 New Ze Recent Law 257, the question as to what would be dominating factors while examining the welfare of a child was considered and it was observed that while material considerations have their place, they are secondary matters. *More important are stability and security, loving and understanding care and guidance, and warm and compassionate relationships which are essential for the development of the child's character, personality and talents.*

Further, elaborating more it was noted that question of a claim raised by maternal grand-father for guardianship of a minor child whose mother had died after giving birth to the child was subject matter of consideration in *Shyamrao Maroti Karwate v. Deepak Kisanrao Tekham*, (2010) 10 SCC 314, and reiterating that in the matter of custody of a minor child, paramount consideration is welfare of minor and not rights of parents or relatives, it was held that the appointment of the maternal grandfather as guardian, was justified.

Court stated that considering the facts of the case in particular the allegations against the respondent and pendency of a criminal case for an offence punishable under Section 498-A IPC, it was observed in the decision in the case of *Nil Ratan Kundu v. Abhijit Kundu*, (2008) 9 SCC 413, that one of the matters which is required to be considered by a court of law is 'character' of the proposed guardian and that the same would be a relevant factor.

In an earlier decision in the case of *Kirtikumar Maheshankar Joshi v. Pradipkumar Karunashanker Joshi*, (1992) 3 SCC 573, where in almost similar circumstances the father was facing a charge under Section 498A IPC, it was held that though the father being a natural guardian, has a preferential right to the custody of the children, but in the facts and circumstances of the case, it would not be in the interest of the children to hand over their custody to the father.

Therefore, in an application seeking a writ of habeas corpus for custody of a minor child, the principal consideration for the Court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

Power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

High Court observed that,

A writ of habeas corpus, is employed in certain cases, to enable a party to enforce a 'right to control' – arising out of a domestic relationship, especially to enable a parent to get custody and control of a child, alleged to be detained by some other person.

Guardianship v. Welfare of the Child

Bench expressed that while examining the competing rights with regard to guardianship vis-à-vis welfare of the child, the predominant test for consideration would be – what would best serve the welfare and interest of the child.

The interest of the child would prevail over legal rights of the parties while deciding matters relating to custody.

In Court's opinion, the custody of a minor child with her maternal grandfather was not in any manner illegal and improper detention.

Reasoning out the above opinion, Court stated that the child from her infancy, when she was of a tender age, appears to be living with her maternal grand father. This together with the fact that the father who is claiming custody is named as an accused in a criminal case relating to the death of the mother of the corpus, would also be a relevant factor.

"…in deciding questions relating to custody of a minor child, as in the present case, the paramount consideration would be welfare of the minor and not the competing rights with regard to guardianship agitated by the parties for which the proper remedy would be before the appropriate statutory forum."

K.S. Narayana Elayathu v. Sandhya : 2021 SCC OnLine Ker 6231- Guardian of Property v/s Guardian of Person of the minor, Kerela HC clarifies jurisdiction of District Court- HELD- held that the District Court cannot entertain petition to appoint guardian of the person of the minor child, however power to appoint guardian of the property of the minor is well within the jurisdiction of the District Court. The Bench clarified, the fact that a court cannot appoint a guardian of the person, is no bar for appointing a guardian of the property. The Bench observed that Section 7 of the Family Courts Act, 1984, lays down that a family Court shall have, and exercise all jurisdiction exercisable by any District Court or any subordinate civil Court under any law in respect of suits and proceedings of the nature referred to in the Explanation which, *inter alia*, includes, according to clause (g), a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Section 8 of the Act specifically says that where a family Court has been established for any area, no District Court or any subordinate civil Court referred to, shall, in relation to such area, have or exercise any jurisdiction in respect of such suits or proceedings referred to, in the Explanation which includes clause (g). However, considering the above provision, the Bench stated,

"But, when the question involved relates to appointment of guardian in respect of the property of minor, the Family Court has no jurisdiction, as that dispute is not coming under explanation (g) to Section 7(1)".

Hence, the Bench held that since the Family Court has no jurisdiction to entertain a petition for guardianship of the property of the minor, no doubt, the jurisdictional District Court has to entertain that petition. Further, Section 7 of the Guardian & Wards Act, 1980 empowers the jurisdictional District Court to appoint a guardian of the person or property or both of a minor or to declare a person to be such a guardian, if the court is satisfied that, it is for the welfare of the minor. So, as far as the dispute between parties to an erstwhile marriage regarding guardianship of the person, or the custody of, or access to their minor child, the Bench held that the jurisdiction of the District Court is taken away by the Family Court.

Consequently, with regard to the impugned proceedings of the District Court, the Bench held that there was not illegality or impropriety to warrant the Court's interference and the District Court can proceed with the original petition for appointing guardian for the property of the minor, and not for the person of the minor.

Mahima Tuli
Research Fellow

NOTIFICATION

1. The Surrogacy (Regulation) Act, 2021: On December 25, 2021, the Surrogacy (Regulation) Act, 2021 received President's assent in order to regulate the practice and process of surrogacy, constitute National Assisted Reproductive Technology and Surrogacy Board, State Assisted Reproductive Technology and Surrogacy Boards. **Key features of the Act:**

I. Prohibition and regulation of surrogacy clinics:

- No surrogacy clinic, unless registered under this Act, shall conduct or associate with, or help in any manner, in conducting activities relating to surrogacy and surrogacy procedures; or employ or cause to be employed or take services of any person, whether on honorary basis or on payment, who does not possess such qualifications as may be prescribed.
- No surrogacy clinic, paediatrician, gynaecologist, embryologist, registered medical practitioner or any person shall conduct, offer, undertake, promote or associate with or avail of commercial surrogacy in any form; or store a human embryo or gamete for the purpose of surrogacy except storage for other legal purposes like sperm banks, IVF and medical research; or conduct or cause to be conducted sex selection for surrogacy.

II. Regulation of surrogacy and surrogacy procedures: No surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the following purpose:

- when an intending couple has a medical indication necessitating gestational surrogacy provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed. Note: "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother;
- when it is only for altruistic surrogacy purposes;
- when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures;
- when it is not for producing children for sale, prostitution or any other form of exploitation.

III. **Written informed consent of surrogate mother:** All known side effects and after effects of such procedures shall be informed to the surrogate mother concerned and also a written informed consent of the surrogate mother to undergo such procedures in the language she understands is required to obtain.

IV. **Registration of surrogacy clinics**: No person shall establish any surrogacy clinic for undertaking surrogacy or to render surrogacy procedures in any form unless such clinic is duly registered under this Act. Every surrogacy clinic which is conducting surrogacy or surrogacy procedures, partly or exclusively, shall, within a period of sixty days from the date of appointment of appropriate authority, apply for registration.

V. **Establishment of National Assisted Reproductive Technology and Surrogacy Registry:** There shall be established a Registry to be called the National Assisted Reproductive Technology and Surrogacy Registry for the purposes of registration of surrogacy clinics under this Act.[2]

[2] https://egazette.nic.in/WriteReadData/2021/232118.pdf

EVENTS

- Ms.Sonia Kinra, Additional District & Sessions Judge-cum-Faculty Member, Chandigarh Judicial Academy gave a Webinar on “Grant of Compensation in the cases under Protection of Children from Sexual Offences Act, 2012” on January 15, 2022 to the District Judiciary of Punjab, Haryana and UT Chandigarh including Trainee Judicial Officers.
- My Book : My Journey with Law & Justice was virtually released on January 29, 2022 in the presence of Justice Dr. D.Y.Chandrachud, Justice Surya Kant, Judges, Supreme Court of India, Justice Ravi Shanker Jha, Chief Justice, Punjab & Haryana High Court, Justice Madan B.Lokur, former Judge, Supreme Court of India and presently Judge, Supreme Court of Fiji, Justice Amol Rattan Singh, Judge, Punjab & Haryana High Court, Prof. Upendra Baxi, Professor Emeritus, Dr.Manish Arora and Dr.Shruti Bedi. This event was attended virtually by Judges, Lawyers, Rotarians and other public persons. Click here for YouTube recording