SJA e-NEWSLETTER

Official Newsletter of Jammu & Kashmir Judicial Academy
(For internal circulation only)

Volume 4 | Monthly | April 2021

Contents

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From the Editor's Desk

In this digital age, data is considered to be the next goldmine. Data is effectively changing the world we live in and the way that we work. It is very important to understand the value of data collection. To understand at its most basic, data is simply a collection of different facts, including numbers, measurements, and observations, that have been translated into a form that computers can process. Data presents wide variety of information that can be utilised in innumerable ways to enhance the efficacy of the processes and efficiency of the system. Correct and scientific collection of data and its proper interpretation leads to making an informed decision, identifying the problem, developing accurate theories, making approach strategies, analysing how the system is performing, helping in saving time and improving upon the quality of dispensation. All these attributes of data collection and data analysis are equally relevant when it comes to justice delivery. A large amount of data is generated on daily basis in the judicial system. It is important to capture the data at its inception by ensuring the accuracy thereof. The more data we have at our disposal, the better position we shall be in to make good decisions. Good data presents an evidence to arrive at an appropriate conclusion and shows the way for going forward. In absence of accurate data, one is likely to make mistakes and reach incorrect conclusions.

Every organization has problems and inefficiencies, so is the case with judicial system. Any organisation which is able to identify the problems by doing research and analysis, is likely to come up with effective solutions for efficiency and quality improvement. That being so, access to good data ensures that we are able to identify significant problems early on and take action to solve them. In order to truly implement effective solutions, we need to understand what is happening at different levels and in different sections of judicial system.

Strengthening of the judicial system in the country and expediting the court processes, thereby to ensure timely disposal of cases has been much debated over a period of time. We are yet to exactly pinpoint the problem(s) and, therefore, we are unable to find appropriate strategies to work out effective solutions.

The most successful organization have both short-term and long -term strategies in place. Proper data collection and analysis means that we will always be able to put our resources where they are needed most. Things which need to be prioritized can be understood only through efficient data analysis. Having a smart data collection system in place saves valuable time and saving the resources that are wasted going back again and again to retrieve the same information. A smart system will gather and display data in a way that is easy to access and navigate, meaning everyone who is part of the organization will save time. Soon, we must come up with effective tools of data collection and analysis.

LEGAL JOTTINGS

"Democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality."

Dipak Misra, J. in *Manoj Narula v. Union of India*, (2014) 9 SCC 1, para 75.

CRIMINAL

Supreme Court Judgments

Criminal Appeal No. 1438 of 2011
Rajendra @ Rajappa & Ors. v. State of Karnatka
Decided on: March 26, 2021

The Supreme Court in this case reiterated that the contradictions only in material particulars and not the minor contradictions can form a ground to discredit a witness and thereby to acquit an accused. It held that—

"The trial court has disbelieved their testimony by referring to some minor contradictions. This Court, in the case of Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra, has considered the minor contradictions in the testimony, while appreciating the evidence in criminal trial. It is held in the said judgment that only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses. Relevant portion of Para 42 of the judgment reads as under:

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness……"

Criminal Appeal No. 363 of 2021
Charansingh v. State of Maharashtra & Ors.
Decided on: March 24, 2021

The Supreme Court observed in this case that the statement of an accused recorded during the course of preliminary enquiry does not partake the character of substantial evidence or a confession, and cannot be used as statement under section 160 CrPC. It held that—

"However, the next question posed for the consideration of this Court is, whether to what extent such an enquiry is permissible and what would be the scope and ambit of such an enquiry. By the impugned notice, impugned before the High Court, and during the course of the 'open enquiry', the appellant has been called upon to give his statement and he has been called upon to carry along with the information on the points, which are referred to hereinabove for the purpose of recording his statement. The information sought on the aforesaid points is having a direct connection with the allegations made against the appellant, namely, accumulating assets disproportionate to his known sources of income. However, such a notice, while conducting the 'open

enquiry', shall be restricted to facilitate the appellant to clarify regarding his assets and known sources of income. The same cannot be said to be a fishing or roving enquiry. Such a statement cannot be said to be a statement under Section 160 and/or the statement to be recorded during the course of investigation as per the Code of Criminal Procedure. Such a statement even cannot be used against the appellant during the course of trial. Statement of the appellant and the information so received during the course of discrete enquiry shall be only for the purpose to satisfy and find out whether an offence under Section 13(1)(e) of the PC Act, 1988 is disclosed. Such a statement cannot be said to be confessional in character, and as and when and/or if such a statement is considered to be confessional, in that case only, it can be said to be a statement which is self-incriminatory, which can be said to be impermissible in law."

Criminal Appeal No(s). 121 of 2019 & 328 of 2021
Netaji Achyut Shinde (Patil) & Anr. v. State of Maharashtra
Decided on: March 23, 2021

The court reiterated that a cryptic phone call without complete information or containing part-information about the commission of a cognizable offence cannot always be treated as an FIR.A mere message or a telephonic message which does not clearly specify the offence, cannot be treated as an FIR.

In this case, the murder accused viz Samadhan Shinde, Netaji Achyut Shinde and Balasaheb Kalyanrao Shinde were convicted by the High Court. The Trial Court had acquitted Netaji and Balasaheb and convicted Samadhan. The High Court confirmed the conviction of Samadhan and reversed acquittal of others. While upholding the High Court judgment, the Apex Court Bench observed that the physical presence of the accused at the site of the actual commission of the crime and the deposition of independent witnesses about their role, clearly establishes that it was for the purpose of facilitating the offence, the commission of which was the aim of the joint criminal venture.

Criminal Appeal No. 347 of 2021
Ramesh alias Dapinder Singh v. State of Himachal Pradesh
Decided on: March 22, 2021

The Supreme Court reiterated that the criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender.

Criminal Appeal No. 329 of 2021
Arpana Bhat & Ors. v. State of Madhya Pradesh
Decided on: March 18, 2021

The Supreme Court set aside Madhya Pradesh High Court Judgment wherein the Court had imposed a bail condition upon the person (accused of outraging the modesty of his neighbour) to request the victim to tie the rakhi around his wrist.

The Court observed that asking for rakhi tying as a condition for bail, transforms a molester into a brother, by a judicial mandate. This is wholly unacceptable and has the effect of diluting and eroding the offence of sexual harassment. The act perpetrated on the survivor constitutes an offence in law, and is not a minor transgression that can be remedied by way of an apology, rendering community service, tying a rakhi or presenting a gift to the survivor, or even promising to marry her, as the case

maybe. The law criminalizes outraging the modesty of a woman. The Court held that the "use of reasoning/language which diminishes the offence and tends to trivialize the survivor, is to be avoided under all circumstances".

The Court stated that such attitudes should "never enter judicial verdicts or orders" or be "considered relevant while making a judicial decision". They cannot be reasons for granting bail or other such reliefs.

The Court issued the following guidelines.

(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;

(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;

(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;

(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the CrPC. In other words, discussion about the dress, behavior, or past "conduct" or "morals" of the prosecutrix, should not enter the verdict granting bail;

(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;

(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and

(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.

Further, courts should desist from expressing any stereotype opinion, in words spoken during proceedings, or in the course of a judicial order, to the effect that:

(i) women are physically weak and need protection;

(ii) women are incapable of or cannot take decisions on their own;

(iii) men are the 'head' of the household and should take all the decisions relating to family;

(iv) women should be submissive and obedient according to our culture;

(v) 'good' women are sexually chaste;

(vi) motherhood is the duty and role of every woman, and assumptions to the effect that she wants to be a mother;

(vii) women should be the ones in charge of their children, their upbringing and care;

(viii) being alone at night or wearing certain clothes make women responsible for being attacked;

(ix) a woman consuming alcohol, smoking, etc. may justify unwelcome advances by men or 'has asked for it';

(x) women are emotional and often overreact or dramatize events, hence it is necessary to corroborate their testimony;

(xi) testimonial evidence provided by women who are sexually active may be suspected when assessing 'consent' in sexual offence cases; and

(xii) lack of evidence of physical harm in sexual offence case leads to an inference of consent by the woman.

Judges be trained on gender sensitization.

The court mandated that a module on gender sensitization be included, as part of the foundational training of every judge. This module must aim at imparting techniques for judges to be more sensitive in hearing and deciding cases of sexual assault, and eliminating entrenched social bias, especially misogyny. The

module should also emphasize the prominent role that judges are expected to play in society, as role models and thought leaders, in promoting equality and ensuring fairness, safety and security to all women who allege the perpetration of sexual offences against them. Equally, the use of language and appropriate words and phrases should be emphasized as part of this training.

The National Judicial Academy was requested to devise, speedily, the necessary inputs which have to be made part of the training of young judges, as well as form part of judges' continuing education with respect to gender sensitization, with adequate awareness programs regarding stereotyping and unconscious biases that can creep into judicial reasoning.

The Bar Council of India (BCI) should also consult subject experts and circulate a paper for discussion with law faculties and colleges/ universities in regard to courses that should be taught at the undergraduate level, in the LL.B program. The BCI shall also require topics on sexual offences and gender sensitization to be mandatorily included in the syllabus for the All India Bar Examination.

Criminal Appeal Nos. 298-299 of 2021]
Sartaj Singh v. State of Haryana & Anr.
Decided on: March 15, 2021

The Supreme Court held that the accused can be summoned on the basis of even examination in chief of the witness and the Court need not wait till completion of his cross examination. If on the basis of the examination in chief of the witness the Court is satisfied that there is a prima facie case against the proposed accused, the Court may in exercise of powers under Section 319 CrPC array such a person as accused and summon him to face the trial.

Criminal Appeal No(s). 292 and 293 of 2021
Sumeti Vij v. Paramount Tech Fab Industries
Decided on: March 09, 2021

The brief facts of the case which emanates from the record are that the appellant accused approached the complainant-respondent in its factory at Moginand and expressed her desire to purchase non-woven fabric from the complainant. On the basis of order placed by the appellant, non-woven fabric was sold and accordingly delivered to the appellant accused and in lieu thereof, cheques were issued by the appellant in the name of the complainant in order to meet the legal existing and enforceable liabilities. However, The cheques on presentation were returned with a note of "insufficient funds" in the account of the appellant. Accordingly notices were duly served but the appellant neither responded to the notices nor made any payment in furtherance thereto within the statutory period hence, two separate complaints were filed by the complainant- respondent under Section 138 of the Act against the appellant-accused. On perusal of the evidence on record, the learned trial Judge returned a finding that the complainant failed to establish that the material/ goods were delivered to the appellant in lieu of which, the cheques were issued, and in the absence of burden being discharged by the complainant, the onus to disprove or rebut the presumption could not be shifted to the appellant as referred under Section 139 of the Act. Accordingly, the trial court returned the finding of acquittal of the appellant, which became the subject matter of challenge in appeal before the High Court at the instance of the complainant. However, the High Court on reappraisal of the evidence on record affirmed that the primary burden was discharged by the complainant that the cheques were issued by the appellant in lieu of the material supplied, and documentary evidence duly exhibited was placed on record to substantiate the claim, and it was for the appellant-accused to discharge her burden to rebut in defence as required under Section 139 of the Act. In the instant case, the appellant only recorded her statement under Section 313 of the Code. However, no evidence was recorded to disprove or rebut the presumption in defence. Taking into consideration the overall material on record while setting aside the finding of acquittal recorded by the trial Judge, held that the appellant was guilty of committing an offence under Section 138 of the Act and consequently it became the subject matter of

challenge before the apex court. The Apex court held that In the instant case, the appellant has only recorded her statement under Section 313 of the Code, and has not adduced any evidence to rebut the presumption that the cheques were issued for consideration. Once the facts came on record remained unrebutted and supported with the evidence on record with no substantive evidence of defence of the appellant to explain the incriminating circumstances appearing in the complaint against her, no error has been committed by the High Court in the impugned judgment, and the appellant has been rightly convicted for the offence punishable under Section 138 of the Act and needs no interference of this Court. The Court further held that:

The object of introducing Section 138 and other provisions of Chapter XVII in the Act appears to be to enhance the acceptability of cheques in the settlement of liabilities. The drawer of the cheque be held liable to prosecution on dishonour of cheque with safeguards provided to prevent harassment of honest drawers and The burden of proof is on the accused to rebut the presumption that cheques were not issued in discharge of any liability or any debt.

Transfer Petition (Crl.) No. 262 of 2018
Swaati Nirkhi & Ors. v. State (NCT of Delhi) & Ors.
Decided on: March 09, 2021

In the instant case the petitioner filed a transfer petition. The Court held that the apprehension of not getting a fair and impartial enquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. No universal or hard-and-fast rule can be prescribed for deciding a transfer petition, which will always have to be decided on the facts of each case. Convenience of a party may be one of the relevant considerations but cannot override all other considerations such as the availability of witnesses exclusively at the original place, making it virtually impossible to continue with the trial at the place of transfer, and progress of which would naturally be impeded for that reason at the transferred place of trial.

The convenience of the parties does not mean the convenience of the petitioner alone who approaches the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society.

Criminal Appeal No. 258 of 2021
Alka Khandu Avhad v. Amar Syamprasad Mishra & Anr.
Decided on: March 08, 2021

The Apex court upon the perusal of section 139 of the Negotiable Instrument Act, observed that a person who is the signatory to the cheque and the cheque is drawn by that person on an account maintained by him and the cheque has been issued for the discharge, in whole or in part, of any debt or other liability and the said cheque has been returned by the bank unpaid, such person can be said to have committed an offence. However Section 138 of the NI Act does not speak about the joint liability. Even in case of a joint liability, in case of individual persons, a person other than a person who has drawn the cheque on an account maintained by him, cannot be prosecuted for the offence under Section 138 of the NI Act. A person might have been jointly liable to pay the debt, but if such a person who might have been liable to pay the debt jointly, cannot be prosecuted unless the bank account is jointly maintained and that he was a signatory to the cheque.

Criminal Appeal No. 283 of 2021
Krishan Lal Chawla & Ors v. State of UP & Anr.
Decided on: March 08, 2021

In the instant case the parties have been at loggerheads from 2006 onwards. It appears that they have been fighting litigations on one pretext or the other since 2006. The court held that it is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilising the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by

coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.

This Court's inherent powers under Article 142 of the Constitution to do 'complete justice' empowers us to give preference to equity and a justice-oriented approach over the strict rigours of procedural law.

Criminal Appeal No(s). 267 of 2021
V.N Patil v. K Niranjan Kumar
Decided on: March 04, 2021

The Court reiterated that it is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

The Court observed that the aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice.

Criminal Appeal No. 1348 of 2013
Shivaji Chintappa Patil v. State of Maharashtra
Decide on: March 02, 2021

The Supreme Court observed that false explanation or non-explanation of the accused to the questions posed by the court under Section 313 of the Code of Criminal Procedure cannot be used as a link to complete the chain. It can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. The Court observed as under:

"Insofar as the reliance placed by the learned counsel for the State on the judgment of Kashi Ram (supra) is concerned, it would reveal, that this Court had used the factor of non-explanation under Section 313 CrPC only as an additional link to fortify the finding, that the prosecution had established chain of events unquestionably leading to the guilt of the accused and not as a link to complete the chain. As such, the said judgment would not be applicable to the facts of the present case."

J&K High Court Judgments

CRMC No. 90/2018
Dr. Syed Sajad Nazir v. State of J&K
Decided on: March 26, 2021

In this case a charge-sheet was laid against the petitioner for commission of offence under section 420 RPC, on the complaint that the informant's mother was under treatment of the petitioner in a private clinic for Urology problem. The informant could not afford costly treatment at the private clinic, as such on the asking of the petitioner the informant took his mother to Government Hospital. Surgery was planned, for which the petitioner asked the informant to get requisite surgical equipment from the private clinic of the petitioner. The informant, thus, was compelled to purchase costly surgical equipment from the clinic of the petitioner.

The petitioner prayed for quashing the charges against him, firstly on the ground that no offence was made out against him, and secondly that sanction for prosecution had not been obtained.

The Court found substance in both contentions of the petitioner and quashed the charges against him. The Court observed that –

"There is no allegation in the complaint that the petitioner at any point of time by way of any deception induced the complainant to deliver any property to the petitioner. The complainant has raised the dispute with regard to the fact that he was made to purchase the surgical equipments from the clinic of the petitioner and these allegations do not at all constitute offence of cheating. The complainant in his statement recorded under Section 161 CrPC has narrated the similar story and has further stated that the petitioner wanted to grab the money from him. Even if all the allegations

in the complaint/FIR/charge sheet taken at the face value are true, the basic essential ingredients of cheating are missing."

CRAA No. 224/2014
State of J&K v Ravi Kumar
Decided on: March 25, 2021

The Court held that it is a beaten law that the appellate court interferes with the order of acquittal only under compelling circumstances when the impugned order is found to be perverse. The appellate court has to be bear in mind the presumption of innocence of the accused and further that the Trial Court's acquittal bolsters presumption of his innocence. Therefore, interference in a routine manner without any good reason is not permissible.

In this case the accused (the respondent herein) was alleged to have abducted a deaf and dumb lady, confined her for few days and had committed sexual intercourse with her multiple times.

During the course of trial, statement of the prosecutrix was recorded with the help of interpreter. The prosecutrix, while in cross-examination admitted that she was seeing the accused for quite some time and had developed intimacy with him and had eloped with him. The medical officer who had examined her initially, also deposed that during her medical examination also the prosecutrix had told the medical officer in sign language that she had herself left with the accused and everything happened with her consent.

The Court found that the conclusion drawn by the trial court as to innocence of the accused was not perverse in any manner. Acquittal of the accused by the trial court upheld.

CRAA No. 26/2007
State of J&K v. Javid Iqbal & Ors.
Decided on: March 24, 2021

The Court held that it is a settled law that in the case of judgment of acquittal passed by the Trial Court, the High Court in exercise of its appellate jurisdiction would be reluctant to interfere with such findings unless there are grave illegalities and perversities committed by the learned Trial Court. If two views are equally probable, the appellate court would not interfere with the finding of the trial court.

CRAA No. 142/2010
State of J&K v. Rattanjeet Singh
Decided on: March 10, 2021

The Court held that there is no evidence on record to prove any motive whatsoever for the accused to have committed the murder of deceased. Although motive is not necessary to be proved in a case of murder, yet in the absence of any reliable evidence against the accused, the absence of any motive for the accused to commit the alleged crime assumes great importance.

CRAA 52/2007
State v. Abdul Hamid & Anr.
Decided on: March 09, 2021

The Court reiterated that the principles relating to interference by the High Court in appeals against acquittal are well settled. While the High Court can review the entire evidence and reach its own conclusions, it will not interfere with the acquittal by the trial court unless there are strong reasons based on evidence which can dislodge the findings arrived by the trial court, which were the basis for the acquittal. The scope of interference with the judgment of acquittal recorded by the trial Court is very limited. Even if the appellate Court, on analysing the evidence on record, is of the opinion that two views are possible, yet the appellate court would prefer the view which goes to the benefit of the accused.

SLA No. 133/2016
State of J&K v. Tarsem Raj & Ors.
Decided on: March 03, 2021

The Court held that it is well settled in law that High Court while hearing an acquittal appeal can re-appreciate the evidence, however, it should not interfere with the order of acquittal if the view taken by the trial court is a reasonable view of the evidence on record and the findings recorded by the trial Court are not manifestly erroneous, contrary to the evidence on record or perverse.

"The Sovereign Democratic Republic has been constituted to secure to all the citizens the objectives set out. The attainment of those objectives forms the fabric of and permeates the whole scheme of the Constitution. While most cherished freedoms and rights have been guaranteed, the Government has been laid under a solemn duty to give effect to the Directive Principles."

J.M. Shelat and A.N. Grover, JJ. in *Keshvananda Bharti v. State of Kerala*, (1973) 4 SCC 225, para 533.

CIVIL

Supreme Court Judgments

Civil Appeal No. 6379 of 2010
Narbada Devi and Ors. v. Himachal Pradesh State Forest Corporation
Decided on: March 22, 2021

In the instant case the facts are that on the night before his death, the deceased was heavily drunk, and had gone and slept outside on a cold, rainy October night in Chopal and died of asphyxia. A claim for insurance was made.

The Court in this appeal held that the order passed by the National consumer disputes redressal commission i.e. that the deceased's death was not accidental, and that the Insurance Company would not be liable to settle the Appellants' claim was not to be interfered with.

From a bare perusal of the Insurance Policy, as quoted supra, it is clear that only if the insured sustains any bodily injury resulting solely and directly from accident caused by outward, violent and visible means, the Insurance Company would be liable to indemnify the insured. Therefore, as per the Insurance Policy, only accidental death of the insured shall be indemnified.

Transferred Case (Civil) No. 25 of 2021]
Aman Lohia v Kiran lohai
Decided on: March, 17, 2021

The Supreme Court ruled that a family court does not have plenary powers to do away with the mandatory procedural requirements which guarantee fairness and transparency for adjudication of claims.

Suo Motu Writ Petition (Civil) No. 3 of 2020]
In Re: Cognizance for Extension of Limitation
Suo Motu Writ Petition (Civil) No. 3 of 2020
Decided on: March 08, 2021

The Apex Court observed that due to the onset of COVID-19 pandemic, this Court took suo motu cognizance of the situation arising from difficulties that might be faced by the litigants across the country in filing petitions/ applications / suits / appeals / all other proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both Central or State). By an order dated 27.03.2020 this Court extended the period of limitation prescribed under the general law or special laws whether compoundable or not with effect from 15.03.2020 till further orders.

The order dated 15.03.2020 was extended from time to time. Though, we have not seen the end of the pandemic, there is considerable improvement. The lockdown has been lifted and the country is returning to normalcy. Almost all the Courts and Tribunals are functioning either physically or by virtual mode. The court held that the order dated 15.03.2020 has served its purpose and in view of the changing scenario relating to the pandemic, the extension of limitation should come to an end. The Court issued the following directions:-

1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall

apply.

3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

Civil Appeal Nos. 659-660 of 2021]
Sachin Kumar & Ors. v. Delhi Subordinate Service Selection Board (DSSSB) & Ors.
Decided on: March 03, 2021

The Apex Court held that recruitment to public services must command public confidence. Persons who are recruited are intended to fulfil public functions associated with the functioning of the Government. Where the entire process is found to be flawed, its cancellation may undoubtedly cause hardship to a few who may not specifically be found to be involved in wrong-doing. But that is not sufficient to nullify the ultimate decision to cancel an examination where the nature of the wrong-doing cuts through the entire process so as to seriously impinge upon the legitimacy of the examinations which have been held for recruitment.

J&K High Court Judgments

AA No. 2/2003
M/s K.B. Construction Company v. Union of India
Decided on: March 29, 2021

The High Court in this case, relying upon judgment in "Union of India v. Balwant Singh and Sons and another" (AA No.74/1997, decided on 07.05.2016) held that an arbitrator cannot award any sum beyond the scope of reference made for arbitration, especially when there is no agreement to that effect or where no option or liberty was given to the parties to amend, add or modify the claim(s).

On the issue of award of interest, the Court observed that –

"Section 31(7)(a) and 31(7)(b) of the Act of 1997, as it stood prior to the amendment effected by Section of the Act No.VI of 2010, the award of interest by the arbitrator was to be in two compartments i.e. pre-award interest and post award interest. So far as pre-award interest is concerned, the same was regulated by Section 31(7)(a) and it provided that unless otherwise agreed by the parties and where the arbitral award is for payment of money, the arbitral tribunal may award interest on the principal sum at such rate as it may deem reasonable. So far as post award interest is concerned, the same was regulated by Section 31(7)(b), which provided that unless the award otherwise directs the sum directed to be paid by the arbitral tribunal would carry interest @ 18% per annum from the date of award to the date of payment."

CMAM No. 80/2016
United India Insurance Company Limited v. Mohammad Amin Bhat & others
Decided on: March 26, 2021

Compensation awarded in favour of dependents of the deceased hawker was challenged mainly on two counts; one, that the deceased had no fixed income as such the Tribunal could not have added 50% as prospective income, and second, that the Tribunal ought to have deducted more than 1/3rd on personal expenses of the deceased. On the first count, the Court agreed with the petitioner Insurance Company that in view of the fact that the deceased had no fixed income, addition of 50% as prospective income was not permissible. Since it is proved that the deceased was a hawker, prospective income could be added to the extent of 40% only.

On the second count, the Court observed that –

"The Tribunal has deducted 1/3rd of the income of the deceased, who was bachelor, towards his own expenses keeping in view the evidence that has come on record that he is survived by the mother and even minor siblings who were dependent upon the earnings of the deceased. The judgment in

Pranay Sethi's case (supra) which also takes note of the law laid down in case titled Sarla Verma Vs. Delhi Transport Corporation reported in 2009 (6) SCC 121 does not hold that deduction is required to be applied in a straight-jacket manner. The facts of the case ultimately decide the deduction that is to be made while calculating the compensation in any given case. The Tribunal has not erred in its finding in this aspect of the matter."

CR No. 124/2011
Dewan Dewakar Rai & Ors. v. Ajit Singh
Decided on: March 25, 2021

In this case the trial court dismissed the suit as abated, the plaintiff having not arrayed the legal representatives of the deceased defendant no. 3 in time. Application though was made by plaintiff for bringing on record LRs of deceased defendant alongwith application seeking condonation of delay, after the other defendant filed their written statement contending therein that defendant no. 3 had died earlier. Order challenged by way of civil revision. The Court observed that –

"13. Law being settled that the Code has not prescribed any particular form for making an application for bringing the legal heirs of deceased-defendant on record. The application is required to be filed in writing supported with an affidavit containing the names of the legal representatives of the deceased-defendant and the court upon receiving an application is required to issue a notice to the proposed legal heirs of the deceased/defendant, offer a liberty of hearing to them and make an appropriate order for granting or refusing the prayer sought in the application.

14. Law being also settled that even though an application for bringing on record the legal representatives of the deceased-defendant is distinct and different from the proceedings to set-aside the abetment of a suit, yet it is equally a settled law that the procedural provisions of Order 22 should be construed liberally to advance substantial justice and moreover law is also being settled that if some of the legal representatives of the deceased/defendant are on record, they would represent estate of the deceased and the suit would not abate if, the other legal representatives are not on record."

Order of abatement of suit against the surviving defendants set aside.

MA No. 174/2012
Rajni v. Joginder Singh & Ors.
Decided on: March 23, 2021

The Court reiterated that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the courts have no power to extend the period of limitation on equitable grounds.

MA No. 23/2007
O.I.Co. Ltd v. Desa Singh & Ors.
Decided on: March 22, 2021

In the instant case award was passed by Assistant Labour Commissioner, Udhampur. It was challenged on the ground that it is bad in law in the facts of the case and that the deceased was not a driver but a passenger in the truck therefore, not a workmen, under the Act. Held that—The Commissioner rightly has held the deceased to be a workman in the employment of owner/insured entitling the claimants to a compensation thereof. The said conclusions are purely based upon the questions of fact determined by the Commissioner on the basis of evidence led by the claimants and failure of the respondent/ appellant to lead any evidence in rebuttal thereto. The court held that the impugned award cannot in law be reversed on the basis of the questions framed by the appellant which questions in essence are pure questions of facts and a reference in this regard to judgement of Supreme court was given, stating that:

"Under the scheme of the Act, the Workmen's Commissioner is the last authority on facts. The Parliament has thought if fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation."

WP(C) No. 1648/2019
Jagdish Chander v. Sushma Sharma
Decided on: March 17, 2021

The Court held that in case the

defendants are purposely avoiding service or for any other reasons the summons cannot be served in the ordinary way or through substituted service the trial court should resort to the other modes of service as provided in Order 5 and serve the respondents.

WP(C) No.443/2021
Navneet R. Jhanwar v. State Tax Officer & ors.
Decided on: March 17, 2021

In the instant case a refund claim was made by petitioner as under Central Goods and Service Tax Act, 2017 and a show cause notice was issued to explain the claim being barred by limitation and thereafter the explanation given was accepted. Still the refund claim was rejected without giving and opportunity of being heard to the petitioner.

The Court reiterated that the very purpose of the show cause notice issued is to enable the recipient to raise objections, if any, to the proposals made and the concerned Authority are required to address such objections raised. This is the basis of the fundamental Principles of Natural Justice. In cases where the consequential demand traverses beyond the scope of the show cause notice, it would be deemed that no show cause notice has been given for that particular demand for which a proposal has not been made.

WP(C) No.275/2021
Indian Farmers Fertilizer Cooperative Ltd. v. Sales Tax Officer
Decided on: March 09, 2021

The Court reiterated that it is well settled that once statutory mechanism is provided for resolution of dispute, the party aggrieved must avail of the statutory remedy provided under the Statute and should not rush to the High Court invoking its extra ordinary writ jurisdiction.

OWP No. 758 & 761/2006
1. Roop Kour v. State of J&K & Ors
2.Sabita Jamwal v. State of J&K & Ors
Decided on: March 05, 2021

The main issue in this case was whether subsequent contempt is maintainable before High court during the pendency of contempt petition in the same matter before the trial court or not.

The Court held that issue that stands settled and having assumed finality in law cannot be reopened.

WP(C) 108 of 2021
M/s. Col Nature Fabrications & Ors. v. Punjab and Sindh Bank & Anr.
Decided on: March 04, 2021

The Court held that it is permissible to simultaneously issue notice to the borrower about the intention to sell and also to issue a public notice for the sale of secured immovable property, the only restriction being that there should be 30 days time gap between such notice and date of sale. Further it was held that there is no need or requirement to give separate individual notice.

LPA No 112 of 2020
Vijay Kumari v. Ashwani Kumar
Decided on: March 03, 2021

In the instant case learned single judge had passed the decree of divorce in an appeal arising from a matrimonial dispute decided by the Additional District Judge wherein permanent alimony had been fixed with the consent of the parties. The issue raised was that whether appellant wife is entitled to maintain an application for enhancement of permanent alimony and the second being that whether Letters Patent Appeal is maintainable against order impugned passed by learned single judge in exercise of his appellate power. The Court held that in accordance with the statutory provisions appellant wife is entitled to maintain application seeking enhancement as contemplated by sec 31(1) of Jammu and Kashmir Hindu Marriage Act, 1980/Section 25 of Hindu Marriage Act, 1955 and as per the second issue it was said that LPA is not maintainable, where an appeal is decided by a single judge of the High Court, further appeal against it is barred in law. The wife is at liberty to pursue any other remedy like applying fresh for enhancement of permanent alimony.

ONLINE PROGRAMMES ON "ELECTRONIC CASE MANAGEMENT TOOLS AND eCOURT SERVICES FOR THE ADVOCATES OF THE UNION TERRITORIES OF JAMMU AND KASHMIR & LADAKH"

Under the guidance and directions of the Chairperson, eCommittee of the Hon'ble Supreme Court of India, Hon'ble Dr. Justice D.Y Chandrachud, a series of online training programmes in different batches, on the topic "Electronic Case Management Tools and eCourt Services for the Advocates of the Union territories of Jammu and Kashmir & Ladakh", was organized on 26th of March, 2021 by the Jammu and Kashmir State Judicial Academy in collaboration with IT section of the High Court of the Jammu and Kashmir.

Mr Parvaiz Iqbal, Railway Magistrate Jammu, Mr Manjeet Rai, Municipal Magistrate Srinagar, Mr Mir Wajahat, Sub Judge Bijbehera Anantnag, Mr Umesh Sharma, Joint Registrar, Inspection, High Court of Jammu and Kashmir, Jammu and Mr. Sarfraz Nawaz, Special Mobile Magistrate, Poonch were the Resource persons in the said training programmes. In total, 78 Advocates from different District Bars of the Union territories of Jammu and Kashmir & Ladakh participated in the training sessions through virtual mode.

During the training sessions, the participating Advocates were apprised by the resource persons about the vision and objectives of the eCourts mission mode Project. Various topics like "Introduction about the eCommittee of the Hon'ble Supreme Court of India and its websites", "efiling", "eCourt Services mobile app" and "other eServices" were discussed and deliberated upon during the training sessions.

It is worthwhile to mention here that this training programme is the part of a five phase training module conceptualized by the eCommittee for creating Advocate Master Trainers. These trained advocates shall further impart training to their fellow colleagues.

In 1st phase of the training programme, Judicial Officers (Core Master Trainers) of the Union territories of Jammu and Kashmir & Ladakh were trained by the eCommittee of the Hon'ble Supreme Court of India. In 2nd phase, the Core Master trainers thus trained by the eCommittee imparted training to other Master Trainers (Judicial Officers). In 3rd phase, Master Trainers (Judicial Officers) trained by the Core Master trainers in the 2nd phase have imparted training to various Advocates nominated by Principal District Judges/ Registrars Judicial of the both the wings of the High Court. In 4th Phase, the Advocate Master Trainers trained in the 3rd phase by the Judicial Officers (Master Trainers) have to impart training to other Advocates and Clerks of the Advocates of their respective Bars.

The module of training of the Advocates has been devised with an objective of enabling and empowering the Advocates in making optimum use of various eCourts Services developed, designed and maintained by the eCommittee of the Hon'ble Supreme Court of India so as to achieve the goal of transformation of Judicial System by ICT enablement. All the stakeholders in the judicial system are intended to be brought on board for effective implementation of the National Policy. Lawyers being the important component of the judicial system are required to be trained for creation of a conducive ICT environment for modernization of justice delivery system in India.

Pertinently, e-Committee of the Hon'ble Supreme Court of India is the governing body charged with overseeing the e-Courts Project conceptualized under the "Nation Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary-2005". The e-Courts is a pan India project monitored and funded by the Department of Justice, Ministry of Law and Justice, Government of India.

"Law of Bails" : A Conspectus (Part— II)

6. Direction for grant of bail to person apprehending arrest (anticipatory bail).

i) Section 438 of CrPC, enables the Court/s, i.e. the High Court or the Court of Sessions, to grant the anticipatory bail which means that if a person is arrested, bail shall be granted to him. It is bail in anticipation of arrest and is, therefore, effective at the moment of arrest. Arrest consists of actual seizure or touching of a person's body with view to his detention.

ii) Section 438 can be invoked if the person is accused of nonbailable offence. Two conditions are to be satisfied to entitle a person to approach the Court for anticipatory bail, which are:

a) he fears that he would be arrested ; and

b) the anticipated arrest is for a non-bailable offence.

Only if the said two conditions are satisfied, one can maintain an application under this Section. The application is not maintainable if the offences are bailable;

iii) However, the Section does not give one a right of grant of bail as a matter of course.

The Court always has the discretion to consider each case on its own facts, and either grant bail or refuse it. Besides the considerations which normally weigh with the Courts while granting bail in case of non-bailable offences under section 437 of CrPC, a Court while considering an application for anticipatory bail has to take into account the nature and seriousness of the proposed charges, the context of the events likely to lead to making of charges, the antecedents of the applicant including the fact as to whether he has previously under gone imprisonment or conviction by a Court in respect of any cognizable offence; the possibility of the applicant to flee from justice and securing his presence during investigation or trial; whether the accusation has been made with the object of injuring or humiliating the applicant by having him arrested; and the larger interest of public or State are to be kept in mind by the Court;

iv) The provision of grant of anticipatory bail can be invoked in cases involving offences as heinous as 'murder' in the peculiar facts and circumstances of the case and it can not be said that anticipatory bail can not granted in murder cases, as a rule. (See Gurbakash Singh Sibbia VS State of Punjab', AIR 1980 SC 1632);

v) However, after the amendment made vide Section 22 of Act no. 22 of 2018 (w.e.f. 21.04.2018), the provisions of Section 438 of the Code are no longer applicable to any case involving the arrest of any person on accusation of having committed an offence under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code;

vi) When an application for grant of anticipatory is made before a Court, it can either reject the application after taking into account the relevant considerations, noticed here above, or pass any interim order under Subsection (1) of Section 438 including the directive that in case of his arrest the applicant shall be released on bail;

viii) If the application is rejected or the Court does not pass any interim order, then it is open to an Officer incharge of Police Station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application;

viii) However, if the Court passes interim order, it shall forthwith cause a notice , being not less then 7 days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court;

ix) Further, in case the court passes a direction under Sub section (1), it may impose, in the light of the facts of the particular case or as is deemed fit by it, inter alia, the following conditions, that:

a) the accused shall make himself

available for interrogation by a police officer as and when required;

b) he shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

c) he shall not leave India without the previous permission of this Court; and

d) such other conditions as may be imposed under Sub-section (3) of Section 437, as if the bail were granted under that section.

x) As per Sub-section (1B) of Section 438 of CrPC, the presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the public prosecutor, the Court considers such presence necessary in the interest of justice;

xi) As regards the duration up to which the applicant accused should be admitted to (anticipatory) bail is concerned, it is apt to notice here that for a considerable period of time the Courts, including the different Benches of the Hon'ble Supreme Court of India, expressed divergent views regarding whether an anticipatory bail should be for a limited period of time so as to enable the person to surrender before the trial court and seek regular bail or it should remain in force right till the culmination of the proceedings of the case against him. Taking into account the conflicting views of the different Benches of varying strength, an Hon'ble Full Bench, comprising of three Hon'ble Judges, of the Supreme Court of India, in "Susheela Aggarwal and ors vs State (NCT of Delhi) and anr", as reported in (2018) 7 SCC 731, came to the conclusion that the legal position required authoritative settlement in clear and unambiguous terms and accordingly referred the following questions for consideration by a larger bench. The questions framed for reference were, as under:

Question no.1: Whether the protection granted to a person under section 438 of CrPC should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail?

Question no.2: Whether the life of anticipatory bail should end at the time and stage when the accused is summoned by the court?

xii) The matter was accordingly considered by an Hon'ble Constitution Bench of the Supreme Court of India, in: "Susheela Aggarwal and ors vs State (NCT of Delhi) and anr" (Special leave petition no. 72817282/2017, decided on 29th of Jan., 2020) and whilst answering the aforesaid said questions, held, consistent with the judgment in: "Shri Gurbaksh Singh Sibbia and ors vs State of Punjab" (AIR 1980 SC 1632), with respect to the question no.1, that protection contained under section 438 of CrPC should not invariably be for a limited period; it should inure in favour of the accused without any restriction on time. Normal conditions under section 437 (3) read with section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for it to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or timebound etc.). As regards the second question, it was answered by holding that the life of an anticipatory bail does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail , it is open for it to do so;

xiii) However, the courts have been directed to keep certain points in mind as guiding principles while dealing with application/s for anticipatory bail. Without being exhaustive, the Court/s are required to be generally guided by the consideration/s such as: the nature and the gravity of offence, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether

and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on the facts of the case and subject to discretion of the court. Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge-sheet till end of the trial;

xiv) The Hon'ble Constitution Bench accordingly overruled the observations made in: 'Siddharam Satlingappa Mehtre Vs State of Maharashtra and ors' {(2011)(1) SCC 694 and other similar judgments} which had ruled that no restrictive conditions at all can be imposed while granting anticipatory bail. Likewise the decision in: 'Salauddin Abdulsamad Shiekh vs State of Maharashtra' {(1996)(1) SCC 667} and the subsequent decision/s including: 'K.L Verma vs State and ors' {(1998)(9) SCC 348}; 'Sunita Devi Vs State of Bihar and anr' {(2005)(1) SCC 608}; 'Adri Dharan Dass V/s State of West Bengal' (2005)(4)SCC 303; 'Nirmaljeet Kour vs State of Madhya Pradesh' (2004)(7) SCC 558; 'HDFC Bank vs J.J Mannan' (2010) (1) SCC 679; 'Satpal Singh VS State of Punjab' 2018 SCC on line 450, and 'Naresh Kumar Yadev V/s Ravinder Kumar' (2008) (1) SCC 632 which laid down such restrictive conditions or terms limiting the grant of anticipatory bail to a period of time, were also overruled.

7. (1) Special powers of High Court and Sessions regarding bail.

a) Section 439 (1) (a) of CrPC confers unlimited jurisdiction on the High Court or Court of Sessions in matter of granting bail.

i) Whilst Section 437 (1) of CrPC lays down the circumstances in which bail may be granted by a Court in case of non-bailable offences and, inter alia, provides that the accused shall not be released on bail if there appear reasonable grounds for believing that he is guilty of offence punishable with death or imprisonment for life, the bar as enjoined under section 437 (1) of CrPC does not control or even constitute a consideration for the exercise of special powers by the High Court or the Court of Sessions as enjoined in section 439. This is the marked distinction between the scope of two sections. However, it is provided that the High Court or Court of Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by Court of Sessions or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be so recorded in writing, of opinion that it is not practicable to give such notice.

(ii) Sub-section (1) of Section 439 empowers the High Court or Court of Sessions to direct that any person be admitted to bail. However, notwithstanding the fact that the power conferred under Section 439 of CrPC is not controlled by the restrictions contained in Section 437, it has to be exercised judicially and not arbitrarily and after taking all the considerations including limitations under section 437 (1) into account.

All those considerations which normally weigh with the Court while granting bail in non -bailable offences under section 437, which have been discussed at length whilst alluding to the principles governing grant of bail in non-bailable offences, have to be borne in mind and considered while considering the bail plea under section 439 (1) of CrPC;

iii) A person who has been tried and convicted has no right to file an application under section 439 of CrPC. A person convicted by the Court of Sessions or by the High Court can not even apply for grant of bail pending appeal to the next higher forum as the only remedy for them is to approach the Appellate Court in terms of Sub-section (3) of Section 389 of CrPC.

iv) Section 439 of CrPC enjoins that no person accused of an offence can move the Court for bail under this Section unless he is in custody.

However, as in case of Sections 436 and 437(1) of CrPC, such a person can be stated to be in 'judicial custody', when he surrenders before the Court and submits to its directions. The legal position on that behalf enunciated by the Apex Court on the point,in: 'Niranjan Singh

Vs Prabhakar Raja Ram Kharta', as reported in (1980) 2 SCC 559 , still holds good. This said legal position has been consistently followed and reiterated by the Hon'ble Supreme Court of India in numerous cases, including: 'Nirmaljeet Kour vs State of Madhya Pradesh', as reported (2004)7 SCC 558 ; 'Sunita Devi Vs State of Bihar', (2005) 1 SCC 608 ; and 'Sundeep Kumar Bafna Vs State of Maharashta and anr', as reported in AIR 2014 SC 1745;

v) Though both the Courts of High Court and Court of Sessions have concurrent powers, normal practice is to move the latter first;

b) Section 439 (1) (b) empowers the High Court or Court of Sessions to direct that any condition imposed by a Magistrate while releasing any person on bail be set aside or modified. The settled legal position is that the Court/s should not impose conditions which are not countenanced in law. As already noticed the Court may impose, in the interest of justice, such other conditions, besides those specified in Sub-section (3) of Section 437 of CrPC, as it considers necessary with the only rider being that the condition/s should not be unreasonable or onerous. The Court of Sessions or the High Court can modify, in appropriate cases, a condition of bail which in its opinion is not reasonable. To illustrate: Hon'ble Supreme Court of India, in: 'Keshav Naryan Banerjee vs State of Bihar', as reported in AIR 1985 SC 1666, set aside the condition that the accused should furnish Rupees One Lakh as security and also two sureties residing in State of Bihar, each furnishing security for like amount. Instead it reduced the amount to Rs 25000/in case of each of them and directed that the Surety need not be resident of Bihar only. Similarly, the Hon'ble Supreme Court of India, in 'Munish Bhasin and ors Vs State (Government of NCT of Delhi) and anr', as reported in AIR 2009 SC 2072, did not approve the condition directing the accused, who was admitted to bail, to pay a sum of Rs. 12500/per month as maintenance to his wife and his child. Holding the condition to be onerous and unwarranted, the Hon'ble Supreme Court laid emphasis on the point that while imposing conditions on an accused, who is granted bail under section 438 of CrPC, the Court should refrain from imposing conditions which are harsh, onerous or excessive, so as to frustrate the very object of grant of anticipatory bail. Similar is ratio of the ruling delivered in 'Kunal Kumar Tiwari Vs State of Bihar and anr', as reported in AIR 2017 SC 5416;

c) Although the High Court or Court of Sessions has unlimited powers under this section to grant bail, a rider has been imposed, vide section 23(a) of Act no.22 of 2018 (w.e.f 23.04.2018), by virtue of which it has become mandatory that before granting bail to a person who is accused of an offence triable under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376DB of the IPC, the Court shall give notice of the application of bail to the Public Prosecutor within a period of 15 days from date of receipt of such application; and d) Section 439(1A), introduced by Section 23(b) of Act no.22 of 2018 (w.e.f 23.04.2018), has made the presence of the informant, or any person authorised by him, obligatory at the time of hearing the application for bail to the person under Sub-section (3) of Section 376 or Section 376AB or Section 376DA or Section 376 DB of the IPC.

7.(2) Order granting bail should be a 'reasoned order'

Although there is no provision in Section 439 of CrPC. similar to Subsection (4) of 437, which enjoins the officer or Court releasing any person on bail under Sub-section (1) or Sub-section (2) thereof to record in writing his or its reasons or special reasons for doing so, yet it is incumbent upon the High Court or Court of Sessions to pass a reasoned order while exercising powers of grant of bail under this Section without making detailed examination of the evidence and elaborate discussion on the merits of the case. However, it must appear from the perusal of the order that the court had applied its mind to the relevant facts in the light material filed by the prosecution at the time of consideration of bail application. (See 'Ajay Kumar Sharma Vs State of UP and ors', as

reported in (2005) 7 SCC 507; 'Lokesh Singh V/ s State of UP and anr', as reported in (2008) 16 SCC 753 and 'Dataram Singh Vs. State of UP and anr', as reported in (2018) 3 SCC 22.

8.(1) Cancellation of bail under Sub-section (5) of section 437 and Sub-section (2) of section 439.

i) Power to rearrest and commit the accused to custody is an inherent power possessed by every Court. Sub-section (5) of section 437 and Sub-section (2) of section 439, both provide for cancellation of bail and rearrest of the accused. Whilst Sub-section (5) of Section 437 of CrPC empowers the Court, which granted bail, to cancel the bail; Sub-section (2) of section 439 empowers the High Court and the Court of Sessions to cancel bail whether granted by it or any other subordinate Court. Thus, there is a marked distinction between the provisions of Section 437 and section 439. Section 437(5) pertains to a Court of Magistrate but not a High Court or Court of Sessions;

ii) Prior to the insertion of Sub-section (2), by Act 26 of 1955 in the 1898 Code, doubts were expressed whether a person who has been admitted to bail could be caused to be arrested except in exercise of the inherent powers of High Court. It is to remove these doubts that this Sub-section was so inserted. According to the accepted principles under the old Code, the High Court is not devoid of any jurisdiction to deny bail to a person who had been granted bail, if he was not facilitating proper conduct of the case before the Court. Sub-section (2) of section 498 of old Code, therefore, authorized the Sessions Court or the High court to arrest a person admitted to bail. The said section is practically like the section 439(2) of the Code of 1973;

iii) Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when on a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. (See: 'State Vs Late Sanjay Gandhi', as reported in AIR 1978 SC 961). The grounds for cancellation of bail under section 437(5) and 439 (2) are identical. Without being exhaustive, the bail granted under section 437(1) or 439 (1) of CrPC can be cancelled, where : i) the accused misuses the liberty by indulging in similar activity; ii) interferes with the course of investigation; iii) attempts to tamper with evidence of witnesses; iv) threatens witnesses or indulges in similar activities which could hamper smooth investigation; v) there is likelihood of fleeing to another country; vi) attempts to make himself scarce by going underground or becoming unavailable to the Investigating Agency; viii) places himself beyond the reach of his surety, etc . (See' Aslam Babalal Desi Vs State of Maharshata, AIR 1993 SC. 1). These guiding considerations, enunciated by the Hon'ble Supreme Court of India, still hold good and continue to govern the field of cancellation of bail in exercise of powers conferred under section 437 (5) or 439(2) of CrPC;

iv) Considerations applicable for cancellation for bail and considerations for challenging the order of grant of bail on ground of arbitrary exercise of the discretion, are different. Once an order of bail is made, law immediately puts a protective ring around him and the bail can not be cancelled without giving an opportunity to a person for whose benefit it was made. Whereas while considering the application for cancellation of bail, the Court ordinarily looks for some supervening circumstances like i) the accused misuses the liberty by indulging in similar activity; ii) interferes with the course of investigation ; iii) attempts to tamper with evidence of witnesses; iv) attempts to make himself scarce by going underground or becoming unavailable to the Investigating Agency; v) places himself beyond the reach of his surety, etc., on the other hand in an order challenging the grant of bail on the ground that it has been granted illegally, the considerations are whether there was improper or arbitrary exercise of discretion in grant of bail. (See: 'Union of India Vs Hasan Ali Khan

and ors', as reported in (2011) 10 SCC 235; 'Bharatbhai Bhimabhai Bharwad Vs State of Gujrat and ors', as reported in (2019) 10 SCALE 138; and Prabhakar Tiwari Vs State of Uttar Pradesh', as reported in JT 2020(2) SC 72).

8.(2) Bail/ cancellation of bail, on addition of new offences.

"Whether in a case, where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be granted for taking the accused in custody?

This question came up for consideration before the Hon'ble Supreme Court of India , in: 'Pradeep Ram Vs State of Jharkhad and anr', as reported in AIR 2019 SC 3193. The Apex Court while observing that in all cases, where accused is bailed out under orders of the Court and new offences are added including offences of serious nature, held that it is not necessary that in all cases earlier bail should be cancelled by the Court before granting permission to arrest him on the basis of new offences. The power under sections 437(5)and 439(2) are wide powers granted to the Court by the legislature under which court can permit an accused to be arrested and commit in custody without even canceling the bail with regard to earlier offences. It was further held that sections 437(5) and 439(2) can not be read in a restricted manner that the order for arresting the accused and committing him to custody can be only passed by the Court after cancelling the earlier bail. The Hon'ble Supreme Court accordingly laid down the following guidelines in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:

(i) the accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested;

(ii) the investigating agency can seek order from the Court under section 437(5) or 439 (2) of CrPC for arrest of the accused and his custody;

(iii) the Court, in exercise of power under Section 437(5) or 439(2) of CrPC., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court, in exercise of power under Section 437(5) as well as Section 439 (2), can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences even with out cancelling of earlier bail; and

(iv) in a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.

- Sh. Jatinder Singh Jamwal
Additional Distt. & Sessions Judge,
Kathua

FIR AND ITS SIGNIFICANCE : A COMPREHENSIVE APPROACH

Introduction -

First Information Report is the ignition of the Criminal justice system. the purpose of registering FIR is to set the machinery of criminal Investigation into motion, which culminates with filing of the police report and only after registration of FIR, beginning of Investigation in a case, collection of evidence during Investigation and formation of the final opinion is the sequence which results in filing of a report under section-173 CrPC. Hon'ble Supreme Court in the case of Manoj Kumar Sharma and others vs State of Chhatisgarh and another, AIR 2016 SC 3930 propounded about the significance and purpose of FIR.

While any incidence has been taken place in respect of any cognizable offence then FIR is the First step towards criminal justice administration . In a very simple word you can say that FIR is the basic structure or foundation stone of a building upon which the structure of the criminal justice system raised.

What is FIR?

The very important question is before us

that what is FIR means what is the meaning of the FIR? It is very clear that in Code of Criminal Procedure or Indian Penal Code the term FIR has not been defined yet. But word FIR itself denotes that First Information Report, But question is still before us that about whom then you can simply reply that about cognizable offence. Now you can defined in simple term that FIR means the First Information about Cognizable offence. What is cognizable offence Section 2(c) in The Code Of Criminal Procedure, 1973 defined as below-

(c) "cognizable offence" means an offence for which, and" cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

The term offence is also defined under section 2 (n) of the Code of Criminal Procedure as below-

"offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section- 20 of the Cattle- trespass Act, 1871 (1 of 1871);

A very serious question again arise before us that whether each and every first time information regarding commission of cognizable offence comes within the purview of FIR, If the answer is affirmative then why ? If answer is negative then why ?

In the opinion of the author answer is negative because each and every information made by any person first time before police officer in respect of commission of cognizable offence does not come within the purview of FIR, unless and until it does not bear all the ingredients of the FIR. It means that if the information is given so, does not bear all the ingredients and information given so is vague and cryptic then it would not come within the purview of FIR.

Ingredients of FIR-

Now the next question is before us that what are the ingredients of the FIR? It is very clear that there is no any provision regarding ingredients of the FIR, But on the basis of Interpretation laid down by the Court of records it if necessary for the FIR it must be clear and unambiguous. It means that if information regarding cognizable offence receive in cryptic and vague manner then such kind of information can not constitute a valid FIR. Now the question before us that in what circumstances information regarding cognizable offence would be clear and unambiguous . The reply of this particular question is also known as ingredients of the valid FIR, these are as follows-

Information in respect of cognizable offence must be bear particulars given below-

(1) Time of offence.

(2) Date of the offence.

(3) Name of the place of occurrence.

(4) Particulars of the informant/victim.

(5) Name or particulars of Accused persons.

(6) Description/Particulars of the incident.

For the detailed description you can see the below case laws-

1- Sidhartha Vashisth: Alias Manu Sharma vs State (NCT of Delhi), CRIMINAL APPEAL NO. 179 OF 2007 judgment dated 19th April 2010.

2-Damodar v. State of Rajasthan, AIR 2003 SC 4414.

In order to constitute an FIR in terms of section 154 of the Code. of Criminal Procedure, 1973 two conditions are to be fulfilled:-

(a) what is conveyed must be an information; and

(b) that information should relate to the commission of a cognizable offence on the face of it.

Whether Information furnished through a telephonic message etc. would constitute a valid FIR or not?

There is not straight jacket answer to this proposition. Time and again it has been held by the Hon'ble Courts of our country that a telephonic conversation is generally made with

an intention to gather police at the crime scene. In such cases, the telephonic conversation made between the informant and the police officer would not amount to registration of the FIR.

Phone calls made immediately after an incident to the police constitutes a FIR only when they are not vague and cryptic. Calls purely for the reason of getting the police to the scene of crime do not necessarily constitute the FIR". Hence, as per authors interpretation, a telephonic conversation would amount to the constitution of a FIR if the information furnished about the crime is unambiguous, clear and in detail that satisfies the above-mentioned test (not vague and cryptic).

1- Sidhartha Vashisth: Alias Manu Sharma vs State (NCT of Delhi), CRIMINAL APPEAL NO. 179 OF 2007 judgment dated 19 th April 2010.

2-Damodar v. State of Rajasthan, AIR 2003 SC 4414.

Telephonic FIR whether FIR in law? :

Telephonic information to police station about cognizable offence recorded in daily diary book would be treated as FIR u/s 154 CrPC even when the said information though mentioning the names of assailants but investigation has started on its basis. See :

1. Sunil Kumar Vs. State of M.P., AIR 1997 SC 940
2. Vikram Vs. State of Maharashtra, 2007 CrLJ 3193 (SC)

A cryptic telephonic message recorded at police station not to be treated as FIR :

A cryptic telephonic message given to police to the effect that accused accompanied by others assaulted the complainant party cannot be treated as an FIR u/s 154 CrPC when the said message did not disclosed the letter of offence and the manner in which the offence was committed. See:

Bhagwan Jagannath Markad Vs. State of Maharashtra, AIR 2016 SC 4531 (para 26)

R.T. message & FIR :

R.T. message or high frequency set message simply informing police that one person had died due to gun shot without disclosing the names of assailants or deceased, cannot be treated as FIR u/s 154 CrPC particularly when details of the occurrence regarding commission of 29 cognizable offence were subsequently conveyed to the police station officer. See :

1. Budhraj Singh Vs. State of U.P.,2006(5) ALJ (NOC) 972(All— D.B.)
2. Uppari Venkataswamy Vs. Public Prosecutor, 1996 SCC (Criminal) 284
3. Ramsinh Bavaji Jadeja Vs. State of Gujarat, (1994) 2 SCC 685

Cryptic telephonic message not to be treated as FIR:

Where information by an individual to police regarding commission of cognizable offence was given in the form of cryptic telephonic message not for purpose of lodging FIR but the police to reach at the place of occurrence, it has been held that such Cryptic telephonic information can not be treated as FIR. See :

Sidharth Vashisth alias Manu sharma Vs. State of NCT of Delhi, 2010(69) ACC 833

GD entries whether FIR? :

Gist of information regarding commission of cognizable offences recorded in GD can legally be treated as FIR. See :

Superintendent of Police, CBI Vs. Tapan Kumar Singh, 2003 (46) ACC 961 (SC).

Only gist of information received required to be recorded in general diary (GD):

What is to be recorded in general diary as per Section 44 of the Police Act, 1861 in general diary is only gist of information received and not the whole of information received. It cannot, therefore, be said that what is recorded in general diary is to be considered as compliance of requirement of Section 154 CrPC for registration of FIR. See :

Lalita Kumari Vs. Govt. of UP, AIR 2014 SC 187 (Five-Judges Bench).

Daily diary entry not FIR :-

Where on receiving telephonic message about the incident, SI made entry in Daily Diary

report that after receiving the information he was proceeding to the spot along with other constables, it has been held that that was not an FIR u/s 154 CrPC and therefore non mentioning of the names of the assailants in that entry cannot have any bearing on the case of the prosecution. See :

Thaman Kumar Vs. State, (2003) 6 SCC 380. 19(C-3).

Entries made in G.D. not to be treated as FIR registered u/s 154 CrPC :- What is recorded in General Diary cannot be considered as compliance of requirement of Section 154 CrPC of registration of FIR. See the below case law- :

Lalita Kumari Vs Govt. of UP, AIR 2014 SC 187 (Five-Judge Bench).

Information received by the police must be entered into the G.D. :-

Since the General Diary/Station Diary/ Daily Diary is the record of all information received in a Police Station, all the information relating to cognizable offences, whether resulting in registration of FIR or leading to an enquiry must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary enquiry must also be reflected as mentioned above. See :

Lalita Kumari Vs Govt. of UP, AIR 2014 SC 187 (Five-Judge Bench) (para 111).

Who can lodge FIR?

Anyone who has information about the commission of a cognizable offense can lodge an FIR. It is not necessary that he/she should be the victim or eye-witness himself. A police officer can lodge an FIR on his own if he comes to know about the Commission of a cognizable offence. In Hallu & Ors. vs. the State of M.P, AIR 1974 1936 SC, it was held that "Section 154 does not require that the Report must be given by a person who has personal knowledge of the incident reported. The section speaks of information relating to the commission of a cognizable offense given to an officer in charge of a police station."

How to register non-cognizable offenses?

• In non-cognizable offenses, when an informant approaches the officer in charge, the officer enters such information in his book (maintained as per the format prescribed by the State Government).

• Secondly, a police officer can begin with the investigation for a non-cognizable offense, only after receiving an order from the magistrate under section 155(2) of the CrPC.

The investigating powers of a police officer are the same in cognizable and non-cognizable offenses, except the power to arrest without a warrant. The Hon'ble Supreme Court in State Of West Bengal & Ors vs. Swapan Kumar Guha & Ors held that "there is no such thing like unfettered discretion in the realm of powers defined by statutes and indeed, unlimited discretion in that sphere can become a ruthless destroyer of personal freedom. The power to investigate into cognizable offenses must, therefore, be exercised strictly on the condition on which it is granted by the Code".

Hence, it can be concluded that if a person wants to register a complaint regarding the commission of a non-cognizable offense, he/she has to first register a complaint with the magistrate having proper jurisdiction. There are no strict norms pertaining to the format of a complaint. A complaint can be in the form of an affidavit or a petition as the case may be. After receiving the complaint, the magistrate will decide upon the issue of cognizance. If the magistrate is satisfied that a non-cognizable offense has been committed, he will order for further investigations.

What are the remedies available if the police refuse to lodge FIR?

It is not always illegal when the officer in charge refuses to lodge the FIR. As it all depends upon the reason because of which the police officer refuses to lodge the FIR. If the police officer refuses to lodge the FIR because the case does not fall within their jurisdiction, deals with an offense which is non-cognizable in nature or it is outside their legal capacity to take cognizance of such an offense, in such circumstances the refusal to lodge an FIR is legitimate and justified.

Although, if the FIR is refused on the ground of jurisdiction, it is mandatory for the police officer to record information about the commission of a cognizable offense and forward the same to the police station having proper jurisdiction. Otherwise, it would amount to dereliction of duty.

If the refusal to lodge FIR is not legitimate then there are two kinds of remedies available to the person who want to lodge FIR these are statutory or primary or immediate remedy and another is judicial remedy which can be get by the Court of records under article-32 and 226 of the Indian Constitution.

1-Statutory Remedies

(a) Under section 154(3) CrPC – When an informant's right to register the FIR is refused, he/she can approach the Superintendent of Police and submit the substance of such information in writing by post. If the Superintendent of Police is satisfied that such information discloses the commission of a cognizable offense then, he might investigate the case himself or direct an investigation to be made by any police officer subordinate to him.

(b) Under section 156(3), read with section 190 CrPC – If an informant remains unsatisfied even after pursuing the remedy under section 154(3), he/she can further pursue the remedy mentioned under section 156(3) read with section 190 CrPC.

This is a different channel to get the FIR registered. This remedy is similar to the process of registering a complaint for non-cognizable offenses. As through this channel, a magistrate first take cognizance of an offense under section 190 and then order for consequential investigations under section 156(3).

(c) Under section 200 CrPC – A complaint can be submitted to the magistrate orally or in writing under section 200 of the CrPC. After the submission of a complaint, the magistrate will conduct a hearing, deciding upon the issue of cognizance. In this channel, the complainant and the witnesses thereof are examined on oath in front of the magistrate.

2-Judicial remedy-

Mandamus is one of the prerogative writs issued by the superior Courts (High Court or Supreme Court), which is in the form of a command to the State, its instrumentality or its functionaries as the case may be, to compel them to perform their constitutional/statutory/ public duty. Hence, a writ of mandamus can be filed under Article 226 or Article 32 of the Constitution of India, directing the police officials to perform their duty and register the FIR.

Can one pursue the Judicial Remedy before the Statutory Remedy?

It is a well settled principle that an alternative remedy is not an absolute bar while filing a writ petition. In other words, it is nowhere expressly mentioned that a writ petition cannot be filed if there exists an alternative remedy. Although, on perusal of the various High Court's and Supreme Court's decisions, it can be concluded that ordinarily, the courts prefer and advice to first exhaust the remedies available to an informant. Some of the examples of such decisions are mentioned below:

1- Sakiri Vasu Vs. State of U.P, MANU/ SC/8179/2007

2- Aleque Padamsee and others Vs. Union of India and others, reported in, MANU/ SC/2975/2007.

3- Sudhir Bhaskar Rao Tambe Vs. Hemant Yashwant Dhage and Ors, MANU/ SC/1328/2010.

The procedure for lodging FIR-

The process of filing an FIR is very simple. It is as simple as narrating a story to the police. The informant has to visit the police station (ideally near the crime scene) and furnish all the information he/she has pertaining to the commission of an offence. Section 154 of the CrPC gives a choice to the informant to furnish information orally or in writing. If the information is disclosed orally then, the report must be reduced to writing by the police officer himself or under his direction. The report must be read out to the informant. Every report whether reduced to writing or submitted in

written form, shall be signed by the informant. The procedure in respect of lodging FIR has been prescribed in CrPC under section-154 these are as follows-

154. Information in cognizable cases

Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

Provided that if the information is given by the woman against whom an offence under section 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer;

Provided further that—

(a) in the event that the person against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section1 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be video graphed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.

(1) A copy of the information as recorded under Sub-Section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

The provision in section 154 regarding the reduction of oral statement to writing and obtaining signature of the informant to it, is for the purpose of discouraging irresponsible statement about criminal offences by fixing the informant with the responsibility for the statement he makes. Refusal by the informant to sign the first information is an offence punishable under section 180 of the Indian Penal Code. The absence of signatures on the first information report by the informant, however, is not necessary to the extent that it will vitiate and nullify such report. The first information is still admissible in evidence.

In other words, FIR is only a complaint to set the affairs of law and order in motion and it is only at the investigation stage that all the details can be gathered. In one of the judgments, the Madhya Pradesh High Court observed that the report of the crime which is persuading the police machinery towards starting investigation is FIR, subsequent reports are/were written, they are not hit under section 161 of the Code of Criminal Procedure, 1973 and cannot be treated as such.

What was the fate of prosecution case if Informant/complainant when turning hostile & not proving FIR?:

Once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. It is settled law that FIR is not substantive piece of evidence. But certainly it is a relevant circumstance of the evidence produced by the investigating agency. Merely because the informant turns hostile it cannot be said that the FIR would lose all of it's relevancy and cannot be looked into for any purpose. See: Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621.

Whether Public prosecutor is bound or not to examine such witnesses which are not supportive of prosecution's case :-

Under S. 226 CrPC the public prosecutor has to state what evidence he proposes to adduce for proving the guilt of the accused. If he knew at that stage itself that certain persons cited by the investigating agency as witnesses might not support the prosecution case he is at liberty to state before the court that fact. Alternatively, he can wait further and obtain direct information about the version which any particular witness might speak in Court. If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for prosecution. When the case reaches the stage envisaged in S. 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said Section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution for relieving itself of the strain of adducing repetitive evidence on the same point but also helps the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those Courts crammed with cases, but without impairing the cause of justice. See below case laws-

(i) Sandeep Vs. State of UP, (2012) 6 SCC 107.

(ii) Hukum Singh & others Vs. State of Rajasthan, 2001 CrLJ 511 (SC).

Whether reports Newspaper can be treated as evidence or not? :

Newspaper reports would be treated as hearsay evidence and cannot be relied upon. See the below case laws- :

1. Joseph M. Puthussery Vs. T.S. John, AIR 2011 SC 906.

2. Laxmi Raj Shetty Vs. State of T.N, AIR 1988 SC 1274.

3. Quamarul Ismam Vs. S.K. Kanta, 1994 Supp. (3) SCC 5.

Whether FIR is a substantive piece of evidence or not? :-

It is settled law that an FIR registered under Section 154 CrPC is not substantive piece of evidence. See: Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621 17 (B).Evidentiary value of FIR not lost if informant turns hostile : Once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. It is settled law that FIR is not substantive piece of evidence. But certainly it is a relevant circumstance of the evidence

produced by the investigating agency. Merely because the informant turns hostile it cannot be said that the FIR would lose all of its relevancy and cannot be looked into for any purpose. See the below case law:-

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What would be the fate of FIR if Informant/complainant when turning hostile :- Once registration of the FIR is proved by the police and the same is accepted on record by the Court and the prosecution establishes its case beyond reasonable doubt by other admissible, cogent and relevant evidence, it will be impermissible for the Court to ignore the evidentiary value of the FIR. It is settled law that FIR is not substantive piece of evidence. But certainly it is a relevant circumstance of the evidence produced by the investigating agency. Merely because the informant turns hostile it cannot be said that the FIR would lose all of its relevancy and cannot be looked into for any purpose. See the below case law :-

Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621

Scribe of FIR when not examined? :

Non-examination of scribe of FIR is not fatal to prosecution and no adverse inference can be drawn against prosecution if the scribe was not an eye-witness to the incident and the complainant/informant had proved the execution of the FIR by examining himself as PW :-

1. Moti Lal Vs. State of U.P., 2009 (7) Supreme 632
2. Anil Kumar Vs. State of U.P., (2003) 3 SCC 569

Non-mentioning of name of accused in FIR not fatal to prosecution case :-

It is well settled that if name of the accused is not mentioned in the FIR, but case has been proved beyond reasonable doubt, the same cannot be fatal to prosecution case. See the case laws :

(i) Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench)

(ii) Mritunjoy Biswas Vs Pranab alias Kuti Biswas & Another, AIR 2013 SC 3334.

Appreciation of FIR & its contents :-

The FIR is not the encyclopedia of all the facts relating to crime. The only requirement is that at the time of lodging FIR, the informant should state all those facts which normally strike to mind and help in assessing the gravity of the crime or identity of the culprit briefly. See below case laws- :

1. State of MP Vs. Chhaakki Lal, AIR 2019 SC 381.
2. Prabhu Dayal Vs. State of Rajasthan, (2018) 8 SCC 127
3. Motiram Padu Joshi Vs. State of Maharashtra, (2018) 9 SCC 429
4. Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537.
5. Jarnail Singh Vs. State of Punjab, 2009 (6) Supreme 526 18(C).

Non-mentioning of name of witness in FIR not fatal :-

Testimony of witness cannot be disbelieved merely because of non-mentioning of his name in FIR. See :

Prabhu Dayal Vs. State of Rajasthan, (2018) 8 SCC 127

Information regarding cognizable offence from two or more sources & FIR :-

Where two information regarding commission of cognizable offence are received and recorded and it is contended before the court that the one projected by the prosecution as FIR is not the real FIR but some other information recorded earlier (in GD) is the FIR, that is a matter which the court trying the accused has jurisdiction to decide. See :

1. Superintendent of Police, CBI Vs. Tapan Kumar Singh, 2003 (46) ACC 961 (SC)
2. Vikram Vs. State of Maharashtra, 2007 CrLJ 3193 (SC)

Witness when not named in FIR or charge-sheet : Mentioning of names of all witnesses in FIR or in statements u/s 161 CrPC is not a requirement of law. Such witnesses can also be examined by prosecution with the permission of the court. Non-mentioning of the

name of any witness in the FIR would not justify rejection of evidence of the eye-witness :

1. Prabhu Dayal Vs. State of Rajasthan, (2018) 8 SCC 127
2. Raj Kishore Jha Vs. State of Bihar, 2003(47) ACC 1068 (SC)
3. Chittarlal Vs. State of Rajasthan, (2003) 6 SCC 397
4. Bhagwan Singh Vs. State of M.P., 2002(44) ACC 1112 (SC)
5. Sri Bhagwan Vs. State of Rajasthan, (2001)6 SCC 296
6. Satnam Singh Vs. State of Rajasthan, (2000) 1 SCC 662

Delayed FIR and delayed recording of statement of PWs by I.O. u/s 161 CrPC—effect thereof? :

Delay in lodging of FIR—if causes are not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending the copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by its reliable evidence :

1. State of MP Vs. Chhaakki Lal, AIR 2019 SC 381
2. Mukesh Vs. State for NCT of Delhi & Others, AIR 2017 SC 2161 (Three-Judge Bench).
3. Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)
4. Rabindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC)
5. Ravi Kumar Vs. State of Punjab, 2005 (2) SCJ 505
6. State of H.P. Vs. Shree Kant Shekari, (2004) 8 SCC 153
7. Munshi Prasad Vs. State of Bihar, 2002(1) JIC 186 (SC)
8. Ravinder Kumar Vs. State of Punjab, 2001 (2) JIC 981 (SC)
9. Sheo Ram Vs. State of U.P., (1998) 1 SCC 149
10. State of Karnataka Vs. Moin Patel, AIR 1996 SC 3041 25.

Delayed sending of FIR to Magistrate u/s 157 CrPC:

Delay in sending copy of FIR to the area Magistrate is not material where the FIR is shown to have been lodged promptly and investigation had started on that basis. Delay is not material in the event when the prosecution has given cogent and reasonable explanation for it. Mere delay in sending the FIR to Magistrate u/s 157 CrPC cannot lead to a conclusion that the trial is vitiated or the accused is entitle to be acquitted on that ground. The accused must show that prejudice was caused to him by delayed sending of the FIR to the Magistrate u/s 157 CrPC. See:

(i) Ramji Singh Vs. State of UP, (2020) 2 SCC 425

(ii) Jafel Biswas Vs. State of West Bengal, AIR 2019 SC 519.

(iii) Anil Rai Vs. State of Bihar, (2001) 7 SCC 318

(iv) State of Punjab Vs. Hakam Singh, (2005) 7 SCC 408

Whether Accused is entitled to get copy before the stage of Sec- 207 CrPC?

Hon'ble Supreme Court has issue following directions in respect of providing copy of the FIR to the Accused as well as uploading in the website-

(1) An Accused is entitled to get a copy of the FIR at an earlier stage than as prescribed under sec-207

(2) Suspect Accused has right to submit application for grant of certified copy before concerned Police Officer or to Superintendent of Police on payment of prescribed fee.

(3) On an application being filed for certified copy of the FIR on behalf of the accused, same shall be given by the Court concerned within two working days.

(4) Copy of the FIR except in sensitive cases like sexual offences, offences pertaining to insurgency and terrorism should be uploaded on website within 24 hours of registration. See

the case law-

Youth Bar Association of India vs Union of India and others, AIR 2016 SC 4136.

Second FIR can it be lodged or not ?

There can be no second FIR in the event of any further information being received by the Investigating agency in the respect of offence or same occurrence or incident giving rising to one or more offence. See the case law-

Awdhesh Kumar sha alias Akhilesh Kumar Jha vs State of Bihar, AIR 2016 SC 373.

FIR against the dead person-

Now the very important question is before us that whether FIR can be lodge against death person ? Even though this issue is very debatable because some High Courts clearly denied that FIR can not lodge against dead person but some High Courts is of the view that FIR can be lodge against dead person. But this dispute has been end right now and Hon'ble Supreme Court has established that FIR can lodge against dead person, even though Human Right workers are criticizing that judgment of the Hon'ble Supreme Court. But in others opinion for the purpose of seeking private defence, purpose of accident claim it is required by the same. See the below case laws-

1- PUCL VS State of Maharashtra, Criminal appeal No- 1255/1999, judgment dated 23.09.2014.

2- Rajiv Gandhi Ekta Samiti vs Union of India, 2000, Cri. L.J. 2002 Delhi.

Summing up-

It is very clear from above discussion that FIR is the foundation stone of the Criminal justice system. But it also inculcate that the procedural and technical short comings in respect of FIR must be ignored by the Court of law and in the interest of justice adjudication or trial of the accused should be made by the same.

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Guest Column

BLENDING LAW WITH LITERATURE

I have been the consumer of legal writings: Judgments, law books, memorial lectures, legal orations, autobiographies, biographies of lawyers and Judges and a variety of other legal writings. Every legal writing would not qualify as good legal literature. Certainly, many would. This would be true of any domain. Some legal writings would be comparable and match-able with the best of literature. There are two aspects. One, the richness of the words of the language. Two, the weaving of thoughts and ideas into an enduring contribution. This is a recipe for any good literature. Not particularly legal literature. It is on the touch-stone of this meaning of literature that legal literature is rich, lasting and durable. The richness of English language is a matter of common knowledge. Richness of legal minds, lawyers, judges and academia is also common knowledge. The weaving of best of minds into black and white has resulted in colossal legal literature. Normally, when we talk of English literature, we find a good blending, refreshing and relaxing, inspiring and motivating and at the same time universal in nature. It provides rich nourishment. One enjoys, reading such literature. Many judges love to soak their judgments with literature. Equally, many others produce good legal literature. The richness of legal literature is evident from the fact that we have a book of legal quotations "evocatively portraying" the thoughts and minds of Judges of the summit Court. It has been described by Justice Dipak Misra, former Chief Justice of India in its Foreword – 'artistically woven' spread over a period of 5 decades. It is a 'treasure house' of 'Judicial Wisdom'. The thought behind his compilation is to 'acquaint the generation of lawyers' with the 'authors of judgments' to 'ignite their thinking'. This compilation of quotations is with a difference. It contains only the wisdom of the Judges of the Indian apex Court. What a treasure. Legends in Law by V. Sudhish Pai[1] covers the best of 42 lives of great men of law in the Indian context.

This book mirrors the best of legal literature, weaved through the medium of life and life experiences. It provides a sense of legal history. Connecting the past with the present and the future. It is a must-read for academic and professional lawyers and judges. It is an enjoyable read. Those who are interested in literature would also enjoy it. It is a book which relaxes you. Also teaches you that the legal coparcenary is a mix of good human beings. It is an adult dose of legal literature and judicial culture.

I wish to share some real stories. Kanhaiya Lal Misra appeared in the Indian Civil Service Examination of 1926. He scored 150 out of 150 marks in his English Essay Paper. Yet, he was not selected for ICS. He had joined the nationalist movement. What is more important is that Sir Arthur Quillar, a well known Professor of English Literature had examined and marked Misra's paper. He had given full marks because he was so impressed. He wrote a personal letter to Misra's Professor in Allahabad University, Professor Dunn. His brilliance was described:

"It is the Englishman who had conquered India, but it is only K.L. Misra who conquered English !"

Misra having not been selected to ICS, he opted to be an advocate. He rose to the position of Advocate General, UP. He was a great lawyer. A lover of English language and literature. Language makes all the difference. The people of Allahabad would acknowledge the tribute which was paid to Misra by Chief Justice Earl Warren of the US Supreme Court. He said, "I, as a judge of the Supreme Court of America should not be emotional, but I must confess that though I have travelled all over the globe but never I was moved more emotionally than by the speech of the learned Advocate General of Uttar Pradesh Mr. K.L. Misra today." I never had the occasion to hear him argue. It is said that it used to be a privilege to see him in-action in court. Cool and smooth. Never to lose his temper. A real feast. He was offered Judgeship of the Supreme Court in 1957 when he was 54. He refused. He never wanted to shift to Delhi from Allahabad. If he had accepted Judgeship he would have enriched the legal literature through his judgments. Justice S.R. Das (CJI) in open court complimented :

"Mr. Misra, why do you not appear more frequently in the Supreme Court. When you appear, it helps us to raise the standard of our judgment."

H.M. Seervai was a Constitutional Law scholar of the highest academic distinction. He was offered judgeship of the Supreme Court of India twice. He did not accept it. He thought, he would be able to make his lasting contribution in shaping the Indian constitution through the medium of his book on Constitutional Law. Indeed, he did. His love for literature was so deep. He blended the two together. It was in 1973. First trip out of India. To U.K.. He was at the Pitt's Cottage. Some lines were inscribed over the fire place. To the amazement of every one, he said:

"Oh Scott -- But what a pity, the next few lines were not inscribed." He recited the lines: "Now is the stately column broke; The beacon light is quenched in smoke…"

He completed the last stanza. He was asked, are you a Professor of literature at Oxford or Cambridge? He laughed and said, no! I am a lawyer from India. Still another one. 4th July, U.S Independence day Celebrations at U.S Consulate in Bombay. The Vice Consul was amazed. Seervai rattled off Abraham Lincoln's Gettysburg as also the second Inaugural Address. He was fond of literature. He knew hundreds of poems. He could recite them with body, mind and soul. Shakespeare was part of his vocabulary. He knew the great lines in different plays by heart. A rare mix of law and literature.

Nani Palkhivala, the courtroom genius. He became a lawyer by accident. He did his B.A. (Hons.) in English literature. He wanted to be a lecturer in a local college. A lady was selected. He was not. He went on to do M.A. in English literature. He wanted to become a member of the Indian Civil service (ICS), the ultimate dream for many young Indians at that time. The circumstances so conspired, he could

not take the ICS examination. It was in this background, he took up Law in 1942. Joined the legal profession in 1944. What an irony! India's greatest lawyer by accident. One could fathom his love for literature throughout his journey.

There is another story worth sharing. Nelson Mandela spent 18 years of his 27 years in jail in the Robben Island jail in South Africa. A copy of the complete works of William Shakespeare found its way into the jail. Sonny Venkatrathnam, a fellow prisoner, smuggled the book into the prison. He pasted the cover with Hindu deities with Diwali Greeting Cards. This was done to disguise the book from prison guards. The book is now called the Robben Island Bible. It is displayed in the British Museum as part of London 2012 Festival. The book was circulated amongst the prisoners. Each prisoner was asked to mark out his favourite passage. Nelson Mandela marked out Caesar's speech to his wife. Caesar says "Cowards die many times before their death. The valiant never taste of death but once."

The term "Shakespearean Tragedy" evokes a rise-and-fall narrative even if the listener is not intimate with the works themselves. A real happening. Oscar Pistorius, a Paralympics athlete, overcame with serious effort severe disability to reach "Olympian heights". He fell in love with a beautiful model. He killed the one with whom he had fallen in love on Valentine's Day. He was convicted of murder in December 2015. The presiding judge, in his judgment described the case as a "human tragedy of Shakespearean proportions". Thus, Pistorius's actions on that night demonstrated clearly the familiar Shakespearean frame. Apt. What a comparison. Leaves nothing to doubt. What is it that the works of Shakespeare, in particular, lend themselves to legal quotation and reflection? Robert Peterson says in "The Bard and the Bench" that all 37 of Shakespeare's plays including the lesser-known "The Two Noble Kinsmen" and "Timon of Athens" have been quoted by American Courts, in over 800 judicial opinions.[2] The answer lies in Shakespeare's status as an embodiment of high culture. Citing him means to invest the judgment with credibility and invoke a sense of history. Another reason is, Shakespeare's universality. Everyone claims, he has read his works. Maybe not all, only some. It is almost fashionable to say, I have read plays like Hamlet and Julius Caesar. Lawyers love Shakespeare. It is appropriate to say that more has been written by Shakespeare discussing law than any other profession. Some think and believe that his knowledge of law was so detailed that the 'real' Shakespeare must have been a lawyer. A study by Scott Dodson and Ami Dodson was published in 2015.[3] The study was undertaken to discover the 'most literary'– US Supreme Court currently sitting Justice. The 'most prolific' citer and the 'widest read' was found to be Antonin Scalia. This was no surprise. William Shakespeare topped the list of the most often quoted, along with Lewis Carroll. Both Shakespeare and Carroll accrued 16 references from five Justices. Other popular authors among the judges were – George Orwell, Charles Dickens, Aldous Huxley and Aesop. No female writer made the top ten.

Justice Frankfurter was a special kind of jurist who strove for literary excellence. He says, Justice Holmes "has written himself into a slender volume of the literature of all time". Justice Benjamin Cardozo was known for the literary excellence of his writings. He began his lecture entitled 'Law and Literature' with the words: "I am told at times by friends that a judicial opinion has no business to be literature." He refuted with illustrative examples of judicial opinions of giant judges which would rank as pieces of literature. A study by David Comer Kidd and Emanuele Castano argues that reading literary fiction makes people show empathy, challenge preconceptions and be more flexible in their decision making – all of which are presumably, desirable in practitioners of Law.[4] A literary sensibility enables lawyers to present clear structured opinions and briefs. Samuel Wesley – a lawyer, gave good advice to lawyers Style is the dress of thought; a modest dress, Neat, but not gaudy, will true critics please. The walls of his office were lined – not with law books but

with books of history and literature. On the walls, paintings were hung. He was asked – where are the law books? He responded – "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

Harvard Law School offers a seminar which focuses entirely on "Justice and Morality in the Plays of Shakespeare". Kings College, London has prepared a module – "Shakespeare and the Law" being co-taught by the Literature and Law Faculties. It explores "the role of Law in mediating the place of the individual within society". University of Southampton offers the opportunity to study Law through a literary prism of Shakespeare, Dickens, Kafka and others in order to "help Law students to become ethically astute practitioners".

Can Magna Carta rank as a piece of literature or not?

It is as old as 1215. It is the most important Constitutional document we ever had. Initially, it is said that it was annulled. It was only in the year 1225 that it was re-issued. It was re-issued by the King himself under the Great Seal. Magna Carta took its final form. Word by word. As it stands today. Lord Denning has described it as the "earliest enactment on the Statute Rolls of England."

Clauses 39 and 40 need re-production. Clause 39 guarantees Freedom under the Law:

"No free man shall be taken, imprisoned, disseized, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."

Clause 40 guarantees Impartial Administration of Justice:

"To no one will we sell, to no one will we deny or delay right of justice."

These Clauses have echoed and re-echoed down the centuries. It is true of the US Constitution (1787). It is equally true of the Indian Constitution (1950). It can legitimately be said that Magna Carta (which is more than eight centuries old), the US Constitution (which is 233 years old) and the Indian Constitution (which is 70 years old) are definitely pieces of literature. It maybe the lanuage. Longevity. Durability. These are 'organic' documents. Ever growing. Ever expanding. Ever lasting. The beauty of these documents is that so much has already been written in explaining and understanding the meaning of different provisions. This process is a continuous one. Is this not the true reflection of good and lasting literature!

The common belief is that the 'Briefs' of the lawyers and the 'Judgments' of judges are mere enumeration of facts, of rules and the application of law in a factual canvas. It is in this context that judges in particular have contributed 'gems' of literature. That is the beauty of legal literature. In spite of all practical limitations, if judges over the centuries have been able to produce good and lasting literature, this needs to be acknowledged duly and fully. Such good literature needs to be shared by legal and judicial minds. Who does not enjoy the flavour of good literature?

A good dose of good legal literature is a health tonic. Generally speaking (exceptions apart), those who have contributed to good legal literature have lived longer and healthier. Therefore, they could contribute hugely.

Quoting Lord Denning is fashionable. Not without a reason. Because of what he wrote. How he wrote. Why he wrote. Means a lot. A piece of literature. It adds credibility and durability. It provides a good support system. Literature illuminates and beautifies the court proceedings. Makes them user-friendly. Denning in The Family Story[5] records :

"Judges do not speak, as do actors, to please. They do not speak, as do advocates, to persuade. They do not speak, as do historians, to recount the past. They speak to give judgment. And in their judgments you will find passages which are worthy to rank with the greatest literature which England holds. John Buchan at one time desired to make an anthology of them. 'It would', he said, 'put most professional stylists to shame'."

Denning further says: "Judgments have been taken down and recorded in our law books for nearly 700 years. There are to be found there 'full many a gem of purest ray serene'. When great issues have been at stake, the judgments are marked by eloquence, wisdom, and authority. They have laid the foundations of freedom in our land."

Justice P.B. Gajendragadkar, former Chief Justice of India in his autobiography To The Best of My Memory records: Venkatarama Iyer was a great judge. Well-versed in statutory law, master of case law, sound in the principles and philosophy of law, lucid in the exposition of law, sound in his conclusions, patient to the Bar, his judgments read like literature and with all that he was so humble, so modest, so appreciative of other people's merits. He was a trained musician and a great Sanskrit scholar. He knew Upanishadic philosophy, Rigveda and the Bhagavad Gita by heart and was capable of speaking on any facet of Hindu philosophy with mastery.

Literary flavour can be tasted in the judgments of Justice V.R. Krishna Iyer. Maru Ram vs. Union of India[6] needs specific mention:

"A procession of 'life convicts' well over two thousand strong, with more joining the march even as the arguments were on, has vicariously mobbed this court, through the learned counsel, carrying constitutional missiles in hand and demanding liberty beyond the bars…… Their despair is best expressed in the bitter lines of Oscar Wilde:

I know not whether Laws be right, or whether Laws be wrong, All that we know who lie in gaol, Is that the wall is strong; And that each day is like a year, A year whose days are long.'

Justice R.F. Nariman in Shreya Singal vs. Union of India[7] dealt with Article 19 of the Constitution – Right to Freedom of Speech and Expression. In para 13, it is recorded:

"This leads us to a discussion of what is the content of the expression "freedom of speech and expression".

There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1) (a). It is only when such discussion or advocacy reaches the level of incitement that Article 19 (2) kicks in."

Footnote no.9 reads:

"A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an "honourable man". He then shows the crowd Caesar's mantle and describes who stuck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says: (Full speech of Mark Anthony is reproduced)

How beautifully, this brings out the distinction between advocacy and incitement. Literature-in –aid of Fundamental Rights at its best. The summit court has recently held that 'Privacy' is a constitutionally protected right.[8] Nine Judges bench, 5 Judgments. Each one has given literary flavour. This judgment cannot be ignored, if you wish to taste the richness and the aroma of literary wealth. Justice D.Y. Chandrachud has over-ruled senior Chandrachud's Judgment in ADM Jabalpur. A story within a story. The younger Chandrachud says:

'Neither life nor liberty are bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right.'

Therefore, during emergency, the suspension of Article 21 cannot amount to – no right to life or personal liberty. Justice J. Chelmeswar beautifully records:

'…the silences of the Constitution are also to be ascertained to understand the Constitution.'

Justice Sanjay Kishan Kaul opines: 'The Constitution and its all encompassing spirit forever grows, but never ages.'

Justice R.F. Nariman unfolds when he records: 'It is as a result of constitutional interpretation that after Maneka Gandhi, Article 21 has been repository of a vast multitude of human rights.'

Justice S.A. Bobde (now CJI) reminds:

'… privacy is more than merely a derivative Constitutional right. It is the necessary and unavoidable logical entailment of rights guaranteed in the text of the Constitution.'

Professor Upendra Baxi has richly contributed to legal literature. His Contribution is so well recognized within and beyond the country. One must enjoy his flavour: A sample: "Massive hostile publicity, for example, contributes to a public culture which reverses presumption of innocence into attribution of guilt even before charges are formally made and sustained by courts on evidence. Jurisdiction of suspicion prevails over the jurisdiction of proof. The mere facts that one's house and offices are raided, the arc of suspicion falls on certain individuals, bail-denying police and judicial custody orders are made by courts, and lengthy investigation ensues, facilitates the assumption of guilt in the public mind thus effectively suspending the due process of law. This trend, when unchecked, undermines the very foundations of the due process of law."

The net result is so much of Constitutional literature meaning thereby more of Constitutional Jurisprudence. Constitutional literature adds to the durability of the Constitution. The Constitution becomes an enduring and growing document of literature. Law and literature are inseparable. They are like the Siamese twins. They are blended together. One aids the other. The final product become wholesome. The dish is digestive. Tasty. Attractive. Above all, literature acts as the preservative. It never ages. Lasting legal literature.

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1. V. Sudhish Pai, Legends in Law: Our Great Forebears (Universal Law Publishing Company, 2013)

2 Robert W. Peterson, The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare, 39 Santa Clara L. Rev. 789 (1999).

3 Scott Dodson and Ami Dodson, Literary Justice, 18 Green Bag 2d 429 (2015).

4 Kidd, David & Castano, Emanuele. (2013). Reading Literary Fiction Improves Theory of Mind. Science (New York, N.Y.). 342.

5 Butterworths, 1981.

6 1980 AIR 2147, 1981 SCR (1)1196.

7 AIR 2015 SC 1523.

8 Justice K. S. Puttaswamy (Retd.) and Anr. vs Union Of India And Ors. (2017) 10 SCC 641.

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Analysing The Gamut Of Section 436-A Of The Code Of Criminal Procedure, 1973

With the best interests of under trial prisoners in mind, Section 436-A of the Code of Criminal Procedure, 1973 was brought in. The intent behind the new Section was to uphold the rights of imprisoned individuals who are forced to languish in jail for prolonged periods of time pending investigation, inquiry or trial. In many cases, imprisonment of under trial prisoners was continuing for substantial periods of time as against the principle of "presumption of innocence until found guilty".

The primary constitutional and moral concern with under trial detention is that it violates normative principle that there should be no punishment before a finding of guilt by due process. So under trial detention of those suspected, investigated or accused of an offence effectively detains the innocent. However, all criminal justice systems across the world authorize limited pre trial incarceration to facilitate investigation and ensure the presence of accused persons during trial. So, the critical challenge in this area is to identify the normatively optimal and necessary level of pre trial incarceration and then design a criminal

justice system to achieve this, The criminal justice system established in India appertains to a reformative model of administering justice, and posits a need to reform the criminal, rather than opting for retribution against the crime committed. Debunking this aspirational model, the present study aims to analyze the present condition of prisoners in India languishing in prisons after their arrest, which is depreciating at an alarming rate. These under-trials are detained in explicit contravention of the statutory requirements explicated in the Criminal Procedure Code, 1973, while consistently being subject to barbaric third degree torture methods and are coerced to undertake dehumanizing activities during incarceration.

436-A of Code of Criminal Procedure, 1973 : Section 436-A Code of Criminal Procedure, 1973 was brought into force w. e. f. June 23, 2005, by virtue of an Ordinance duly promulgated by the President of India. Section 436-A Code of Criminal Procedure, 1973 states that where a person has, during the period of investigation, inquiry or trial under the Code of Criminal Procedure, 1973 of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

The first proviso states that the Court may, after hearing the Public Prosecutor and for the reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties.

The second proviso envisages that no such person shall, in any case, be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Furthermore, the explanatory provision states – In computing the period of detention under this Section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

Scope of Section 436-A of Code of Criminal Procedure, 1973

Section 436-A of Code of Criminal Procedure, 1973 provides that in a case where punishment for the offence cannot be death and a person has undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for the offence, he shall be released on bail. The fact that this is not absolute in terms is apparent from the proviso thereof which states that the Court may, after hearing the Public Prosecutor and for the reasons to be recorded in writing, order the continued detention of such a person for a period longer than one half of the period of imprisonment prescribed in law.

The Law Commission recommended incorporation of Section 436-A, keeping in mind the inordinate delay in trials, where even for lesser offences long incarceration continued without trial leading to overcrowd in jails also. The salutary purpose of the amendment would stand defeated if it is construed in a blanket manner without its applicability in the facts and circumstances of a given case. The liberty to citizen has been noticed in Section 436-A, Part I of the Legislation. The proviso balances the liberty of the citizen with the need for protection of the interest of the society. Therefore, it is apparent that the Legislature did not intend to make the first part concerning the liberty of the citizen absolute in terms, but allowed it to be subject to regulatory control. But when this liberty is to be denied, the Court must indicate the reasons for exercise of the regulatory control. Thus, the legislation itself incorporates adequate safeguard for the person in custody.

Gamut of the Provision

Although the provision appears to be quite axiomatic, it can be seen that the relief of bail does not follow as a matter of course even if the pre-conditions contemplated in the provision are satisfied. The first proviso

empowers the Court to deny such relief if it is of the opinion that further detention is necessary. As regards the second proviso – it elucidates that the relief is absolute in case the under-trial prisoner has served the maximum term prescribed for the offence he is charged with.

The First Proviso of Section 436-A of Code of Criminal Procedure, 1973

The Supreme Court and High Courts in a spate of Judgments have indicated that speedy trial is a fundamental right of an accused under Article 21 of the Constitution of India and the consequence of denying such right is bail.

Although, the right to bail under the provision is not an absolute right, can the Courts deny relief to prisoners by getting into merits of the matter? In Bhim Singh Vs. Union of India & Ors., (2015) 13 SCC 605, a Three-Judge Bench of the Supreme Court directed the Jurisdictional Magistrates/Sessions Judges to hold one sitting in a week in each jail/prison for two months to identify the under-trial prisoners who had completed half period of the maximum term; or maximum term of imprisonment stipulated for the offence – and pass an appropriate order to release them on bail. The bench also issued directions to all the High Courts in the country to ensure compliance of the said order and submit a report to the Secretary of the Supreme Court without unnecessary delay.

It would not be out of place to say that much prior to the provision coming in existence, the Supreme Court had expressed concerns with regard to persons languishing in jail for long periods of time. In Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, (1980) 1 SCC 98, Justice P. N. Bhagwati, speaking for the Supreme Court, recognized 'speedy trial' as a fundamental right of an accused and anxiously directed the State to take steps for a positive approach on enforcing this fundamental right.

In Supreme Court Legal Aid Committee Vs. Union of India, (1994) 6 SCC 731, the Supreme Court, relying on Hussainara Khatoon (supra) directed the release of prisoners charged under the Narcotic Drugs and Psychotropic Drugs Act after completion of one half of the maximum term prescribed under the Act. A. M. Ahmadi, J. (speaking for the Court) directed the same in an Article 32 Petition, after taking into account the non obstante provision of Section 37 of the Act which imposed the rigours of twin conditions for release on bail. It was observed:

"We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this Section in the earlier part of the Judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh Vs. State of Punjab, (1994) 3 SCC 569. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay Vs. R. S. Nayak & Anr., (1988) SCC 1531, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21.

As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article

14 which also promises justness, fairness and reasonableness in procedural matters."

In Hasan Ali Khan Vs. State, (2015) SCC OnLine Bom 8695 the Bombay High Court was pleased to release an under-trial prisoner charged under provisions of PMLA, after serving one half of the maximum term prescribed under the special statute. It was held:

"Since the Hon'ble Supreme Court has observed that the case of the present Applicant is to be considered in view of the Judgment of Bhim Singh Vs. Union of India, this Court is of the opinion that it would not be necessary to go into the merits of the matter. Hence, this Court is of the opinion that by virtue of Section 436-A of the Code of Criminal Procedure, 1973, the applicant is entitled to be enlarged on bail."

Similarly, the Bombay High Court in Rashesh Mukesh Shah Vs. State, 2018 SCC OnLine 17551 enlarged the accused (who had completed one-half of the maximum term prescribed) on bail under Section 436-A of the Code of Criminal Procedure, 1973 without getting into the merits of the matter.

The approach of Courts indicates that although the first proviso of Section 436-A of the Code of Criminal Procedure, 1973 empowers the Court to direct continued detention of the prisoners, the Courts would be overstepping the very said boundaries if the merits of the matter are ventured into for the purpose of denying relief under the provision. Just as right to speedy investigation is a facet of Article 21 of the Constitution of India, the right to speedy trial, too, is a facet of Article 21 of Constitution of India. Two sides of the same coin, both facets hold water. As we know, failure to complete investigation within the prescribed period under Section 167 (2) of the Code of Criminal Procedure, 1973 renders an indefeasible and right of bail in favour of the accused.

Conclusion

Under-trial prisoners are facing trials in Court and for ensuring fair trial are kept in the custody so that they are not in a position to influence and a fair trial can be ensured. By promising judicial custody they are remanded in the jail mostly. Key reason for them spending substantial time in prison is the delay in trial. Other reasons includes lack of legal awareness, poor legal aid etc, due to which under-trial prisoners are unable to employ the advantages of Bail provisions and are forced to languish in the jails. All these factors give birth to various problems such as overcrowding of prisons, human rights abuse to due to lack of speedy trial, violation of fundamental right due to unnecessary prolonged detention, corroded reputation in society and other emotional and physical setbacks, which runs against the under-trial prisoners in their future endeavours. Section 436-A of the Code of Criminal Procedure, 1973 deals with the rights of the under-trials prisoners to be released on bail. Section 436-A of the Code of Criminal Procedure, 1973 explains the maximum duration after which under-trial prisoners is entitled to be released on Bail. The Section reads as "Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties."

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