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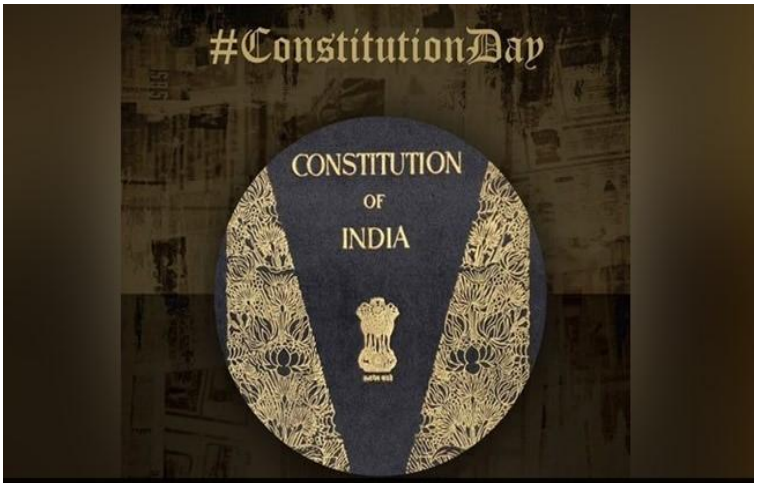
FROM THE DESK OF CHIEF EDITOR

National Constitution Day



The Constitution is the present day Holy Book. It is a way of life. The Constituent Assembly started crafting the Indian Constitution on December 9, 1946. It took 2 years 11 months and 18 days in drafting the Constitution. It was adopted on November 26, 1949. It was signed by 308 members of CA. Two copies of the Indian Constitution are Handcrafted one in English and the other in Hindi. Both are kept in helium cases in the Library of the Parliament. The calligraphic work is covered over 250 pages. The original Constitution is in 22 Parts. Equally, there are 22 illustrative panels. It has completed 72 years of its journey. Today is its 73rd birthday – The Constitution Day.

The first Constitutional Fundamental Duty of every citizen is to abide by the Constitution and respect its ideals and institutions. Every Constitutional Authority in the country takes oath to bear true faith and allegiance to the Constitution as by law established. Every Legislative Act and Executive Order is tested on the touchstone of the Constitution. The Constitution is the mother of all actions.

The Constitution is like a plant. It grows with the passage of time. No wrinkles. It never ages. It is a living organism. Judicial Review keeps the Constitution in shape. Its Basic Structure cannot be altered by the Parliament. The Members of the Parliament and the Political Executive, they take oath to uphold the Constitution. Judges connect the Constitution to the people of India. Judicial Review is a useful tool to provide Constitutional voice to the silences of the Constitution. The Constitution serves from generation to generation. From century to century. Constitutions are meant to have only Birthdays. No death days.

HUMANITARIAN APPROACH TO JUSTICE

Aeschylus, 6th Century B.C.Greek Dramatist proclaimed : 'wrong must not win by technicalities'. We find the echo of this in a case of Dalit student, Prince Jaibir Singh before the summit court on November 22, 2021. The Bench comprised Justices D.Y.Chandrachud and A.S.Bopanna. Briefly, the factual canvas. Jaibir Singh belonged to Gaziabad in Uttar Pradesh. He had been allotted a seat in the Indian Institute of Technology, Bombay in the discipline of Civil Engineering on October 27. He uploaded his documents on the seat allocation authority's portal on October 29. He did not have the requisite amount of money at that time to pay his fee. Jaibir's sister transferred some money to him on October 30. He tried to pay his fee online 10 to 12 times but encountered a technical error. The next day, he also tried to make the payment from a cyber cafe. He did not succeed. He ended up missing the deadline for submitting the fee. He called the institute and wrote mails to them. He did not get any response. After this, he travelled to IIT Kharagpur and urged the authorities to accept the payment in other mode and confirm his seat. The authorities turned down his request. In short, he lost his seat because of the technical glitch. Since, there was no fault on his part, he approached the Bombay High Court for relief. The Bombay High Court dismissed his petition. Finally, Jaibir moved a petition before the Supreme Court. A Bench of Justices D.Y.Chandrachud and A.S.Bopanna felt that the case of the boy may be weak on law. The court has to show **humanitarian** approach. It should rise above the law in such instances. Justice Chandrachud remarked : "can't we do something? We can show him the door on five different points of law. But this is a **humanitarian** thing. Sometimes we must rise above the law." The Hon'ble Judge added : This is a dalit boy who has cracked IIT Bombay. For all we know he could be a leader of the nation 10 years down the line. The Central Government lawyer was asked to procure the details of admission list of IIT Bombay. IIT's Joint Seat Allocation Authority told the court that they did not have any seats left. The top court used its special power under Article 142 for this particular case in order to do complete justice. The Hon'ble Bench ordered to 'create a seat for this student. Ensure that this does not disturb any other already admitted student. This additional seat may be adjusted against a seat falling vacant subsequently.' The institute was advised not to adopt a 'wooden approach'. Please understand the realities of social life, the issues on ground. The student did not have money, his sister had to transfer money. Then there were technical issues. The boy cleared the examination. If it was his negligence, we would not have asked you to create a seat for this student. The Bench strongly felt that it would be a 'travesty of justice' for the student to be denied a seat at IIT.

There is another case in the domain of service law. It came up before the Delhi High Court. The Hon'ble Bench comprised Justice Talwant Singh and Justice Rajiv Shakdher. A lady IAS Officer from the West Bengal cadre married an IAS Officer of Tamil Nadu cadre. She requested the state of West Bengal for issuance of its no-objection to the Government of India's Department of Personnel and Training (DoPT). The Government of Tamil Nadu communicated its no objection to the request. On the other hand, the state of West Bengal expressed its inability to grant consent. It reasoned on the ground that the state was facing an acute shortage of officers. However, the state of West Bengal

offered to absorb the petitioner's spouse if he wished to be transferred to West Bengal. The petitioner accepted the then situation existed for the next three years. She made another representation. Since, there was no response, she sent a reminder. Thereafter, she moved the Central Administrative Tribunal (CAT). The CAT directed the respondent state to reconsider the request. Finding that there was no reconsideration, the petitioner moved the Delhi High Court. The petitioner specifically pleaded that she had been meted out discriminatory treatment as the request of several other officers on similar grounds had been considered. Even otherwise, the petitioner made it clear that her request was in line with the provisions of Office Memorandum (OM) issued by DoPT, as well as the Indian Administrative Service (Cadre) Rules, 1954. On the other hand, the West Bengal Government argued that COVID-19 had created a dire need for the services of Administrative Officers. The refusal of the petitioner's request should be viewed in this background. The Division Bench found that the reason that there was shortage of officers was not duly supported by placing on record the actual cadre position. The State of West Bengal had not submitted the relevant data. It had merely made the bald statement that there was acute shortage of officers. The same could not be accepted. The petitioner argued that her well being and family relationship had been gravely affected due to the state's decision. In fact, it violated her fundamental rights under Article 21 – protection of life and personal liberty. The petitioner is unable to strike a balance between her work and personal life. The obdurate approach of the state of West Bengal has prevented the petitioner from starting her family. The petitioner pleaded that this approach lacked **humanitarian** element which is the foundation of Article 21.

The court accepted that an inter cadre transfer cannot be effected without the concurrence of the state government. The court, however, made it clear that the refusal of a request for transfer on the ground of marriage required to be supported by cogent reasons. The same would be subject to judicial review. On consideration, the Division Bench found that 1954 Cadre Rules and the OM were to ensure holistic progress and well being of the members of All India Services. The court held : The object and purpose appear to be to enhance the efficiency of the officers by ensuring that they are not weighed down because of marital discord and unhappiness on the home front. Merit was also found in the petitioner's submission that her right to family life had been "infracted" on denial of her request. The High Court concluded that an unreasonable denial of a request by an employee seeking inter cadre transfer in such a manner impinges on their right to demand respect for their family. Accordingly, the writ petition was allowed and the state of West Bengal was directed to issue a no objection to the petitioner's request within two weeks of the receiving the copy of the judgment.

This clearly proves that justice according to law is not always the best kind of justice. The technicalities must not come in the way of doing justice. Judges are humans. They are healers. They adjudicate human disputes. Therefore, the **humanitarian** approach is integral to the doing of justice. The humanitarian approach is founded on the popular saying : Let Justice be done, though heavens may fall.

Balram K. Gupta

LATEST CASES: CIVIL

"*There are limitations of the judicial process in providing absolute answers to these questions. Judgments are rendered in cases involving specific fact situations. While they immediately bind the parties before the court, the impact of the pronouncement of principle will have a bearing on others whose contracts may contain similar provisions*."

- *Dr D.Y. Chandrachud, J. in Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209, para 148*

Badrilal v Suresh & Ors: 2021 SCC OnLine SC 1001- S.70 of the Indian Succession Act -HELD- The Hon'ble SC clarified that the essential ingredients of S.70 of the Indian Succession Act are required to be fulfilled in a case involving a question of revocation of will by a subsequent agreement. The Court noted that as per S.70, revocation of a will can be made by one of the following methods:

- Execution of another Will or codicil
- Writing executed by the testator declaring an intention to revoke the Will and executed in the manner in which an unprivileged Will is required to be executed.
- By burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

K.V Anil Mithra and Another v. Sree Sankaracharya University of Sanskrit and another :2021 SCC OnLine SC 982- Section 25F of the Industrial Disputes Act 1947-HELD-The Supreme Court has held that the requirements specified under Section 25F of the Industrial Disputes Act 1947 for the retrenchment of an employee will apply even if the appointment was irregular. It was held that: "*In every retrenchment, the employer is not under an obligation to comply with the twin conditions referred to under clauses (a) and (b) of Section 25F of the Act but in a case where the workman has been in continuous service for more than 240 days in the preceding 12 months before the alleged date of termination as contemplated under Section 25B, the employer is under an obligation to comply with the twin conditions referred to under clauses (a) and (b) of Section 25F of the Act 1947.*" Further holding that the reinstatement with consequential benefits is not automatic in case there is non compliance of the mandatory provision of Section 25F of the Act 1947 and that the alternative relief to the workman on account of non-observance of mandatory requirement is open to be considered by the Tribunal/Courts in the facts and circumstances of each case, and considering the facts and circumstances of the instant cases that the nature of service rendered by the appellants as daily wager was for a short period, while upholding the termination of the appellants being in violation of Section 25F of the Act 1947, a lumpsum monetary compensation of Rs.2,50,000/- (Rupees two lakh fifty thousand) to each of the appellants-workmen in full and final satisfaction of the dispute in lieu of right to claim reinstatement with 50% back wages as awarded by the Tribunal was awarded.

Welspun Specialty Solutions Limited vs Oil and Natural Gas Corporation Ltd :2021 SCC OnLine SC 1053 - Principles regarding the relevancy of time-HELD- The Hon'ble court noted the following principles regarding the relevancy of time conditioned obligations:

a. Subject to the nature of contract, general rule is that promisor is bound to complete the obligation by the date for completion stated in the contract. [*Refer to Percy*

Bilton Ltd. v. Greater London Council, [1982] 1 WLR 794]

b. That is subject to the exception that the promisee is not entitled to liquidated damages, if by his act or omissions he has prevented the promisor from completing the work by the completion date. [*Refer Holme v. Guppy, (1838) 3 M & W 387*]

c. These general principles may be amended by the express terms of the contract as stipulated in this case.

Further held:

1) It is now settled that 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances.

2) Contractual clauses having extension procedures and liquidated damages is good indicator that time was not the essence of the contract. However, merely having an explicit clause may not be sufficient to make time the essence of the contract.

3) Once, by extension if there is waiver of liquidated damages, compensation may only be granted on the basis of the Actual Loss suffered.

Nandlal Lohariya vs Jagdish Chand Purohit: LL 2021 SC 636 - National Consumer Disputes Resolution –HELD- While dismissing the Special Leave Petition filed against the National Consumer Disputes Resolution Commission order, the court noted that : "*4.1 Once it is found and held that there was no deficiency in service on the part of the advocates, the complaint filed by the petitioner – complainant against the three advocates was liable to be dismissed and is rightly dismissed by the District Forum and the same has been rightly confirmed by the State Commission and thereafter by the National Commission. Only in a case where it is found that there was any deficiency in service by the advocate, there may be some case. In each and every case where a litigant has lost on merits and there is no negligence on the part of the advocate/s, it cannot be said that there was any deficiency in service by the advocate/s. If the submission advanced on behalf of the petitioner is accepted, in that case, in each and every case where a litigant has lost on merits and his case is dismissed, he will approach the consumer fora and pray for compensation alleging deficiency in service. Losing the case on merits after the advocate argued the matter cannot be said to be deficiency in service on the part of the advocate. In every litigation, either of the party is bound to lose and in such a situation either of the party who will lose in the litigation may approach the consumer fora for compensation alleging deficiency in service, which is not permissible at all*."

Sudhir Kumar Atrey vs Union of India & ors: 2021 SCC OnLine SC 971-HELD- that in the matter of adjudging seniority of the candidates selected in one and the same selection, placement in the order of merit can be adopted as a principle for determination of seniority but where the selections are held separately by different recruiting authorities, the principle of initial date of appointment/continuous officiation may be the valid principle to be considered for adjudging inter se seniority of the officers in the absence of any rule or guidelines in determining seniority to the contrary.

Kewal Krishan vs Rajesh Kumar: 2021 SCC OnLine SC 1097-HELD-1)If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eyes of law. It is of no legal effect. Therefore, such a sale will be void. It will

not effect the transfer of the immovable property.

2) A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings.

3)Hence, the issue of bar of limitation of the prayers for declaration incorporated by way of an amendment does not arise at all.

Assa Singh (D) By LRs v. Shanti Parshad (D) By LRs. & Others Citation : 2021 SCC OnLine SC 1064 -Whether bar under Section 25 is would operate, even in a situation, where the landlord tenant relationship is disputed in a proceeding under Section 14A of the Act?-HELD- that the validity of the orders under Section 14A is open to scrutiny in a Civil Court, in a situation, when the tenant denies and disputes the case of the landlord that there is a landlord-tenant relationship. We must, however, further hold that a mere plea by the tenant, should not lead, without anything more, to render the Authorities helpless and bereft of power to order eviction. In a situation, where, the Authority finds the plea of the tenant to be completely frivolous and mere attempt at blocking the proceedings, the validity enacted under Section 25, cannot be diluted.

Rashid Wali Beg v. Farid Pindari : 2021 SCC OnLine SC 1003- Jurisdiction of Civil Courts when barred under Waqf Act, 1995-HELD- A conjoint reading of Sections 6, 7 and 85 would show that the bar of jurisdiction of civil court contained in Section 6(5) and Section 7(2) is confined to Chapter-II, but the bar of jurisdiction under Section 85 is all pervasive.

There are 2 limbs to Section 85.

- The words, “any dispute, question or other matter relating to any waqf or waqf property” used in the first limb of Section 85, provide a clear indication that the Tribunal would have jurisdiction to adjudicate upon any dispute and answer any question relating to a waqf or waqf property, including the two questions mentioned in Sections 6(1) and 7(1).
- The words in the second limb of Section 85 namely, “other matter which is required by or under this Act to be determined by a Tribunal”, seek to cover matters which have no relevance to the two questions covered by Section 6(1) and 7(1).

Section 83(1) even as it stood before the Amendment, provided for the determination by the Tribunal, of any dispute, question or other matter

- relating to a waqf; and
- relating to a waqf property.

Hence, stating that the court cannot do violence to the express language of the statute, the Court said,**“To say that the Tribunal will have jurisdiction only if the subject property is disputed to be a waqf property and not if it is admitted to be a waqf property, is indigestible in the teeth of Section 83(1).”**

Valsan P. v. State of Kerala: 2021 SCC OnLine SC 953- Can service rendered in Central and State government be considered a single block of pensionable service by condoning the break period between two services?-HELD- The SC bench condoned the non pensionable sandwiched period between pensionable services rendered in Central and State government for the purpose of providing a single bock of pensionable service.

Jithendran v. The New India Assurance Co.: 2021 SCC OnLine SC 983 - Tribunals, Courts must recognize actual needs; award just compensation to help restore dignity of claimant with permanent disability- HELD-The Court emphasized that the Tribunal and the

Courts must be conscious of the fact that the permanent disability suffered by the individual not only impairs his cognitive abilities and his physical facilities but there are multiple other non-quantifiable implications for the victim.

It further noted that the plea of the victim suffering from a cruel twist of fate, when asking for some more, is not extravagant but is for seeking appropriate recompense to negotiate with the unforeseeable and the fortuitous twists is his impaired life.

Executive Engineer, Gosikhurd Project Ambadi, Bhandara, Maharashtra Vidarbha Irrigation Development Corporation v. Mahesh : 2021 SCC OnLine SC 1034-Whether the two-year period specified under Section 11A of the Land Acquisition Act, 1894 will apply even after the repeal of the 1894 Act, or the twelve-month period specified in Section 25 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 will apply for the awards made under clause (a) of Section 24(1) of the 2013 Act?-HELD- The Court held that *in cases covered by clause (a) to Section 24(1) of the 2013 Act, the limitation period for passing/making of an award under Section 25 of the 2013 Act would commence from 1st January 2014, that is, the date when the 2013 Act came into force. Awards passed under clause (a) to Section 24(1) would be valid if made within twelve months from 1st January 2014. This dictum is subject to the caveat stated that a declaration which has lapsed in terms of Section 11A of the 1894 Act before or on 31st December 2013 would not get revived.*

(i)Section 25 of the 2013 Act would apply to the awards made and published under Section 24(1)(a) of the 2013 Act.

(ii) The limitation period for passing/making of an award under Section 24(1)(a) in terms of Section 25 of the 2013 Act would commence from 1st January 2014, that is, the date when the 2013 Act came into force.

(iii) Period during which the Court order would inhibit action on the part of the authorities to proceed with the making of the award would be excluded while computing the period under Section 25 of the 2013 Act.

Meena Pawaia vs Ashraf Ali: 2021 SCC OnLine SC 10-HELD-In case of a deceased, who was not earning and or not doing any job and/or self-employed at the time of accident/death, as observed hereinabove his income is to be determined on the guesswork looking to the circumstances narrated hereinabove. Once such an amount is arrived at he shall be entitled to the addition over the future prospect/future rise in income.

The claimants are entitled to just compensation. Merely because in the execution proceedings they might have accepted the amount as awarded by the High Court, may be as full and final settlement, it shall not take away the right of the claimants to claim just compensation and shall not preclude them from claiming the enhanced amount of compensation which they as such are held to be entitled to.

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

LATEST CASES: CRIMINAL

"*Identity is an amalgam of various internal and external including acquired characteristics of an individual and name can be regarded as one of the foremost indicators of identity. And therefore, an individual must be in complete control of her name and law must enable her to retain as well as to exercise such control freely "for all times" which include the aspiration of an individual to be recognised by a different name for a just cause. Article 19(1)(a) of the Constitution provides for a guaranteed right to freedom of speech and expression which would include the freedom to lawfully express one's identity in the manner of their liking. In other words, expression of identity is a protected element of freedom of expression under the Constitution*."

- *A.M. Khanwilkar, J. in Jigya Yadav v. CBSE, (2021) 7 SCC 535, para 125*

Attorney General for India Vs. Satish and Another: 2021 SCC OnLine SC 1076-Interpretation of Section 7 of the POCSO Act?-HELD-Hearing Criminal Appeals preferred by the Attorney General for India, the National Commission for Women and the State of Maharashtra against judgment acquitting the accused for the offence under Section 8 of the POCSO Act and convicting him for the minor offence under Sections 342 and 354 of IPC, the Hon'ble Supreme Court has held that the act of touching the sexual part of body or any other act involving physical contact, if done with "sexual intent" would amount to "sexual assault" within the meaning of Section 7 of the POCSO Act.

The Hon'ble Supreme Court has clarified that the most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the "sexual intent" and not the "skin to skin" contact with the child.

Rishipal Singh Solanki Vs. State of Uttar Pradesh & Ors. : 2021 SCC OnLine SC 1079 -Claim of juvenility under JJ Act?-HELD-Hearing a Criminal Appeal preferred against the order passed in Criminal Revision upholding the dismissal of the Criminal Appeal filed against the order passed by the Principal Magistrate, Juvenile Justice Board declaring the accused as a juvenile delinquent in case under sections 147, 148, 149, 323, 307, 302 and 34 of the Indian Penal Code, the Hon'ble Supreme Court has summarised the law by holding that "What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(iia) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(iib) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(iic) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply.

Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person.

Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case. (vii) This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

Jitul Jentilal Kotecha Vs. State of Gujarat & Ors. Etc.: 2021 SCC OnLine SC 1045-Value of report of the investigating agency submitted before the High Court even before the same could be submitted before the Magistrate?-HELD-Hearing a Criminal Appeal preferred against the judgment and order quashing an FIR which was registered against the private respondents under Section 482 of the Code of Criminal Procedure 1973, except for the allegations

against the fourth and fifth respondents under Section 385 of the Indian Penal Code 18603, in respect of which the investigation was permitted to continue, the Hon'ble Supreme Court has held that the report of the investigating agency submitted before the High Court even before the same could be submitted before the Magistrate cannot be relied on by the High Court while exercising powers under Section 482 of the Code.

Bhupesh Rathod Vs. Dayashankar Prasad Chaurasia & Anr.: 2021 SCC OnLine SC 1031- The competency and the manner of filing of the complaint under NI Act?-HELD-Hearing a Criminal Appeal preferred against the judgment dismissing the Appeal against acquittal under section 138 NI Act, the Hon'ble Supreme Court has held that no Magistrate could insist that the particular person whose statement was taken on oath alone can continue to represent the Company till the end of the proceedings. Not only that, even if there was initially no authority the Company can at any stage rectify that defect by sending a competent person.

The Hon'ble Supreme Court has further held that it would be too technical a view to take to defeat the complaint merely because the body of the complaint does not elaborate upon the authorisation. The artificial person being the Company had to act through a person/official, which logically would include the Chairman or Managing Director. Only the existence of authorisation could be verified.

Bijender @ Mandar VS. State of Haryana: [Criminal Appeal No. 2438 of 2010], Date of Decision: 08.11.2021- Whether the conviction on the strength of the disclosure statement and the recovery memo in the absence of any corroborative evidence, can sustain?-HELD-Hearing a Criminal Appeal preferred against the judgment affirming the order convicting the Appellant under Sections 392 and 397 IPC, the Hon'ble Supreme Court has held that "It may be true that at times the Court can convict an accused exclusively on the basis of his disclosure statement and the resultant recovery of inculpatory material. However, in order to sustain the guilt of such accused, the recovery should be unimpeachable and not be shrouded with elements of doubt."

The Hon'ble Supreme Court has further held that circumstances such as (i) the period of interval between the malfeasance and the disclosure; (ii) commonality of the recovered object and its availability in the market; (iii) nature of the object and its relevance to the crime; (iv) ease of transferability of the object; (v) the testimony and trustworthiness of the attesting witness before the Court and/or other like factors, are weighty considerations that aid in gauging the intrinsic evidentiary value and credibility of the recovery.

The Hon'ble Supreme Court has further held that "Incontrovertibly, where the prosecution fails to inspire confidence in the manner and/or contents of the recovery with regard to its nexus to the alleged offence, the Court ought to stretch the benefit of doubt to the accused. Its nearly three centuries old cardinal principle of criminal jurisprudence that "it is better that ten guilty persons escape, than that one innocent suffer-. The doctrine of extending benefit of doubt to an accused, notwithstanding the proof of a strong suspicion, holds its fort on the premise that "the acquittal of a guilty person constitutes a miscarriage of justice just as much as the conviction of the innocent."

Hariram Bhambhi Vs. Satyanarayan & Anr.: 2021 SCC OnLine SC 1010-Scope of Section 15A of SC/ST Act?-HELD-Hearing a Criminal Appeal preferred against the judgment dismissing the Criminal Miscellaneous Bail Cancellation Application, the Hon'ble Supreme Court has held that the statutory provisions which have been enacted by Parliament as a measure of protecting the constitutional rights of persons belonging to the Scheduled Castes and Scheduled Tribes must be complied with and enforced conscientiously.

The Hon'ble Supreme Court has further held that the defect in not issuing notice to the victim or their dependent and depriving them of the opportunity to be heard in the concerned proceedings (for grant of bail) cannot be cured by providing them a hearing in a proceeding that arose subsequently (for cancellation of bail). Compliance with the principles of natural justice must be observed at every stage under the mandate of the statute.

A.T. Mydeen and Anr. Vs. The Assistant Commissioner, Customs Department, 2021 SCC OnLine SC 1017-Whether the evidence recorded in a separate trial of co-accused can be read and considered by the appellate court in a criminal appeal arising out of another separate trial conducted against another accused, though for the commission of the same offence?-HELD-Hearing Criminal Appeals preferred against the judgment reversing the acquittal and convicting of all six accused under section 135(1)(a)(ii) read with 135A of the Customs Act, the Hon'ble Supreme Court has held that in the matter of a criminal trial against any accused, the distinctiveness of evidence is paramount in light of accused's right to fair trial, which encompasses two important facets along with others i.e., firstly, the recording of evidence in the presence of accused or his pleader and secondly, the right of accused to cross-examine the witnesses.

The Hon'ble Supreme Court has further held that the evidence recorded in a criminal trial against any accused is confined to the culpability of that accused only and it does not have any bearing upon a co-accused, who has been tried on the basis of evidence recorded in a separate trial, though for the commission of the same offence.

Sripati Singh (D) through his son Gaurav Singh Vs. State of Jharkhand & Anr.: 2021 SCC OnLine SC 1002-Whether dishonourment of cheque issued by way of 'security' and not towards discharge of any debt attracts an offence under Section 138 of the N.I. Act?-HELD-Hearing a Criminal Appeal preferred against the judgment setting aside the orders passed by the Judicial Magistrate First Class taking cognizance of the offence under Section 420 of IPC and Section 138 of N.I. Act, the Hon'ble Supreme Court has held that a cheque issued as security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance.

The Hon'ble Supreme Court has further held that if in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified timeframe and issues a cheque as security to secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment of amount, the cheque which is issued as security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonoured, the consequences contemplated under Section 138 and the other provisions of N.I. Act would flow.

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

LATEST CASES: JUVENILE JUSTICE ACT

"The issue regarding the purport of orders passed by the Supreme Court needs to be answered appropriately in contempt petitions only by the Supreme Court. It is not open to the High Court to interpret or explain the order passed by the Supreme Court in previous proceedings between the parties. The High Court can only follow the dictum of the Supreme Court which is binding on it."

— A.M. Khanwilkar, J. in Abhishek Kumar Singh v. G. Pattanaik, (2021) 7 SCC 613, para 58

Rishipal Singh Solanki Vs. State of Uttar Pradesh & Ors. : 2021 SCC OnLine SC 1079 - Principles For Determining Claim Of Juvenility Under JJ Act- HELD- The judgment culled out the principles from various precedents and summarized them as below :

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(iia) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(iib) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(iic) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring

the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015.

Sumed v. Manoj : 2021 SCC OnLine Bom 955 - Whether adoption can be restricted only to children in conflict with law, or in need of care and protection, or who are orphaned, abandoned or surrendered under provisions of JJ Act and Adoption Regulations? - HELD- In the present matter, the child was sought to be adopted by the relatives, who being the maternal uncle and aunt of the child were clearly covered in the definition of 'relative' under Section 2(52) of the JJ Act, 2015.

In the Supreme Court's decision of ***Shabnam Hashmi v. Union of India,*** **(2014) 4 SCC 1** observation was made, about availability of choice to a person to undertake adoption either under the personal law or under a secular legislation, which was a small step towards reaching the goal of

Uniform Civil Code, enshrined under Article 44 of the Constitution of India.

Lower court in the instant matter, completely ignored the availability of choice as was observed in the above decision by extremely restrictive and erroneous interpretation to JJ Act, 2015 provisions for adoption of girl child.

The Bombay High Court held that on appreciation of the provisions of the JJ Act, 2015 read with Regulations of 2017, adoption of children cannot be restricted only to children in conflict with law or those in need of care and protection or only those children who are orphaned, abandoned or surrendered children.

Therefore, lower court was directed to consider the application afresh on merits under the provisions of the JJ Act, 2015.

Nari v. State of Odisha : 2021 SCC OnLine Ori 498– JJ Act distinguishes between children below and above 16 years of age with regard to enquiry but not for the purpose of bail - HELD- The Court relied on judgment *Re: Contagion Of Covid 19 Virus In Children's Homes*, (2020) 15 SCC 280 wherein it was held that

…"In this regard, JJBs and Children's Courts are directed to proactively consider whether a child or children should be kept in the CCI considering the best interest, health and safety concerns.

These may include:

(i) Children alleged to be in conflict with law, residing in Observation Homes, JJB shall consider taking steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12, JJ Act, 2015.

(ii) Video conferencing or online sittings can be held to prevent contact for speedy disposal of cases."

The Court observed that from a careful reading of Section 12 JJ Act, it is clear that a delinquent juvenile has to be released on bail irrespective of nature of the offence alleged to have been committed by him unless it is shown that if he is released on bail there are reasonable grounds to believe that the release of the CICL is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice. The nature of offence and the merits of the case do not have any relevance but can be considered to some extent if they are of such a nature as would defeat the ends of justice if the CICL is released on bail.

The Court further observed that a distinction has been carved out among two categories of CICLs –

- CICLs aged below 16 years and
- CICLs above 16 years as regards enquiry by the JJ Board or trial by the Children's Court as per the provisions of Section 15 and Section 18 (3) of the Act

but there is no distinction as regards the consideration of their prayer for bail and hence the prayer for bail of both categories of CICLs is to be considered as per the mandate of Section 12 of the JJ Act .

The Court thus held *"Considering the nature of allegations against the CICL, the mandate of Section 12 of the Act, the decisions of this Court and the Hon'ble Supreme Court referred to above, absence of the social investigation / background report and in view of the threat of infection and complications posed by the resurgence of Covid 19, I am inclined to release the CICL on interim bail for a period of four months."*

Satya Deo v. State of Uttar Pradesh: 2020 SCC OnLine SC 809– Section 25 JJ Act,2015 -HELD- Section 25 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is a non-obstante clause which applies to all proceedings in respect of a child alleged or found to be in conflict with law pending before any Board or court on the date of commencement of the 2015 Act, that is, 31st December 2015. It states that ***the pending proceedings shall be continued in that Board or court as if the 2015 Act had not been passed***.

- The use of the word 'any' before the board or court in Section 25 of the 2015 Act, would mean and include any court including the appellate court or a court before which the revision petition is pending.
- The word 'found' in the phrase 'a child alleged or found to be in conflict with law' is used in past-tense and would apply in cases where an order/judgment has been passed.
- The word 'alleged' would refer to those proceedings where no final order has been passed and the matter is sub-judice.
- The expression 'court' is not restricted to mean a civil court which has the jurisdiction in the matter of 'adoption' and 'guardianship' in terms of clause (23) to Section 2 of the 2015 Act . The definition clause is applicable unless the context otherwise requires.

"In case of Section 25, the legislature is obviously not referring to a civil court as the section deals with pending proceedings in respect of a child alleged or found to be in conflict with law, which cannot be proceedings pending before a civil court. Since the Act of 2015 protects and affirms the application of the 2000 Act to all pending proceedings, we do not read that the legislative intent of the 2015 Act is to the contrary, that is, to apply the 2015 Act to all pending proceedings."

X v. State, S.B.: Criminal Revision Petition No. 494/2021, decided on 01-07-2021– Is Juvenile Justice Act totally foreign to the concept of "right of hearing" given to the complainant/CICL in bail applications? Court examines- HELD- Sections 12, 101 and 102 of the Juvenile Justice Act are the provisions dealing with the prayer for bail made on behalf of the CICL at different stages

The Court observed that an application for bail on behalf of a CICL is firstly required to be filed before the Juvenile Justice Board under Section 12 of the Act, which does not stipulate any opportunity of hearing to the complainant/victim for deciding such bail application.

The Court observed that in case of rejection of the bail application by the Board, the CICL can approach the Children court/Sessions court concerned by filing an appeal under Section 101 of the Juvenile Justice Act which makes it clear that there is no requirement in this provision as well to hear the complainant/victim

It was observed in case of an appeal preferred there against under Section 101 of the Juvenile Justice Act has also been rejected, these orders can be challenged by filing a revision in the High Court by invoking powers conferred under Section 102 of the Juvenile Justice Act which stipulates that the High Court shall not pass an order under this section, prejudicial to any person without

giving him a reasonable opportunity of being heard.

The Court observed that *after analyzing the entire scheme of the Juvenile Justice Act, I am of the firm view that the concept of hearing the complainant in an application for bail of a CICL under the Juvenile Justice Act be it before the Board, the appellate court or the revisional court is totally foreign to the fundamental principles underlying the welfare legislation.*

The Court also observed that if *the legislature had intended to give a right of hearing to the complainant in proceedings of bail, under the Juvenile Justice Act specific insertions to this effect could have been made in Sections 12, 101 and 102 of the Juvenile Justice Act as are available in the Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, another special legislation.*

The Court observed that practice has been adopted of impleading the complainant as a party in a revision for bail of a juvenile under Section 102 of the Juvenile Justice act. It has also been seen on numerous instances that in cases involving multiple accused, of which few are adults and one is juvenile, the bail applications of the adult offenders are decided much earlier, whereas the juvenile continues to languish in the Observation Home, awaiting service of notice on the complainant.

This anomalous situation is absolutely unwarranted and has to be resolved by taking a pragmatic, legal and logical view of the situation.

The Court held *"The apprehension expressed regarding the likelihood of the petitioner coming into contact with other offenders can be taken off by requiring his natural guardian to furnish a suitable undertaking. I am of the opinion that petitioner child is entitled to be enlarged on bail. Consequently, the instant revision is allowed.*

In Re Contagion Of Covid 19 Virus In Children Protection Homes: 2021 SCC OnLine SC 422- No illegal adoption; no discontinuance of education: Here's the list of Supreme Court directions- HELD- The State Governments/Union Territories are directed to prevent any NGO from collecting funds in the names of the affected children by disclosing their identity and inviting interested persons to adopt them. No adoption of affected children should be permitted contrary to the provisions of the JJ Act, 2015. Invitation to persons for adoption of orphans is contrary to law as no adoption of a child can be permitted without the involvement of CARA.

"Stringent action shall be taken by the State Governments/Union Territories against agencies/individuals who are responsible for indulging in this illegal activity."

Direction issued

(1) The State Governments/Union Territories are directed to continue identifying the children who have become orphans or lost a parent after March, 2020 either due to Covid-19 or otherwise and provide the data on the website of the NCPCR without any delay. The identification of the affected children can be done through Childline (1098), health officials, Panchayati Raj Institutions, police authorities, NGOs etc.

(2) The DCPU is directed to contact the affected child and his guardian immediately on receipt of information about the death of the parent/parents. Assessment shall be made about the

suitability and willingness of the guardian to take care of the child. The DCPU should ensure that adequate provisions are made for ration, food, medicine, clothing etc. for the affected child. Financial assistance to which the disconsolate child is entitled to under the prevailing schemes by the Central Government and the State Governments/Union Territories should be provided without any delay.

(3) The DCPO should furnish his phone number and the name and phone number of the local official who can be contacted by the guardian and the child. There should be a regular follow up by the concerned authorities with the child at least once in a month.

(4) If the DCPO is of the prima facie opinion that the guardian is not suitable to take care of the child, he should produce the child before the CWC immediately.

(5) CWC should provide for the essential needs of the child during the pendency of the inquiry without fail. The inquiry should be completed expeditiously. CWC shall ensure that all financial benefits to which the child is entitled are provided without any delay.

(6) The State Governments/Union Territories are directed to make provisions for continuance of education of the children both in Government as well as in private schools.

(7) The State Governments/Union Territories are directed to take action against those NGOs/individuals who are indulging in illegal adoptions.

(8) Wide publicity should be given to the provisions of the JJ Act, 2015 and the prevailing schemes of the Union of India and the State Governments/Union Territories which would benefit the affected children.

(9) DPCO shall take the assistance of government servants at the Gram Panchayat level to monitor the welfare of the disconsolate children who are devastated by the catastrophe of losing their parent/parents.

Mahima Tuli
Research Fellow

EVENTS

- Trainee Judicial Officers undergoing Foundational Training continued with the Institutional Training till November 18, 2021. They proceeded for the Court Attachment from November 20 to December 17, 2021.
- Ms.Harshali Chowdhary, Faculty Member, CJA gave a Webinar on “Cancellation and Untraced Reports-Procedural Aspects” on November 20, 2021 to the District Judiciary of Punjab, Haryana and UT Chandigarh.

FORTHCOMING EVENT

- Mr.H.S.Bhangoo, Faculty Member, CJA will be giving a Webinar on “The Law of Sentencing” on December 4, 2021 to the District Judiciary of Punjab, Haryana and UT Chandigarh.