



SJA e-NEWSLETTER

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Editor
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From the Editor's Desk

Framers of the Constitution of India while drafting the Constitution were conscious of the multi-dimensional social and political set-up as well as religious and moral values system prevalent in the Indian Sub-Continent. They have aspired for placing in the scheme of the Constitution the lofty ideals for creating ideal system of Governance in India. They also tried to create a perfect harmonious balance between the Indian values and progressive scientific vision. The preamble of the Constitution highlights the Constitutional Vision founded on the bed-rock of the freedom struggle. The high ideals enshrined in the preamble represent the aspirations of the common masses, experienced through the freedom movement. JUSTICE, LIBERTY, EQUALITY and FRATERNITY are not just the rhetorical words but they infuse life into the provisions of the Constitution. The idea of JUSTICE in the preamble manifests the idea of equitable social, economic and political development. It tries to correct the historical perspective of social inequalities. The concept of LIBERTY also encompasses all spheres of the human development. It manifests all the natural rights available to a human being born as a free individual. The concept of EQUALITY in the preamble also recognises the equal status of every individual and availability of equal opportunities to all of them. The Constitution mandates for creation of a fertile ground for overall development of every individual born as a free citizen. FRATERNITY is a true representation of the aspirations of the freedom struggle. It is meant to ensure dignified individual existence as well as safe and secure nation, based on the values of unity in diversity. The framers of the Constitution have accomplished their task to utmost perfection but now it is for the citizens and the institutions of governance to uphold the values of the Constitution. In every sphere of life and in every policy decision making, it is incumbent upon all of us to keep in perspective these Constitutional values. Sans Constitutional Values we cannot have our priorities right.

LEGAL JOTTINGS

“Criminals have no religion. No religion teaches violence and cruelty-based religion is no religion at all, but a mere cloak to usurp power by fanning ill feeling and playing on feelings aroused thereby. The golden thread passing through every religion is love and compassion. The fanatics who spread violence in the name of religion are worse than terrorists and more dangerous than an alien enemy.”

*Dr Arijit Pasayat, J. in Zahira Habibulla H. Sheikh v. State of Gujarat,
(2004) 4 SCC 158, para 19*

Criminal

Criminal Appeal No. 1727 of 2019

Rekha Murarka v.

**The State of West Bengal and another
Decided on November 20, 2019**

Hon'ble Supreme Court held that the public prosecutor occupies a position of great importance in our criminal justice system. Given that the crimes are treated as a wrong against the society as a whole, his role in administration of justice is crucial, as he is not just a representative of the aggrieved person, but that of the State at large. Though he is appointed by the Government, he is not a servant of the Government or the investigating agency. He is an officer of the Court, and his primary duty is to assist the Court in arriving at the truth by putting forth all the relevant material on behalf of the prosecution. While discharging these duties, he must act in a manner that is fair to the Court, to the investigating agencies, as well to the accused. This means that in instances where he finds material indicating that the accused legitimately deserves a benefit during the trial, he must not conceal it. The space carved out for the Public Prosecutor is clearly that of an independent officer who secures the cause of justice and fair play in a criminal trial.

Hon'ble Court also held that it did not find that the use of the words “under this sub-section” in the proviso to Section 24(8) implied that a victim's counsel can only be engaged to assist a Special Public Prosecutor. Such an interpretation would go against section 301(2), which makes the pleader instructed by a private person subject to the directions of the Public

Prosecutor or the Assistant Public Prosecutor. A harmonious reading should be given to these provisions to give them full effect. The assistance given by the victim's counsel is meant to be given to the prosecution in general.

The use of the term “assist” in the proviso to Section 24(8) is crucial, and implies that the victim's counsel is only intended to have a secondary role qua the Public Prosecutor. A mandate that allows the victim's counsel to make oral arguments and cross-examine witnesses goes beyond a mere assistive role, and constitutes a parallel prosecution proceeding by itself. Given the primacy accorded to the Public Prosecutor in conducting a trial, as evident from Section 225 and Section 301(2), permitting such a free hand would go against the scheme envisaged under the CrPC.

If there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the Court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 of the

CrPC or Section 165 of the Indian Evidence Act, 1872.

Criminal Appeal No. 1631 of 2019
Ranbir Singh and others v. The State of Uttarakhand
Decided on November 4, 2019

While noting that the case of the prosecution was based purely on circumstantial evidence and the acquittal of the accused was premised on the assessment that the prosecution had failed to establish its case, Hon'ble Supreme Court held that it does not necessarily mean that the investigator and the concerned witnesses ought to be proceeded against for the offence under Section 218 IPC.

Criminal Appeal No. 259 of 2015
Kandaswamy Ramraj v. The State by Inspector of Police CBCID
Decided on November 07, 2019

Taking note of the temperament of the appellant during his frequent run-ins with the children in this case, the Hon'ble Supreme Court held that the appellant had committed the offence in question (Murder) whilst he was deprived of the power of self-control upon sudden provocation by the children, and that there was no calculated intention or premeditation on his part to commit the murder of the deceased. And the Hon'ble Court held that the offence committed by the appellant may fall under the first exception to Section 300 of the IPC, and consequently, it could be safely said that the appellant had committed the offence under Section 304, Part II of the IPC.

Some of the relevant facts involved in this case were that the appellant/accused had shot dead one of the boys who ventured into the army men's enclave to pluck almonds and mangoes. Also, as per the evidence of PW -5, a domestic help working at the appellant's house, the appellant was a short-tempered person, and used to chase the boys who used to jump into the defence compound to pick almonds. On one occasion, the boys had even damaged the windshield of the appellant's car.

CRM (M) No. 623/2019
Sat Pal and others v. State of J&K and others
Decided on October 30, 2019

Hon'ble High Court of J&K reproduced the following from the judgment in *Parbatbhai Aahir @ Bhimsinhbhai Karmur and ors vs State of Gujrat and anr, (2017) 9 SCC 641*: "the invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice".

CRM(M) 254/2019
Showkat Hussain and Others v. Mst Nazia Jeelani and Another
Decided on November 07, 2019

Hon'ble High Court of J&K held that both the courts below had rightly concluded that the form of divorce i.e triple talaq in one go is null and void in view of the law laid down by Hon'ble the Supreme Court in case of *Shayara Bano and Ors vs. Union of India & Ors*, reported in JKL T 2017 Volume 4 (SC) 1.

The plea of the learned counsel for the petitioners that there was no domestic relationship in existence on the date of filing of application, is totally misconceived

and cannot be accepted.

Hon'ble Court also reproduced the following from the judgment in the case of Juveria Abdul Majid Patni V/s Atif Iqbal Mansoori (2014) 10 SCC 736 has not been brought to the notice of the learned Single Judge. The Supreme Court in para 31 of the Judgment has held thus:-

“31. An act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the Respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief u/s 20, Child Custody u/s 21, Compensation u/s 22 and interim or ex parte order u/s 23 of the Domestic Violence Act, 2005.”

WP(C) No.3134/2019

Gull Mohammad Ashraf Jalali & others v. State of JK & another

Decided on November 19, 2019

Hon'ble High Court of J&K held that the Hon'ble the Supreme Court, in a catena of judgments, has held that the power under Section 173 of the Code is to be exercised cautiously, carefully and sparingly, and that

“Rights, such as, freedom of press or religion which are not mere values, they are justiciable and capable of interpretation. The values impose a positive duty on the state to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it.”

S.H. Kapadia, J. in M. Nagaraj v. Union of India, (2006) 8 SCC 212, para 26

CIVIL

SLP (C) NO. 23599 OF 2018

Ashok Kumar Kalra v. Wing Commander Surendra Agnihotri and others

Decided on November 19, 2019

Hon'ble Supreme Court reiterated that the procedural justice is imbibed to provide further impetus to the substantive justice. It is this extended procedural fairness provided by the national courts, which adds to the legitimacy and commends support of general public. On the other hand, we must be mindful of the legislative intention to provide for certainty and clarity. In the name of substantive justice, providing unlimited and unrestricted rights in itself will be

the Court has not to function as a Court of appeal or revision.

The Court has to only ascertain as to whether the allegations made in the Challan/ FIR do or do not disclose the commission of offences and, if it does, then it cannot be quashed at the threshold stage. It is not proper to scuttle away the investigation at its threshold stage, and that if the FIR/ Challan discloses the commission of offences, the High Court should not interfere with the investigation which would amount to stalling the investigation and jurisdiction of statutory authorities to exercise powers in accordance with the provisions of the Code. While keeping in view the scope of the provisions of the Code, the Courts should refrain from making *prima facie* decision at interlocutory stage when the entire facts of the case are incomplete, hazy and, moreso, when the material evidence is yet to be collected and issues involved could not be seen in their true and correct perspective.



detrimental to certainty and would lead to the state of lawlessness. In this regard, this Court needs to recognize and harmoniously stitch the two types of justice, so as to have an effective, accurate and participatory judicial system.

When we look at the whole scheme of Order VIII CPC, it unequivocally points out at the legislative intent to advance the cause of justice by placing embargo on the belated filing of written statement, set-off and counter-claim.

The whole purpose of the procedural law is to ensure that the legal process is made more effective in the process of delivering substantial justice. Particularly, the purpose of introducing Rule 6A in Order VIII of the CPC is to avoid multiplicity of proceedings by driving the parties to file separate suit and see that the dispute between the parties is decided finally. If the provision is interpreted in such a way, to allow delayed filing of the counter-claim, the provision itself becomes redundant and the purpose for which the amendment is made will be defeated and ultimately it leads to flagrant miscarriage of justice. At the same time, there cannot be a rigid and hyper-technical approach that the provision stipulates that the counter-claim has to be filed along with the written statement and beyond that, the Court has no power. The Courts, taking into consideration the reasons stated in support of the counter-claim, should adopt a balanced approach keeping in mind the object behind the amendment and to sub-serve the ends of justice. There cannot be any hard and fast rule to say that in a particular time the counter-claim has to be filed, by curtailing the discretion conferred on the Courts. The trial court has to exercise the discretion judiciously and come to a definite conclusion that by allowing the counter-claim, no prejudice is caused to the opposite party, process is not unduly delayed and the same is in the best interest of justice and as per the objects sought to be achieved through the amendment. However, the defendant cannot be permitted to file counter-claim after the issues are framed, and after the suit has proceeded substantially. It would defeat the cause of justice and be detrimental to the principle of speedy justice as enshrined in the objects and reasons for the particular amendment to the CPC. (para 17)

Order VIII Rule 6A of the CPC does not put an embargo on filing the counter-claim after filing the written statement, rather the restriction is only with respect to the accrual of the cause of action. Having said so, this does not give absolute right to the defendant to file the counter-claim with substantive delay, even if the limitation period prescribed has not elapsed. The court has to take into consideration the outer limit for filing the

counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, after taking into consideration and evaluating inclusive factors provided below which are only illustrative, though not exhaustive:

- i. Period of delay.
- ii. Prescribed limitation period for the cause of action pleaded.
- iii. Reason for the delay.
- iv. Defendant's assertion of his right.
- v. Similarity of cause of action between the main suit and the counter-claim.
- vi. Cost of fresh litigation.
- vii. Injustice and abuse of process.
- viii. Prejudice to the opposite party.
- ix. and facts and circumstances of each case.
- x. In any case, not after framing of the issues.

**Civil Appeal No. 8556 of 2019
Jabbar v. The Maharashtra State
Road Transport Corporation
Decided on November 13, 2019**

Hon'ble Supreme Court reiterated that it is permissible to grant compensation of any amount in excess to that one which has been claimed.

Hon'ble Court reproduced inter alia the following from the judgment in Ramla & others v. National Insurance Company Limited & Ors. [(2019) 2 SCC 192]:

" There is no restriction that the Court cannot award compensation exceeding the claimed amount, since the function of the Tribunal or court under Section 168 of the Motor Vehicles Act, 1988 is to award "just compensation". The Motor Vehicles Act is a beneficial and welfare legislation. A "just compensation" is one which is reasonable on the basis of evidence produced on record. It cannot be said to have become time barred. Further, there is no need for a new cause of action to claim an enhanced amount. The courts are duty bound to award just compensation."

M.A. No. 814 of 2019
Principal Commissioner of Income Tax
(Central) - 1 v. NRA Iron & Steel Pvt. Ltd.
Decided on October 25, 2019

In this case, the issue involved was the service of notice on Chartered Accountant of a company who was also holding a power of attorney on behalf of the company. Hon'ble Supreme Court held that the service of notice was a valid service, and notice could be served on him as the agent of the Assessee Company.

Civil appeal No. 8898 of 2019
N. Mohan v. R. Madhu
Decided on November 21, 2019

Hon'ble Supreme Court held that right to appeal under Section 96(2) CPC challenging the original decree passed ex-parte, being a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that the application filed under Order IX Rule 13 CPC was earlier dismissed. Whether the defendant has adopted dilatory tactics or where there is a lack of bona fide in pursuing the remedy of appeal under Section 96(2) of the Code, has to be considered depending upon the facts and circumstances of each case. In case the court is satisfied that the defendant has adopted dilatory tactics or where there is lack of bona fide, the court may decline to condone the delay in filing the first appeal under Section 96(2) CPC. But where the defendant has been pursuing the remedy bona fide under Order IX Rule 13 CPC, if the court refuses to condone the delay in the time spent in pursuing the remedy under Order IX Rule 13 CPC, the defendant would be deprived of the statutory right of appeal.

When the defendant filed appeal under Section 96(2) CPC against an ex-parte decree, and if the said appeal has been dismissed, thereafter, he cannot file an application under Order IX Rule 13 CPC. This is because after the appeal filed under Section 96(2) of the Code has been dismissed, the original decree passed in the suit merges with the decree of the appellate court.

Civil Appeal No. 8611 of 2019

Taj Mahal Hotel v. United India Insurance
Company Ltd. & others
Decided on November 14, 2019

Hon'ble Supreme Court held that the general rule has been that in a contract of bailment, if goods are lost or damaged while in the possession of the bailee, he will be liable. The burden of proof will be on the bailee to show that he took a reasonable degree of care in respect of the bailed goods (See N.R. Srinivasa Iyer v. New India Assurance Co. Ltd. AIR 1983 SC 899). This is because there is an implicit expectation between the hotel and the guest when a vehicle is handed over for valet parking that the vehicle would be taken reasonable care of, and returned in a proper condition. Thus, the failure to return the vehicle strikes at the root of the bailment relationship and gives rise to a prima facie case of negligence against the hotel. In our considered opinion, the strict liability rule under common law is a relic of the past and should not be given effect in the Indian context.

Civil Appeal No. 8871 of 2019
Rani Narasimha Sastry v. Rani Suneela
Rani
Decided on November 19, 2019

Hon'ble Supreme Court relied the judgment in Vijaykumar Ramchandra Bhatte Vs. Neela Vijaykumar Bhatte (2003) 6 SCC 334, while reiterating that the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1)(i-a) of the Act.

Hon'ble Court further held that it is true that it is open for anyone to file complaint or lodge prosecution for redressal for his or her grievances and lodge a first information report for an offence also and mere lodging of complaint or FIR cannot ipso facto be treated as cruelty. But when a person undergoes a trial in which he is acquitted of the allegation of offence under Section 498-A of IPC, leveled by the wife against the husband, it cannot be accepted that no cruelty has meted on the husband. The appellant was held to have made out a ground for grant of decree of dissolution of marriage on the ground

mentioned in Section 13(1)(i-a) of the Hindu Marriage Act, 1955.

**Contempt Petition No. 1868 of 2018
Kaushaliya v. Jodha Ram and others
Decided on November 25, 2019**

Hon'ble Supreme Court held that in the Mediation it is always open for the parties to explore the possibility of an overall amicable settlement including the disputes which are not the subject matter of the proceedings before the Court. That is the benefit of the Mediation. In the Mediation parties may try for amicable settlement, which is reduced into writing and/or a Settlement Agreement, and thereafter it becomes the part of the Court's Order, and the Court disposes of the matter in terms of the Settlement Agreement. Thereafter, the order in terms of the Settlement Agreement is executable irrespective of the fact whether the Settlement Agreement is with respect to the properties which was/were not the subject matter of the proceedings before the Court. Thereafter the order passed by the Court in terms of the Settlement is binding to the parties, and is required to be acted upon and/or complied with, and the same is executable.

**Civil Appeal No(s). 8246-8247/2019
Renu Rani Shrivastava and another v.
New India Assurance Company Ltd. and
others
Decided on October 23, 2019**

Hon'ble Supreme Court held that the argument of the learned counsel for the respondent/Insurance Company with regard to the relinquishment of her share in favour of the other claimants and consequently she is not entitled to compensation, cannot be accepted. It is in between the family members to make arrangement with regard to the family affairs. The grant of compensation by the MACT or by the Court in respect of accidental death of a person will not be affected by the family arrangement of the parties inasmuch as the compensation as per law has to be awarded by the Court in favour of the dependants. The internal

family matter of the parties will not affect the award of compensation.

**CRAA 82/2012
State of J&K v. Mohammad Shoke
Decided on November 14, 2019**

While observing that it is not a case of simple rape in which a complaint was lodged after more than 6 months, and it is a case where a child was born to the prosecutrix, the evidence led by other prosecution witnesses was merely on the basis of hearsay, and that one of the important evidence, which the prosecution failed to lead in the present case, was the DNA testing, Hon'ble High Court of J&K held that the Investigating Agency could have easily got the DNA testing done, to find out the paternity of the child and establish the fact that it was, in fact, from the loins of the respondent, and that the guilt could have been proved beyond any shadow of doubt, but there was no such evidence on record.

**OWP No. 566/2004
Sajad Mirza and another v. State of J&K
and others
Decided on November 13, 2019**

Hon'ble High Court of J&K held that the question of damages has to be proved by leading evidence as to how it has affected their quality of life and income which is lacking in this case. In view of the fact, the State having framed policy for grant of *ex gratia* relief and petitioners having accepted the same, they cannot now approach the Court for seeking compensation which had to be proved by leading evidence.

Hon'ble Court also relied on the judgment "State of Jammu and Kashmir v. Jeet General Store and others, AIR 1996 J&K 51", and reproduced *inter alia* the following: "....If, therefore, the Court finds that in a given set of circumstances, State was found negligent in protecting the property of its citizens, the Court cannot countenance such negligence and has to burden the State with adverse consequences. After all, being a custodian of the interests of the citizens, it is expected of

the State to ensure that it is not negligent when it comes to giving protection to the life and liberty, which of course includes taking care of the property of the citizens.

In the aforesaid legal background one thing which very strongly emerges for our consideration is the fact, as to whether the writ petitioners had laid any foundation in the pleadings with regard to the obligation cast upon the State to protect the properties and as to whether, in the light of such obligation, the State was negligent in performing its duties or not? We are saying so because, in writ jurisdiction this Court decides the issues and questions only on the basis of the pleadings of the parties. If, therefore, a person approaches this Court invoking its extraordinary jurisdiction, he is expected to plead all necessary facts in the petition so as to constitute the sufficient cause of action, not only giving jurisdiction to the Court to entertain the matter but to even grant relief

to the party coming for this purpose. This is so because, in writ jurisdiction this Court does not take evidence nor does it subject the parties to any other tests, like cross-examination of witnesses etc. so as to elicit certain facts which might be disputed by the opposite party. In a civil suit, of course the matter is entirely different because there the foundation is not so much found in the pleadings, as it is laid subsequently during the course of trial by adducing enough evidence by the parties with regard to their rival contesting stands.



ACTIVITIES OF THE ACADEMY

OATH TAKING CEREMONY

The Jammu and Kashmir State Judicial Academy, at High Court Complex, Jammu organised 'Oath Taking Ceremony' for newly enrolled advocates who have been conferred with absolute certificates to practice law on 2nd November 2019. This was followed by lecture on 'Professional Ethics, Conduct and Behaviour'. Enrolment certificates were distributed among 112 number of advocates from various districts of Jammu province. The newly enrolled advocates took oath to uphold the values of the Constitution of India and to follow the rules of ethics, conduct and behaviour in letter and spirit. Rajeev Gupta, Director Jammu and Kashmir State Judicial Academy administered oath to the advocates.

After the oath ceremony, Director Judicial Academy addressed the advocates and shared with them thoughts and experiences on professional ethics, behaviour and conduct. Recalling the pristine glory of the lawyers' profession and their contribution to the freedom struggle, he highlighted the need to reclaim the trust, faith and confidence of the common masses so as to enhance image of lawyers' community and to greatly contribute to enhancing excellence of judicial institution. Lawyers were told to raise the standard of their knowledge, skills and delivery without losing focus on the ethical commandments. They have always to keep in mind their duty to the



society, profession, courts, and clients and to the opposite party in any litigation. Trust, faith and confidence of the public is the biggest power reposed in the lawyers' community, as such it is a responsibility of the highest order for them to maintain the same. Lawyers were also told to update their professional skills on regular basis and keep pace with the changing dynamics of law and of profession. In order to enhance skill it is needed that lawyers engage themselves in the productive activities of sharing knowledge, through conferences and refresher programmes, as also in the academic pursuits. They were also told that although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. How they conduct themselves affects not only an individual but the administration of justice which is the foundation of the civilised society.

One Day Orientation Programme on “Transition from State Laws to Central Laws in the backdrop of Implementation of Reorganisation Act, 2019” for Civil Judges (Senior/Junior Division)/ Chief Judicial Magistrates/Magistrates serving in Jammu province.

J&K State Judicial Academy organized an Orientation Programme on “Transition from State Laws to Central Laws in the backdrop of Implementation of Reorganisation Act, 2019” on 10th of November, 2019 for Civil Judges (Senior/Junior Division)/ Chief Judicial Magistrates/Magistrates serving in Jammu province. The objective of the Orientation programme was to give insight to the

participants into the provisions in the Jammu and Kashmir Reorganization Act and Order issued by President for removal of difficulties, for smooth transition from the repealed State Laws to the extended Central Laws. On 30th October, 2019 the J&K Reorganization (Removal of difficulties) order, 2019 has been promulgated by the President of India, which has been published in the Government Gazette. Under the said Order many provisions have been made for removal of difficulties arising under the J&K Reorganization Act, 2019, as also in implementation of the Central Laws extended to the Union Territories of Jammu & Kashmir and Ladakh.

Director, J&K State Judicial Academy made PowerPoint presentations on the impact of the Reorganization Act, the difficulties arising under the Act and the implementation of Central Acts, and the effect of the Order regarding removal of difficulties issued on 30th October, 2019. The participants had highlighted number of difficulties which they had felt during the initial phase of application of the Central Laws. Their doubts and difficulties were cleared in the light of the Order regarding removal of difficulties. It was discussed that any right, privilege, obligation or liability acquired, accrued or inquired under the repealed State Laws shall be governed in accordance with the provisions of the repealed Act irrespective of the application of Central Laws. Any penalty forfeiture or punishment incurred in respect of any offence committed against any repealed State law shall continue to be dealt in accordance with



the provisions of the repealed State Laws. Any investigation, legal proceeding, remedy in respect of any such right, privilege, obligation, liability and penalty etc. shall also be governed in accordance with the provisions of the repealed Act. The participants were apprized that the investigation, inquiry or trial in respect of any offence committed before 31st of October, 2019 shall have to be conducted and completed in terms of the provisions of the repealed J&K Code of Criminal Procedure. Only in respect of those offences which are committed on or after 31st October, 2019, the new penal Laws and procedural Law shall be applicable. It was also discussed that statutory authorities constituted under the repealed Acts before 31st October, 2019 shall continue to function and are deemed to have been constituted under the Central Laws and any proceedings initiated or action taken by such authorities is validated under the Central Laws. The Central Laws which were otherwise also applicable in the State of Jammu and Kashmir shall continue to be applicable in the two Union Territories. That apart, all the Central Laws which were applicable in rest of India and not in the State of Jammu and Kashmir now have been applied to the two Union Territories under the Order regarding removal of difficulties. The removal of difficulties order would pave the way for smooth transition from the State Laws to the Central Laws.

Refresher Training Programme for Secretaries, Bench Secretaries, Bench Secretaries, Private Secretaries, Readers and Stenographers attached with Hon'ble Judges of the High Court to educate them



in handling case proceedings in CIS, Display Board and uploading of orders and judgments in CIS with digital signatures in collaboration with E-Courts.

On the directions of Hon'ble Mr Justice Rajesh Bindal, Chairperson IT Committee, the J&K State Judicial Academy in collaboration with E-Courts organized a refresher training programme on 11th



November, 2019 at the J&K State Judicial Academy Jammu for Secretaries, Bench Secretaries, Bench Secretaries, Private Secretaries, Readers and Stenographers attached with Hon'ble Judges of the High Court to educate them in handling case proceedings in CIS, Display Board and uploading of orders and judgments in CIS with digital signatures. Proceedings were conducted by Rajeev Gupta, Director J&K State Judicial Academy who welcomed Mr. Shahzad Azeem, Registrar Computers, High Court of J&K, Mr. Shabir Malik, CPC eCourts, Mr. Kiran Koul (NIC Coordinator), Mr. Umesh Sharma, Munsiff (attached to e-Courts) and the staff members of the High Court of J&K, and deliberated upon the need of handling case proceedings in CIS and uploading of orders and judgments in CIS with digital signatures. It was also added that the J&K State Judicial Academy strives

to function as a capable capacity building institution to fulfill demand driven human development needs of High Court & the subordinate courts across the State of Jammu &



Kashmir for improved workflow delivery through sustainable, innovative and contemporary means, with the motto of "Efficiency and the Public Good". Resource Persons NIC Coordinator and e-Court Staff deliberated upon various topics viz., handling case proceedings in CIS, Display Board and uploading of orders and judgments in CIS with digital signatures.

One Day Lecture on "Leadership" for all Judicial Officers serving in the districts of Jammu & Samba.

The Jammu & Kashmir State Judicial Academy organised a Lecture on "Leadership" for all Judicial Officers serving in the districts of Jammu & Samba on 21st November, 2019 at J&K State Judicial Academy, Janipur Jammu. Shri Roop K. Bhat, Corporate Advisor and motivational speaker was the Resource Person. Proceedings were conducted by Rajeev Gupta, Director, J&K State Judicial Academy. Shri Roop K. Bhat while highlighting the importance of Leadership said that a leader is one who knows the way, goes the way, and shows the way. Irrespective of how you define a leader, he or she can prove to be a difference maker between success and failure. A good leader has a futuristic vision and knows how to turn his ideas into real-world success stories. He added that honesty and integrity are two important ingredients which make a good leader. Mr. Bhat said that as a leader, you should think positive and this positive approach should be visible through your actions. He also guided the judges to stay calm under pressure and keep the motivation level up.

Mr. Bhat highlighted the fundamental difference in a 'Leader' and a 'manager'.

The function concluded with the vote of thanks by Rajeev Gupta, Director, J&K State Judicial Academy.

A day long awareness programme on "Wellness & Health Management" for Judicial Officers of all ranks serving in Jammu Province

The Jammu & Kashmir State Judicial Academy organised a day long awareness programme on "Wellness & Health Management" for Judicial Officers of all ranks serving in Jammu Province, on 24th November, 2019 at Judicial Academy Complex, Janipur Jammu.

Dr. Masarat Shafi and the team comprising Dr. Imran Khan and Dr. Nadiya Mir, Dr. Vishal Sharma, Dr. Chintanjit Kour, Dr. Parshottam and Dr. Sehrish were the resource persons. Proceedings were



conducted by Rajeev Gupta, Director, J&K State Judicial Academy. In his introductory remarks, Director, State Judicial Academy extended warm welcome to the experts and highlighted the need to have this kind of awareness programmes aimed at ensuring good health of all the stakeholders in justice dispensation.

Dr. Masarat Shafi in his Power-Point presentation gave a detailed account of the parameters defining good health and the factors that are responsible for creating imbalance in those parameters. He highlighted that adoption of so called modern lifestyle has taken serious toll on the health. He explained that by and large all the common diseases are outcome of blindly following the present day lifestyle. By following proper health regime, including disciplined life style, balanced diet, stress free work environment and mental peace, such maladies can be prevented.

Physiotherapy, as he said, takes care of common ailments such as backache, osteoporosis, diabetes, sciatica, hypertension etc.

Resource persons also explained the occupational hazards leading to physiological and mental issues. They also addressed the occupational hazards specific to judicial officers and other stakeholders in the judicial system. Officers were told about the need to give due priority to health so as to have proper environment for optimum productivity. It has two elements viz. preventive and curative. They suggested few useful exercises to prevent one's body from contracting these diseases or to avoid these diseases seriously impacting one's abilities, and thereby affecting performance at workplace. They also highlighted the need to have daily exposure to sunlight for effective absorption of Vitamin-D3 and calcium, which is essential for strength of bones. They also stressed for making 30-45 minutes of walk a daily routine, for overall wellbeing.

The function concluded with the vote

of thanks by Rajeev Gupta, Director, J&K State Judicial Academy.

Preamble Reading Ceremony

To commemorate 70th Anniversary of adoption of the Constitution of India, The Jammu & Kashmir Judicial Academy organized "Preamble Reading Ceremony" in which officers and the officials working in the Judicial Academy read the Preamble of the Constitution of India and the fundamental duties enshrined in the Constitution. The Constitution of India was adopted by the Constituent Assembly on 26th of November 1949, and ever since this day is celebrated as the 'Constitution Day'. The Constitution of India came into effect actually on 26th January 1950. The participants in the commemoration ceremony also resolved to uphold the values of the Constitution of India, especially the Fundamental Duties as contained in Chapter IV-A, Article 51-A of the Constitution of India.



JUDICIAL OFFICER'S COLUMN

Do we really need a Judge's Association?

There has been a silent debate in judicial circles whether we, the judge's of J&K subordinate Judiciary should have an 'Association', a professional body for raising our voice and pleading genuine concerns, or not. The argument propounded by few not so vocal voices within us revolves around a myth that such measures are not appreciated and the protagonists of any such idea are dealt with heavy hands and are made scapegoat. These facts have no basis, as the officers who have worked relentlessly toward this cause in the past i.e. in late 90's

and thereafter, have refuted this out rightly, rather have shared tales where their work was duly encouraged and appreciated.

Now, the next pertinent question which lurks in our minds is, as to why the Judge's should have an 'Association'. Is it really required?

First and foremost argument in support, is the fact that whatever good since 1993 has happened to the service conditions of judicial officers at the national level, has been a direct result of the persistent efforts of 'All India Judge's

Association'. This professional body of Judge's has pleaded our cause not only on administrative side but by knocking the doors of our Hon'ble Supreme Court in '**All India Judge's Association V Union of India and ors'** which has paved way for appointment of First and Second Judicial Pay Commissions.

Dear colleagues, there can be three broad aims & objectives of a Judge's organization:

1. To represent the judiciary's interest.
2. To promote the professional training of the Judicial officers.
3. To protect Judicial Independence.

The judiciary has pivotal role to play as guardian of the rule of law. An independent judiciary is essential to protecting against abuse of powers by the state institutions and to preserving the integrity of the courts so that disputes are adjudicated fairly, impartially and without any political or other interference or influence. An important way to assist the judiciary in fulfilling its role, and protecting its interests, is through a judge's association. The following are the examples of aims that judicial association may seek to attain:

1. Maintain the independence of the judiciary;
2. Protect and represent the judiciary's interests, including ensuring security of tenure, fair and reasonable salaries and other terms and conditions of employment, to achieve a competent and committed judiciary;
3. Ensure transparency and public accountability of the judiciary. Importantly, self-regulation is key to attaining high standards and ensuring independence;
4. Improve the effective administration

and delivery of justice;

5. Establish and maintain links with international, regional and other national associations with a view to sharing experiences, collaborating on projects, and enhancing professional development;
6. Create a forum to meet and discuss matters of common interest for the purpose of improving the administration of justice;
7. Deal with procedures and mechanisms for complaints and inquiries concerning the conduct of judges and to provide appropriate guidelines and assistance to its members in relation to those matters, as well as to review and develop codes or rules of conduct or ethics;
8. Speak out in support of members of the judiciary who may be targeted for their judicial decisions.
9. Conduct research on rule of law, human rights, specific laws, and any other issues pertaining to the judiciary and the law;
10. Address the needs and concerns of retired judges.

In my humble appreciation, an active and vibrant association for the judicial officers of J&K is the need of the hour. Vast majority of our fraternity is in favour of this idea but for the fear psychosis and false myths roaming around, they are hesitant to work towards its actual realization. Our senior colleagues owe a duty to clear this haze.

Contributed by:
Shri Parvaiz Iqbal (Sub-Judge)
Railway Magistrate, Jammu



GUEST COLUMN

“JUDICIAL TREND WITH REGARD TO THE PROTECTION OF WELL KNOWN MARK IN INDIA”

ABSTRACT

With the inclination towards globalisation, greater numbers of foreign well-known and famous trademarks are creating

opportunities for consumers to access, use and purchase these international brands even though they are not yet physically present in the market of any particular country. Since these well known mark such as Pepsi, Yahoo, Microsoft, Usha, Rajnigandha ,Benz Honda (to name a few) operate at a global scale, they generally

tend to have high economic value. High commercial value is one of the important inherent characters of a trademark and act as an asset of the trademark's owners. Today, an understanding of what is exactly a well known mark (famous, reputed, renowned) is, contribute a lot in the world of increased global marketing and advertising.

Well-known trademark – The Concept:

Well known mark is a worldwide phenomenon and attaining the status of a "well-known mark" is perhaps parallel to attaining Nirvana as the protection transcends the traditional standards and objectives of trademark protection. The concept of well-known trade mark is inextricably linked with public getting an assurance of quality relating to the goods for which the mark is used or registered.

In the early 1990s when India opened its doors for foreign investment through large number of globally well-established brands there was absence of statutory provision for protection of well known marks and common law remedy of passing off and injunction was accorded by courts.

Statutory protection for well-known marks in India:

The provision relating to an elaborate criterion for their protection of well known mark was introduced only in the Trademark Act of 1999 Act defining "well Known trade mark" as in relation to any goods or services, means an mark which has become so to the **substantial segment of the public** which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken **as indicating a connection in the course of trade** or rendering of services between those goods or services and a person using the mark in relation to the first - mentioned goods or services. This definition is in consonance with provision of Paris Convention and TRIPS agreement.

Determination of well known mark:

Under section 11(6) of the act: The registrar has been given the blanket power to determine whether a mark is well known or not. While determining he needs to take

into account any fact which he thinks relevant including the following:

i) the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark. This depend upon some other factors:

- the number of actual or potential consumers of the goods or services
- the number of persons involved in the channels of distribution of the goods or services
- the business circles dealing with the goods or services to which that trade mark applies

Another way of evaluating the degree of knowledge of a mark to the public is by adducing evidence collected through Surveys of a number of consumers, opinion poll, Volume of sales and the depth of its market, rating the mark by national or international organisations, Ranking given by Inter-brand's official website etc. In *Kabushiki Kaisha Toshiba v Toshiba Appliances* court held that TOSHIBA was a world renowned trademark based upon the factors: Toshiba's record of successfully enforcing its rights, the extensive sales of various goods worldwide under the TOSHIBA trademark, the registrations of the TOSHIBA mark under the Indian trademark laws, the presence of Toshiba service centres in a number of Indian cities and the international registrations of the TOSHIBA trademark.

ii) the duration, extent and geographical area of any use of that trade mark. This factor takes into consideration the market share held by the trademark, the intensity, geographical extent and duration of its use, and the size of the investment made by the proprietor in promoting the mark.

iii) the duration, extent and geographical area of any promotion of the trade mark, including advertising or presentation, at fairs or exhibition of the goods or services to which the trade mark applies. In India, advertising a mark is considered equivalent to the use of the mark. Fast speed internet connections provide good opportunities for trademark owners to bridge, broadcast and develop their trademarks. In the case *The*

Polo/Lauren Company L .P. v. Rohit S. Bajaj the court held that having regard to the extensive promotion and advertisement of the mark since 1967 in the field of designer and branded apparel in leading magazines and newspapers like Forbes, Esquire, Vanity Fair, Vogue, official website getting approximately 800,000 visits each month, bill, invoices establishing export of products clearly establish that the registered trademark of the plaintiff (POLO) is a well-known mark.

iv) the duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent they reflect the use or recognition of the trade mark. In *Polo/Lauren Company L .P. v. Rohit S. Bajaj* (supra) the plaintiff was able to prove through registration certificate of its POLO Trademarks in many countries of the world such as Australia, Canada, Hong Kong, New Zealand, United Kingdom, Singapore and Malaysia.

Record of successful enforcement of, the rights in that trade mark, in particular, the extent to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record. If the enforcement actions are successful in any neighbouring countries by its court, then it will be a reliable evidence for proving that the mark's fame or reputation in another state. Therefore, it is a litigation advantage for well-known trademark owners to show that the trademark has formerly been treated and protected as a well-known or famous one. In *Louis Vuitton Malletier v. Manoj Khurana*, the plaintiff filed the suit for permanent injunction restraining infringement of its registered well known trademarks by the selling of counterfeit Louis Vuitton products. The proof of infringing activities was established by the photographs. The plaintiff through various court records was able to establish that earlier court had declared " Louis Vuitton " word mark, and the "LV" logo as well-known mark. A decree for permanent injunction was passed in favour of the plaintiff and against the defendants.

The factor so provided under the

section are mere guidelines to assist the court in determining the mark to be well known. No single factor can be said to be appropriate criteria in itself, it is the totality of the circumstances and evidences which determine the mark to be well known mark. The most special protection given to the well known mark under the act, is that, it will still be given protection in the country where protection is asked for, even if the mark is not used in that country. Further the Registrar is under an obligation to protect well known mark in order to prevent anyone attempting to deceive or confuse the public by adopting a well-known mark so that they can ride on their goodwill. Registration or usage of a mark in India is not a prerequisite for assigning it the status of a well-known trade mark. Therefore if mark is neither registered nor used in India, it can still be a well-known trademark.

The trademark act is so well equipped to even provide protection to those well known marks that existed before the enforcement of the act. In other words no existing trade mark shall be declared invalid merely because it is identical with or similar to a well known mark. The protection is based upon the concept of "prior use in good faith" or "prior registration in good faith" before the commencement of the Act, of an identical and similar trademark as against well known marks. The protection given to well known marks under the act are prospective in nature.

Protection to well-known trademarks:

The Trademarks Act 1999 provides protection to well-known trademarks on two levels:

- Against the registration of any similar marks (Section 11)
- Against infringement (Section 29).

Protection against registration of similar marks:

Well known Trademarks enjoy protection not only in relation to same or similar goods and services for which they are registered or used, but also for different goods and services registered by any other person. Such reputation is given to give effect to Article 16 of the TRIPS without any string of goods and services. Thus it enables

the registrar to refuse the registration of a later mark, if it is identical or similar to the earlier well known mark and the later mark without due cause is likely to take unfair advantage of earlier trade mark.

Action against infringement of well-known mark:

The statutory protection against third-party misuse of well-known marks is provided under Section 29(4) of the act. The proprietor of a reputed trade mark can debar other similar marks from being used even on different goods and services. The act recognises infringement remedy only when the trademark is registered. Apart from being registered in India, a well known mark must fulfil the following conditions as to make a case for infringement.

1. Reputation in India

Well known marks have repeatedly been held to be marks with reputation, but the right under section 29(4) can be availed only if the mark is registered in India. In *E.I. Du Pont De Nemours & Co. v. Zip Industries Private Limited*, the Intellectual Property Appellate Board, Chennai disallowed the registration of Trade Mark "TUFFLON" as the appellants failed to discharge the initial onus of establishing reputation and use of their mark in India. Not a single invoice pertaining to the sale of the products under the Trade Mark was placed on record. No sufficient evidence in support of the reputation by promotion through advertising was produced before the Board.

2. Use of offending mark is either taking unfair advantage or is diluting or tarnishing the reputed mark.

In *M/s. Kaira District Co-Operative Milk Producers' Union Limited Amul Dairy v. Deputy Registrar of Trade Marks Office of The Trade Marks Registry 'Baudhik Sampada Bhawan', Registrar of Trade Marks Office of The Trade Marks Registry 'Baudhik Sampada Bhawan' and M/s. The Ichhamati Co-Operative Milk Producers' Union Limited*, application for registration of Trade Mark IMUL was allowed by the registrar on the ground that Respondent's adoption of the mark IMUL being used since 2001 was honest and was not deceptively similar to the use of trademark AMUL. Objections was

filled by the Appellant contending that they are carrying on a well established business of manufacturing, marketing and exporting milk products under the name AMUL since 1955. By virtue of long, extensive and continuous use, the trade mark AMUL has become associated and identified by the public. The Respondents adoption and use of the trade mark AMUL is deceptively similar to the Appellants trade mark and is likely to cause confusion and deception among the trade and public. Accordingly the order of the Registrar was set aside.

In year 2015 the Controller-General of Patents Design & Trademarks, Department of Industrial Policy and Promotion (DIPP), Union Ministry of Commerce and Industry, in a notification, approved and categorised Amul as a "well-known brand" in a list of 68 brands.

Conclusion:

Today the well known marks enjoy special protection under the trade mark law because of their high commercial value. There has been significant legislative and enforcement success in the area of protection for well-known trademarks. Courts are playing a proactive role while determining as to what will constitute well known mark through various cases. The path already traversed by the Indian judiciary with respect to protection of well known mark makes it clear that the Indian has already chalked down the plan of extending protection to well known mark even if they are not registered in India. There has been a growing consensus amongst the judicial community to not only to give effect to section 11(6) to section 11(11) of the act, but to even laid down other criteria to bring out the clarity as to what can constitute a well known mark depending upon the facts and circumstances of the case. Even the statutory protection helped a lot to identify the circumstances in which a trademark could enjoy the special status of well-known mark.

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